

Case No: CCRTF 98/0552

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WIGAN COUNTY COURT
H. H. JUDGE URQUHART

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 May 1999

B E F O R E :

LORD JUSTICE SIMON BROWN
LORD JUSTICE ALDOUS
and
LORD JUSTICE MANTELL

PAWLOWSKI
(COLLECTOR OF TAXES)

Appellant

-and-

DUNNINGTON

Respondent

Mr T Brennan (instructed by the Solicitor of Inland Revenue) for the appellant

Mr B Akin (instructed by Stephenson's of 10-14 Library Street, Wigan) for the respondent

Lord Justice Simon Brown:

This is yet another appeal concerning the relationship between public law and private law proceedings. The difficult and important point it raises is whether a taxpayer can invoke a public law defence to a claim by the collector of taxes under Part VI of the Taxes Management Act 1970 - the Part concerned with the collection and recovery of tax.

The particular circumstances in which the point now arises as follows. During the years 1985-1993 the taxpayer (the respondent) was a director of a newly formed company, Fire Design Systems Limited (the Company). Put shortly, the time came when the local inspector of taxes discovered that the Company was not deducting PAYE from the respondent's emoluments as it was required to do. Accordingly, acting under the predecessor to regulation 49 of the Income Tax (Employments) Regulations 1993 (the Regulations), made under s.203 of the Income and Tax Corporation

Taxes Act 1988, the inspector made determinations of the tax due from the Company in respect of the years 1989/90, 1990/91, 1991/92 and 1992/93, determinations which the Company appealed but which eventually became final and conclusive.

Following the Company's failure to pay the tax determined, the Board of Inland Revenue (the Board) made a direction under regulation 49(5) that the tax should instead be recovered from the respondent. Regulation 49(5) provides:

“Where -

(a) any part of the tax determined under this regulation is not paid within 30 days from the date on which the determination became final and conclusive, and

(b) the Board are of the opinion that an employee in respect of whose emoluments the determination was made has received his emoluments knowing that the employer has wilfully failed to deduct the amount of tax which he was liable to deduct under these Regulations from those emoluments,

the Board may direct that such part of that tax as it appears to them should have been but was not deducted under the Regulations by the employer on payment of the relevant emoluments shall be recovered from the employee, and, where the Board so direct, the employer shall not be liable to pay that part of that tax to the collector.”

Since it further appeared to the Board that PAYE had similarly not been deducted by the Company from the respondent's emoluments for the earlier years 1985/86, 1986/87, 1987/88 and 1988/89, they made an additional direction - this one under regulation 42(3) - that this tax too could be recovered from the respondent. Regulation 42(3) provides:

“If it appears to the Board that the amount specified in regulation 40(2) or 41(2) which the employer is liable to pay to the collector exceeds the amount actually deducted by him from emoluments paid during the relevant income tax period and the Board are of the opinion that an employee has received his emoluments knowing that the employer has wilfully failed to deduct the amount of tax which he was liable to deduct under these Regulations from those emoluments, they may direct that the amount which they consider to constitute the excess (“the excess amount”) shall be recovered from the employee, and, where the Board so direct, the employer shall not be liable to pay the excess amount to the collector.”

The total tax involved is £17,293.09. It is these directions - made by the Board in the exercise of their public law powers - which the respondent contends were unlawfully made. His case in a sentence is that there was no material available to the Board upon which they could fairly and rationally form the opinion that he “received his emoluments knowing that the [Company had] wilfully failed to deduct” PAYE.

The question now arising is whether that is a defence which he can properly put forward in these particular proceedings. Before addressing it, however, it is necessary first to indicate the nature of the proceedings and also rather unfortunate course that they have thus far taken.

The Board's directions were made on 26 April 1995. Their effect, put shortly,

was to reduce the extent of the unpaid PAYE the credit previously given to the respondent in his Schedule E assessments - see regulation 101(6)(b); thereby creating an excess tax liability under those assessments - see regulation 101(3) and (4)(a); and allowing the inspector to require the respondent "to pay the excess to the collector instead of taking it into account in determining the appropriate code for a subsequent year" - see regulation 101(2). The inspector exercised that power by notice dated 5 March 1996. At that point responsibility for recovering underpaid tax passed from the Inspector to the collector. Regulation 105(2) provides:

"Any tax which is payable to the collector under -

(a) regulation 101(2) ...

shall be payable within 14 days of the date on which the collector first makes the application for its payment."

Regulation 105(1) provides that:

"Any tax which is payable to the collector by any employee may be recovered in the manner provided by the Income Tax Acts"

That brings me to Part VI of the Taxes Management Act 1970 which, by s.60, requires the collector to make demand of the relevant sums when tax becomes due and payable, and by s.66 provides:

"(1) Tax due and payable under any assessment may ... be sued for and recovered from the person charged therewith as a debt due to the Crown by proceedings in a county court commenced in the name of a collector."

It was pursuant to s.66 of the 1970 Act that the collector (the appellant) on 8 August 1996 issued a default summons against the respondent claiming £17,294.34 plus interest. The claim for interest has long since been abandoned. It is unnecessary to explain why the claim erroneously exceeded the directions by £1.25.

On 15 November 1996 the respondent filed a defence denying that he received any payment from the Company knowing that it had wilfully failed to deduct PAYE. He was acting in a person and clearly unaware of the public nature of his defence. The appellant too was unrepresented despite the judge having expressed concern as to that at a preliminary hearing in the case. No reply was served so that in the event the collector never pleaded the case which Mr Brennan now formulates on his behalf. This is, first, that the true issue was not whether the respondent knew, and second, that in any event such an issue could only ever properly have been raised by way of a judicial review challenge to the directions and not as a defence to the recovery proceedings.

Perhaps unsurprisingly in those circumstances, when the matter finally came before Judge Urquhart in the Wigan County Court on 8 April 1998, he approached it in what is now conceded to have been the wrong way. His judgment implied that it was not sufficient for the Board to form an opinion about the respondent's state of knowledge; rather the collector had to satisfy the court that the Board's opinion was correct, as this he had failed to do. In other words, the judge undertook what

amounted to a rehearing of the merits of the Board's decision and in the result dismissed the claim on an impermissible basis. In dismissing it, I should observe, he concluded that "the Revenue have put forward no evidence that he did know" but rather had stated, in a letter dated 9 January 1995;

"The Board of Inland Revenue take the view that a director by virtue of his offices has the responsibility for management which amongst other things requires that he ensures that the Company complies with its statutory obligations under the Income Tax Regulations and implies that he should ensure that PAYE is correctly operated on his own remuneration and he cannot abrogate responsibility to any other person."

Mr Brennan rightly acknowledges that such an approach could not of itself justify the Board's conclusion. Actual knowledge is required on the part of the employee. As McNeill J held in *R v. Inland Revenue Commissioners ex parte Chisholm* [1981] 2 All ER 602:

"... the word 'knowing' means what it says and does not mean 'ought to have known' or 'should have been suspicious' or any other weakening of knowledge."

What Mr Brennan says, however, is that there was, in the evidence put before the county court, material upon which, even approaching the issue correctly, the Board could properly have concluded, as they did, that the respondent had actual knowledge of the Company's non-payment of PAYE. If, therefore, this court were to hold that a public law defence can be relied upon in these proceedings, the appellant would wish to adduce evidence to this effect and would seek a re-hearing for this purpose.

Mr Akin for the respondent, whilst conceding that the judgment cannot be upheld on its present basis, suggests that on no view of the evidence could the Board properly have found actual knowledge on the respondent's part. I for my part remain unpersuaded of that: the appellant has not hitherto needed to crystallise his response to the proposed public law defence and in my judgement he must have that opportunity. In short, the most that the respondent can achieve on this appeal is a rehearing below for that issue to be decided. Were no public law defence available to him, of course, we would have no alternative but simply to allow the collector's appeal.

That brings me, therefore, to the central question: is the defendant to collection proceedings of this kind entitled to raise a public law defence which puts in issue the legality of directions underlying the assessment?

Mr Brennan submits not, contending that the only way in which a taxpayer can properly contest directions under regulations 42(3) and 49(5) is by way of judicial review, as, indeed, was done in *ex parte Chisholm*.

In contending that he is, Mr Akin relies heavily upon the House of Lords decision in *Wandsworth LBC v. Winder* [1985] AC 461. That case concerned rent demands made by a local authority landlord on one of its tenants. The local authority, pursuant to its powers under the Housing Act 1957, resolved to increase generally. The tenant refused to pay the increased element of the rent. When sued by the local

authority, he sought to defend himself by pleading that the resolutions and notices of increase were ultra vires and void on grounds of *Wednesbury* unreasonableness. In holding that such a defence was open to him, Lord Fraser, giving the single reasoned speech, said this:

“The principle underlying those decisions, [*O’Reilly v. Mackman* [1983] 2 AC 237 and *Cocks v. Thanet District Council* [1983] 2 AC 286], as Lord Diplock explained in *O’Reilly*, is that there is a ‘need, in the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law.’ The main argument urged on behalf of the appellants was that this is a typical case where there is a need for speedy certainty in the public interest. I accept, of course, that the decision in this appeal will indirectly affect many third parties including many of the appellants’ tenants, and perhaps most if not all of their ratepayers because if the appellants’ impugned decisions are held to be invalid, the basis of their financial administration since 1981 will be upset. That would be highly inconvenient from the point of view of the appellants, and of their ratepayers, and it would be a great advantage to them if persons such as the respondent who seek to challenge their decision were limited to doing so by procedure under Order 53. Such procedure is speedy and avoids prolonged uncertainty about the validity of decisions. An intending applicant for judicial review under Order 53 has to obtain leave to apply, so that unmeritorious applications can be dismissed in limine and an application must normally be made within a limited period of three months after the decision which has impugned [sic], unless the court allows an extension of time in any particular case. Procedure under Order 53 also affords protection to public authorities in other ways, which are explained in *O’Reilly* and which I need not elaborate here. It may well be that such protection to public authorities tends to promote good administration. But there may be other ways of obtaining speedy decisions; for example in some cases it may be possible for a public authority itself to initiate proceedings for judicial review. In any event, the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims.

It would in my opinion be a very strange use of language to describe the respondent’s behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend the proceedings brought against by him the appellants. In so doing he is seeking to defend proceedings brought against by him the appellants. In so doing he is seeking only to exercise the ordinary right of an individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court’s discretion in favour.

Since *Winder* there have been many cases considering in different contexts the exclusivity or otherwise of judicial review as the proper process for challenging public law decisions. In the criminal context this question has recently and authoritatively been resolved in *Boddington v. British Transport Police* [1998] 2 WLR 639 where, consistently with *Winder*’s approach in civil cases, the House of Lords held that a defendant in a criminal prosecution can contend that a bye-law or an administrative act undertaken pursuant to it is ultra vires and unlawful, irrespective of the precise ground of challenge and irrespective of which court is trying the case.

More usually the question arises in civil claims which the person concerned to challenge the public law decision has initiated himself, the most important recent decisions in this context being *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, *Mercury Communications Limited v. Director General of Telecommunications* [1996] 1 WLR 46, *British Steel plc v. Customs & Excise Commissioners* [1996] 1 All ER 1002 (Laws J) and [1997] 2 All ER 366 (Court of Appeal), and *Trustees of the Dennis Rye Pension Fund v. Sheffield City Council* [1998] 1 WLR 840. The question arising in these cases, of course, is whether the plaintiff was entitled to bring his proceedings by way of ordinary action rather than judicial review. On that question Lord Woolf MR's judgment in the Dennis Rye Pension Fund case is particularly instructive. For present purposes I cite one short passage only, a passage which follows a series of pragmatic suggestions as to how to determine the appropriate procedure:

“They [these suggestions] do involve not only considering the technical questions of the distinction between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse.”

Mr Brennan's essential argument before us is that the practical consequences of the respondent here postponing his challenge to the Board's directions until he comes to raise it by way of defence to the collector's recovery proceedings are indeed significantly disadvantageous, at any rate to the Inland Revenue and the public interest.

The disadvantages, he contends, are principally these. First, that it confuses liability with debt collection. The inspector and collector are different statutory officers with different statutory functions. It is the inspector's task to determine the taxpayer's liability, the collector's to gather in the tax payable as a debt due to the Crown. Regulation 49(7) expressly provides for appeals against determinations made by the inspector under regulation 49(10)-(4) - determinations, that is, as to the PAYE outstanding from the employer. Similarly, until it was later repealed, regulation 4(5) provided for an appeal in the event of PAYE disputes between employers and employees. But all such appeals are subject to a 30 day time limit and the commissioners' determination upon them is (subject only to statutory appeal where applicable) final and conclusive. The repeal of regulation 42(5) and the omission of any right of appeal by the employee against directions under regulations 42(3) and 49(5) demonstrate, submits Mr Brennan, that the Board's power to impose liability for unpaid PAYE on the employee is intended to be part of a summary procedure. True, he acknowledges, the want of a right of appeal on the part of the employee opens the way to a judicial review challenge to such directions. But any such challenge, he points out, ought properly to be brought within three months and in that event would precede the passing of the case to the collector for recovery. Where a right of appeal exists, the Court of Appeal's decision in *Inland Revenue Commissioners v. Aken* [1990] 1 WLR 1374 establishes that the taxpayer must be regarded as adequately protected by the exclusive statutory appeal machinery and so is not entitled to question the validity of assessments in the course of collection proceedings. Mr Brennan submits that where no statutory right of appeal exists the position is *a fortiori*: true, the taxpayer

must be entitled to challenge the direction by way of judicial review, but that in turn should be regarded as the exclusive remedy available to him; he should not be permitted to carry it over by way of defence to collection proceedings. To do this, he argues, is to burden what are plainly intended to be essentially summary proceedings with potentially complicated legal challenges. Section 70(1) of the 1970 Act provides for an inspector's certificate to be "sufficient evidence that the sum mentioned in the certificate is unpaid and is due to the Crown". True, "sufficient" here does not mean "conclusive"; ordinarily, however, the dispute is merely as to what sums have or have not been paid.

Mr Brennan further points out that the collector is empowered to enforce payment of tax in a number of ways, not all of which necessarily involve any court proceedings at all. By s.61 of the 1970 Act the collector may distrain upon the taxpayer's goods and chattels, no court order being required unless an entry warrant is sought from the magistrates. Under s.65, moreover, tax not exceeding £2,000 is recoverable summarily as a civil debt in the magistrates' court, hardly the ideal forum for a public law dispute.

The second main disadvantage to which Mr Brennan points is that if a direction is challenged only in private law collection proceedings, it may be held invalid as against the employee but nevertheless remain valid for the purpose of discharging the employer's liability for the tax. The county court judge's (or magistrates') decision could not operate to quash the direction and accordingly, where the Board had directed under the regulations that "the employer shall not be liable to pay [the relevant amount] to the collector", the revenue would not be entitled to recover the tax from anyone. Whilst in the present case that would make no practical difference - the Company being long since in liquidation and unable to pay in any event - that would not always be the case and on occasions third party interests too might be affected, i.e. the interests of those claiming through or interested in the affairs of the employer such as his creditors, liquidator or receiver.

As for the House of Lords' decision in *Winder*, that, submits Mr Brennan, is distinguishable. In *Winder*, he points out, there was a pre-existing private law relationship between the parties, that of landlord and tenant. Here, by contrast, the relationship between the parties was purely one of public law, until, that is, the time comes for the assessed tax liability to be collected as a debt due to the Crown.

That distinction apart, moreover, Mr Brennan submits that in deciding whether in any particular case the making of a public law challenge in the course of private law proceedings is an abuse of process, the court should not attach undue weight to whether the challenger is plaintiff or defendant. That, he suggests, is often a matter of circumstance. Suppose, for example, that a taxpayer has submitted to a claim by the Revenue under protest. He may well be able to recover the payment in private law proceedings for restitution - see *British Steel plc v. Customs & Excise Commissioners* [1997] 2 All ER 366, applying *Woolwich Building Society v. Commissioners of Inland Revenue (No 2)* [1993] AC 70. Had he not submitted he would have been the defendant; seeking restitution he is the plaintiff.

Mr Brennan further submits that if, as the cases appear to decide, a legal challenge advanced by way of defence cannot be dismissed in the exercise of the

court's discretion, that consideration ought properly be seen to cut both ways. The point hitherto made is that to compel a defendant to go by way of judicial review is to condemn him to discretionary relief only. The other side of the coin, however, is that to allow a defendant to litigate his challenge by way of defence deprives the public authority of the opportunity to argue that relief should be refused as a matter of discretion. What Mr Brennan specifically envisages is that, if and when the respondent's defence comes to be heard, the appellant may be unable to point to sufficient material to show that at the time of their direction the Board could properly conclude that the respondent had actual knowledge, and yet be able to establish that by reference to other material (in particular, a post-direction interview). Had the challenge been made by judicial review, the court in those circumstances might well have refused relief. Pursued, however, as a defence, the plain assumption is that no discretion arises.

Powerful though many of these arguments are, and ably presented though they were, I for my part would reject them. To my mind there is no true distinction to be made between this case and *Winder*. To my mind there is no true distinction to be made between this case and *Winder*. The lack of any contractual relationship between the Revenue and the taxpayer really can make no logical difference to the position. In the *Dennis Rye Pension Fund* case, Lord Woolf said at page 846:

“... as in *Roy's* case, I would regard this as being a case where the plaintiff's relationship with a public body whether statutory or contractual would confer on him conditional rights to payments so that bringing of ordinary actions to enforce those rights was not in itself an abuse of process”.

By the same token, the respondent's relationship to the Revenue here was surely such as to confer on him “conditional rights to [resist] payment”.

As for the distinction made in the cases between the situation where the challenger is plaintiff and those where he is defendant, imperfect though I recognise the logic of that to be, it seems to me now too well established to be reversible, certainly in this court. I would point, moreover, to the Court of Appeal's decision in *Bragg v. Oceanus Mutual* [1982] 2 Lloyds Rep 132, also decided in the context of abuse of process - although raising the very different question of collateral challenges in subsequent proceedings - in which Kerr LJ said this:

“The present case is clearly not one of a collateral attack on a previous decision; indeed, in both actions *Oceanus* are not plaintiffs but defendants. Any analogy with the foregoing cases therefore breaks down in limine.”

There too, it will be seen, the same distinction was made between plaintiff and defendant.

It seems to me similarly too late in the development of this jurisprudence to contend that the very fact that a defendant “put forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour” (per Lord Fraser in *Winder*) should on occasion incline the court to condemn such a defence as an abuse of process - and too late also to argue, as in the alternative Mr Brennan seeks to do, that the court should properly

be found to have the same discretion to reject a public law defence in private law proceedings as it has to dismiss a judicial review challenge.

As for the undoubted practical disadvantages which flow from raising a public law challenge like this by way of defence instead of judicial review, this too is an argument which Winder amply demonstrates (in the passage already cited) to be unavailable to the appellant. Indeed it seems to me plain that the disadvantages in that case were altogether greater than any which exist here. The decision there affected many third parties (tenants and ratepayers) and its challenge put at risk the whole basis of the council's financial administration over a period of years. The present challenge concerns only a single taxpayer's liability although of course the point of principle is clearly one of great importance to the Revenue and would affect many cases.

It is with this thought in mind that I return finally to *Inland Revenue Commissioners v. Aken*. There, as stated, this court held the taxpayer to be precluded from disputing his liability in proceedings brought by the Commissioners to enforce assessments made against him. Statutory machinery exists for appealing against such assessments and, consistently with *Inland Revenue Commissioners v. Pearlberg* [1953] 1 WLR 331, *Commissioners of Inland Revenue v. Soul* (1975) 51 TC 86, and *In re Vandervell's Trusts* [1971] AC 912, this was held to be the exclusive machinery by which an assessment could be contested. Although the judgments contain obiter dicta which contemplate the possibility that complaints of abuse of power or unfairness could sometimes be raised by way of judicial review or defence to tax recovery proceedings, this possibility is understandably put as "exceptional" and "rare in the extreme".

It seems to me that the Revenue's solution to the problem raised by the present case is a simple one: they should confer on taxpayers a right of appeal against directions comparable to that which arises on assessment.

I would allow the appeal but hold that the respondent is entitled to advance his public law defence in the County Court. There will accordingly have to be a rehearing below.

Lord Justice Aldous:

I agree.

Lord Justice Mantell:

I also agree.