

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
CROWN OFFICE LIST

CO/2745/99 and CO/2979/99

Royal Courts of Justice  
Strand  
London WC2A 2LL

14 June 2000

B E F O R E:

THE HON MR JUSTICE DYSON

THE QUEEN

- v -

SPECIAL COMMISSIONER OF INCOME TAX

*ex parte*

COMMISSIONERS OF INLAND REVENUE

- and -

THE QUEEN

- v -

COMMISSIONERS OF INLAND REVENUE

*ex parte*

ULSTER BANK LIMITED

-

Mr David Goldberg QC and Clive Lewis (instructed by Messrs Travers Smith Braithwaite for the Ulster Bank Limited)

Mr Timothy Brennan (instructed by the Solicitor of Inland Revenue for the Commissioners of Inland Revenue)

*The Hon Mr Justice Dyson:*

*Introduction*

1. These two applications concern section 20 of the Taxes Management Act 1970 (TMA). Under section 20, inspectors of taxes have power to call for documents from, amongst others, third parties to an investigation. In order to exercise that power, an inspector must first give a

notice to the person from whom he wants the documents. Section 20(8) and (8A) provide that he can only give such notice without naming the taxpayer with whose liability he is concerned if a Special Commissioner gives his consent. One of the issues that arises for determination is whether, upon the true construction of section 20(8A) of TMA, an application to a Special Commissioner for consent may be made by an inspector only if it has been authorised by an order of the Board of the Inland Revenue itself, or whether it is sufficient that the application be authorised by an officer to whom the Board has delegated the requisite power. But before I come to the issues in more detail, I need to set the scene.

2. Ulster Bank Limited ("UBL") is a wholly owned subsidiary of National Westminster Bank Plc. Its principal activity is that of deposit-taking. As part of its internal accounting mechanism, a "Sundry Parties' Account" was operated at each of its branches. This is an account through which may be passed isolated transactions with parties who may or may not be customers of the bank, or who may or may not have accounts at the branch. All branches of the bank will have a Sundry Parties' Account to record transactions which are not or cannot be dealt with through specific named accounts. UBL is not under investigation itself, and the Revenue is seeking information about other taxpayers whose transactions were passed through Sundry Parties' Accounts. It is accepted by the Revenue that such accounts can have entirely proper banking purposes. They can, however, be used as a means of facilitating fraud. This is because it is difficult to trace money transactions that pass through such accounts. The Revenue does not suggest that UBL has been complicit in a tax fraud. But it is of the opinion that sundry parties' accounts have been used by individuals for the purpose of serious fraud. The investigation which is the subject of these proceedings has the aim of unravelling these frauds.

3. The history of the attempts by the Revenue to extract documents from UBL under section 20 of TMA is complex. It is unnecessary to examine it in detail. The relevant investigations started in 1995. In November 1997, the Revenue gave UBL a notice in relation to 6 named branches. That notice was challenged in judicial review proceedings on the grounds that it was oppressive. These proceedings were compromised and settlement agreements were reached. The first of these agreements dealt with the existing notice in relation to the 6 branches. The second, the so-called "New Notice Agreement" dated 18 September 1998, dealt with the procedure to be followed if the Revenue wished to give UBL a new notice in relation to the other branches and offices of UBL. Clause 2(iv) of this agreement provided:

“In further recognition of the circumstances referred to in subparagraph (ii) above, the Inland Revenue agrees that it may not serve more than one New Notice and shall not apply to the Special Commissioners for consent to serve such a Notice later than 31 March 1999.”

4. In March 1999, Mr Staples, an inspector of taxes, made an application to a Special Commissioner for consent to give what was, in the terms of the New Notice Agreement, a "New Notice". This application was made pursuant to the authorisation given by Mr Brannigan, who was the "Director Special Compliance Office" of the Board. It is the Revenue's case that this authorisation was contained in, or evidenced by, a document dated 11 March 1999 signed by Mr Brannigan, which was in these terms:

“Please note that I have authorised the above application in accordance with the delegated authority from the Board of Inland Revenue dated 25 October 1993.”

5. By an order dated 25 October 1993, the Board authorised, amongst others, "the Controller of Special Compliance Office" to exercise the functions under section 20(8A) of

TMA. The "Controller" is now called the "Director". By an order dated 29 April 1997, the Board revoked the order of 25 October 1993, and by the same document renewed the authorisation to the Controller to perform the functions under section 20(8A).

6. Mr Staples made the application ex parte to Mr Theodore Wallace, a Special Commissioner. The hearing started on 18 March, but had to be adjourned part heard. The adjourned hearings were held on 10 and 28 April. Mr Wallace gave his reasoned decision on 14 May. He held that, on its true construction, section 20(8A) required the Board to give the necessary authorisation itself, and not by an officer exercising delegated authority. Accordingly, since the Board itself had not given its authorisation to the notice, the question of his giving his consent under section 20(8A) did not arise. He went on, however, to consider the other issues. He said (paragraph 42) that, if he had decided that the application was authorised by order of the Board, he would have held that the other requirements of section 20(8A) were satisfied, as well as those of section 20B(6), which provides for the disapplication of the time limits stated in section 20B(5) in relation to notices under section 20(3).

7. On 18 May, the Board purported to make an order in these terms:

"The Commissioners of Inland Revenue hereby authorise an application by Bernard Staples, one of HM Inspectors of Taxes, under section 20(7) Taxes Management Act 1970 (as amended) for consent to issue a notice under s.20(8A) Taxes Management Act 1970 (as amended) to Ulster Bank Limited. A copy of the proposed application is attached marked Annex A.

Ordered accordingly".

8. On the same day, the Revenue wrote to the Clerk to the Special Commissioners enclosing the order to which I have just referred, and stating that the application was the same in all respects as the application dated 18 March, save for the attached order. The letter added: "Please let me know how the Special Commissioner wishes to proceed in hearing the application."

9. On 19 May, Mr Staples appeared before Mr Wallace. The Special Commissioner asked him "where do I sign?" Without more ado, Mr Wallace gave his consent to the giving of a New Notice.

#### *The relevant statutory provisions*

10. Section 20 of TMA gives the Revenue power to call for documents of a taxpayer and others. An inspector may by notice in writing require a person to deliver documents which in his reasonable opinion relate to that person's tax liability (section 20(1)). Such a notice may not be given by an inspector "unless he is authorised by the Board for its purposes", and then only with the consent of a General or Special Commissioner (section 20(7)). Section 20(2) provides that "the Board" may give a notice in writing requiring a person to deliver documents which in the reasonable opinion of the Board relate to that person's tax liability. There are three important differences between the powers exercisable under subsection (1) and (2). First, the inspector cannot exercise the power under subsection (1) without the consent of a General or Special Commissioner. The Board can act under subsection (2) without such consent. Secondly, the inspector cannot (but the Board can) give a notice without first giving the intended recipient a reasonable opportunity to deliver the documents in question (section 20B(1)). Thirdly, an inspector cannot (but the Board can) give a notice to a barrister, advocate or solicitor. This third restriction derives from section 20B(3), which provides:

"An inspector cannot under section 20(1) or (3) or under section 20A(1), give notice to a barrister, advocate or solicitor, but the notice must in any such case be given (if at all) by the Board; and accordingly in relation to a barrister, advocate or solicitor for references in section 20(3) and (4) and section 20A to the inspector, there shall be references to the Board."

11. Section 20(3) provides that an inspector may, for the purposes of enquiring into the tax liability of a taxpayer, by notice in writing require any other person to deliver such documents as (in the inspector's reasonable opinion) contain, or may contain information relevant to any tax liability to which the taxpayer is, or may be or may have been subject. Sections 20(7) and 20B(3) apply to the giving of such a notice just as they do to the giving of a notice by an inspector under section 20(1). Section 20(8) provides that, subject to subsection (8A), a notice under subsection (3) shall name the taxpayer with whose liability the inspector (or, where section 20B(3) applies, the Board) is concerned. Section 20(8A), which lies at the heart of the applications before me, provides:

"20(8A) If, on an application made by an inspector and authorised by order of the Board, a Special Commissioner gives his consent, the inspector may give such a notice as is mentioned in subsection (3) above but without naming the taxpayer to whom the notice relates; but such a consent shall not be given unless the Special Commissioner is satisfied —

(a) that the notice relates to a taxpayer whose identity is not known to the inspector or to a class of taxpayers whose individual identities are not so known;

(b) that there are reasonable grounds for believing that the taxpayer or any of the class of taxpayers to whom the notice relates may have failed or may fail to comply with any provision of the Taxes Acts;

(c) that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax; and

(d) that the information which is likely to be contained in the documents to which the notice relates is not readily available from another source."

12. Section 20(8B) permits a person to whom a notice is given under subsection (8A) to object to the notice on the ground that it would be onerous for him to comply with it; and provides that if the matter cannot be resolved by agreement, it shall be referred to the Special Commissioner, who may confirm, vary or cancel the notice.

13. Section 20C, so far as material, provides:

"20C(1) If the appropriate judicial authority is satisfied on information on oath given by an officer of the Board that -

(a) there is reasonable ground for suspecting that an offence involving serious fraud in connection with, or in relation to, tax is being, has been or is about to be committed and that evidence of it is to be found on premises specified in the information; and

(b) in applying under this section, the officer acts with the approval of the Board given in relation to the particular case,

the authority may issue a warrant in writing authorising an officer of the Board to enter the premises, if necessary by force, at any time within 14 days from the time of issue of the warrant, and search them.

**20C(2)** Section 4A of the Inland Revenue Regulation Act 1890 (Board's functions to be exercisable by an officer acting under their authority) does not apply to the giving of Board approval under this section."

14. Section 4A of the Inland Revenue Regulation Act 1890 ("IRRA") provides:

"Any function conferred by or under any enactment, including any future enactment, on the Commissioners may be exercised by any officer of the Commissioners acting under their authority

Provided that this section shall not apply to the making of any statutory instrument."

*The issues*

15. The following issues arise on the two applications before me:

(a) Was the Special Commissioner right to hold that the application to him under section 20(8A) was not authorised "by order of the Board", because authorisation had to come directly from the Board itself, and could not be given by its delegate, Mr Brannigan? This raises a question as to the proper interpretation of section 20(8A).

(b) Even if authorisation by Mr Brannigan could be authorisation "by order of the Board" within the meaning of section 20(8A), was there any "order" in this case? This involves a consideration of what is meant by an "order" in section 20(8A), and whether there was an order on the facts of the present case. If the Revenue succeeds on the first two issues, it is unnecessary to consider the true nature and effect of the application made by the Revenue in May 1999, but even on that hypothesis, the third issue remains.

(c) If the Revenue succeeds on the first two issues, what is the appropriate remedy in the circumstances of this case?

(d) If the Revenue fails on the first or second issue, then it becomes necessary to decide whether the May application was a fresh application, or merely a continuation of the application made on 18 March. It is accepted by the Revenue that, in view of clause 2(iv) of the New Notice Agreement, it could not properly make a fresh application to the Special Commissioner after 31 March 1999. It follows that, if the May application was indeed a fresh application, it should not have been made, and that accordingly the consent purportedly given by the Special Commissioner should not have been given.

*The first issue: could the Board delegate its section 20(8A) function of authorisation to Mr Brannigan?*

*Mr Goldberg's submissions on the first issue*

16. In a persuasive and closely reasoned argument, Mr Goldberg QC submits as follows. First, wherever the word "Board" appears in section 20 of TMA, it refers to the Board acting by itself, and not the Board acting by its authorised officers. He accepts that there are numerous references to "the Board" in the tax legislation generally, and in TMA in particular,

and that in most instances, the Board may act by its authorised officers. That, after all, is what section 4A of IRRA is all about. But he submits that section 20 is a self-contained code. Accordingly, there is nothing surprising in Parliament having decided to treat the meaning of "the Board" differently in section 20 from elsewhere.

17. Mr Goldberg seeks to support this argument by an analysis of some of the provisions of section 20. He draws attention to the restrictions on the powers of inspectors to which I have already referred. He points out, for example, that an inspector cannot give a notice under section 20(3) to a barrister, advocate or solicitor, whereas "the Board" can give such a notice. If "the Board" in section 20B(3) means "the Board acting by itself or by its authorised officers", it would be open to the Board to authorise any officer, however junior, to give a notice under section 20(3). To take another example, as we have seen, the Board may give a notice in writing to a taxpayer under section 20(2) free from the restrictions that affect an inspector's exercise of the corresponding power under section 20(1). If the words "the Board" in section 20(2) mean "the Board acting by itself or by its authorised officers", it would be possible for the Board to authorise any officer, possibly even an inspector, to exercise the section 20(2) power, untrammelled by the restrictions that Parliament has very carefully imposed on the exercise of such power by an inspector. These examples are very odd and, submits Mr Goldberg, they cannot have been intended by Parliament, but they are the inevitable consequence of the Revenue's interpretation of the words "the Board" where they appear in section 20B(3). This shows that "the Board" in section 20 must mean "the Board acting by itself", and not "the Board acting by itself or by its authorised officers".

18. Mr Goldberg's second argument involves a close analysis of the words of section 20(8A) in conjunction with section 4A of IRRA. He submits that, properly understood, section 20(8A) impliedly excludes section 4A of IRRA in relation to the giving of notices under section 20(3). His argument runs as follows. Section 20(8A) not only requires "authorisation", but it also requires that the authorisation be by a particular method, namely "by order" and by specific persons, namely members of the Board. The function conferred on the Board is not to "to authorise by order of the Board", but "to authorise", "order of the Board" being the particular form which the authorisation must take. The Board could delegate the function of authorising to Mr Brannigan. Having had that function delegated to him, Mr Brannigan would still be required to authorise a section 20(8A) application "by order of the Board". This he cannot do. He cannot make an order of the Board. He can authorise, but he cannot authorise "by order of the Board". The only body capable of authorising "by order of the Board" is the Board itself. Mr Goldberg contends that his construction gives meaning and purpose to the words "by order of the Board", whereas on the Revenue's interpretation, those words are otiose. Further, to construe section 20(8A) as not permitting delegation is consistent with the nature and purpose of section 20(8A). It is an intrusive process, imposing an obligation on a third party who is not under investigation to disclose information about a taxpayer. The purpose of the statutory scheme is to set safeguards in the public interest to ensure that the intrusive powers are properly exercised. These safeguards would be circumvented if the Revenue's interpretation were correct.

19. Mr Goldberg supports his argument by reference to section 828 of the Income and Corporation Taxes Act 1988 ("ICTA"), which provides:

"(1) Subject to subsection (2) below, any power of the Treasury or the Board to make any order or regulations under this Act or under any other provision of the Tax Acts (including enactments passed after this Act) shall be exercisable by statutory instrument."

20. It is common ground that Parliament could not have intended that the Board's authorisation of an inspector to make an application under section 20(8A) of the TMA should

be by statutory instrument. I heard sophisticated arguments from both counsel as to whether the TMA was one of the "Tax Acts" within the meaning of section 828(1) of ICTA. Mr Goldberg submits that the reason why section 828(1) of ICTA does not apply to section 20(8A) of TMA is that section 20(8A) does not relate to the function of making an order; it relates to the function of authorising applications. The making of an order is merely the method by which a function is carried out, not a function itself

21. Mr Goldberg's third argument is based on the fact that section 20(8A) was introduced by clause 118 of the Finance Bill 1988, which was enacted as section 126 of the Finance Act 1988. On 15 March 1988, when the amendment was laid before Parliament in draft, the Revenue published a press release, which commented on the draft provision. It stated:

"The new power will be restricted to cases of serious tax loss, and an order from the Board of Inland Revenue will be needed before the Inspector may apply to the Commissioners."

22. The Revenue also published a note for clause 118 when the Finance Bill was before Parliament. The note makes no reference to the possibility of delegation, stating under subsection (8A), "this may be done only with leave of the Board of Inland Revenue."

23. Mr Goldberg relies on these statements in support of his construction of section 20(8A).

#### *Conclusion on the first issue*

24. I cannot accept Mr Goldberg's arguments, and largely for the reasons advanced by Mr Brennan. Mr Goldberg's central submission is that section 20(8A) impliedly excludes or disapplies section 4A of IRRA. The existence of section 20C(2) is the principal reason why in my judgment this submission must be rejected. Section 20C(2) was inserted into the TMA by section 57 and Schedule 6 of the Finance Act 1976. Section 20(8A) was introduced into the TMA by section 126 of the Finance Act 1988. Accordingly, when the words "by order of the Board" in section 20(8A) were introduced, the relevant group of sections already included, in section 20C(2), an express statutory formula which was apt to exclude the operation of section 4A of IRRA. Mr Goldberg recognises that the presence of section 20C(2), which expressly disapplies section 4A of IRRA, presents him with something of a difficulty. He meets this by submitting that the fact that Parliament has on one occasion used express words to achieve that result does not mean that Parliament could not achieve the same result by other means. I agree with this so far as it goes. But in construing section 20(8A), one is trying to ascertain what Parliament meant by the words that were used. I accept that it is possible to disapply section 4A by necessary implication as well as by express words. But where Parliament has used simple clear express words to disapply section 4A in one part of section 20, it is highly unlikely that it would have intended to achieve the same result in the same section by the very different route of necessary implication. As Mr Goldberg submits, section 20 is a self-contained code. The significance of the use of express words of disapplication of section 4A of IRRA in section 20C(2) is that they appear in the same section of TMA as that with which we are concerned. It is not a question of comparing the language with that used in a provision in some far-distant section of TMA, still less with that of a different piece of tax legislation altogether.

25. In these circumstances, an argument based on necessary implication is very difficult to sustain, although I accept that it is not impossible. It seems to me that, against the background of section 20C(2), the correct approach to the question of construction is to hold that section 4A has not been disapplied by section 20(8A) unless the language of that subsection, read in the context of section 20 as a whole, clearly compels the contrary conclusion. I turn, therefore, to see how cogent the arguments advanced by Mr Goldberg

really are.

26. I cannot accept his submission that, wherever the words "the Board" appear in section 20, they mean "the Board acting by itself", and that the use of these words alone, in the context of section 20, impliedly excludes section 4A. His argument turns on the strange results that would flow, in particular in relation to the powers in section 20(1) to (3), if "the Board" means "the Board acting by itself or by its authorised officers". I doubt whether the Revenue can invoke section 4A of IRRA to authorise inspectors to act in a way which Parliament has prohibited in section 20 of TMA. Thus, whatever authority an inspector may have been given by the Board, I doubt whether an inspector can give notice under section 20(1) or (3) or under section 20A(1) to a barrister, advocate or solicitor. But this would be because such authorisation is prohibited by section 20B(3), and not because "the Board" means "the Board acting by itself and not by its authorised officers". For similar reasons, I doubt whether the Board could delegate its section 20(2) powers to an inspector so as to enable the inspector to exercise those powers free from the restrictions to which he or she would be subject if exercising the same powers under section 20(1). But it is not necessary for me to resolve these doubts, since I accept that section 20B(3) does not, at least in theory, prohibit the Board from authorising a junior officer to give a notice to a barrister, advocate or solicitor. It follows that, if section 20B(3) does not disapply section 4A of IRRA for the purpose of notices by persons (save perhaps inspectors) there is nothing in the TMA to prevent the Board from authorising such persons to give such notices. Moreover, if section 20(2) does not disapply section 4A for the purposes of giving a notice under that subsection, there is nothing in the TMA to prevent the Board from authorising a junior officer to give a notice under section 20(2).

27. I accept, therefore, that it is possible for the Board to delegate some of its other important and intrusive powers to junior officers. This was a point which clearly influenced the Special Commissioner in the present case (see paragraph 15 of his decision). He was concerned that, if the Revenue's construction of section 20(8A) were correct, the Board would be entitled to delegate its function of authorising to any officer, however junior. In theory, therefore, although the notice under section 20(8A) must be given by an inspector, the Board's authorisation could be given by someone of lower rank than inspector.

28. The key words here are "in theory". I accept the submission of Mr Brennan that underpinning section 4A of IRRA is the statutory assumption that the Board will act responsibly in deciding to whom it will delegate its various functions. It is always open to Parliament to prescribe which officers may, and which may not, perform specified functions of the Board. We find examples of this in section 20 itself where, as we have seen, Parliament has imposed certain restrictions on the powers of inspectors. But in the absence of express prescriptions of this kind, it is to be assumed that Parliament has left it to the Board to determine which of its officers is to be authorised to discharge which of its many statutory functions. It may be asked: why did Parliament not stipulate that the powers that could not be exercised by inspectors could not be delegated by the Board to officers who are junior to inspectors? The likely answer is that it probably never occurred to anyone that it would be necessary to do so, since it is almost inconceivable that the Board would exercise its powers of delegation in such a manner. The Board is a public body, answerable to public law challenges. Decisions that are taken by it in bad faith or which are perverse in the Wednesbury sense can be quashed.

29. In exploring the intricacies of Mr Goldberg's arguments, it is easy to lose sight of the real question, which is: what did Parliament intend by the use of the words "the Board" in section 20? In my judgment, one derives little assistance in resolving that question by considering theoretical, and, I would say, fanciful possibilities.

30. I turn to Mr Goldberg's second and narrower argument, which turns on a close analysis of the words of section 20(8A) itself I shall have to return to the question of what are the requirements of an "order" when I deal with the second issue. At this stage, I deal with the argument that the Board could not delegate the function of authorising "by order of the Board" I start with the observation that the argument based on the otioseness of the words "by order of" is of little weight In Walker (Inspector of Taxes) v. Centaur Clothes Group Ltd [2000] 2 AER 589, 595H, Lord Hoffmann said:

"I seldom think that an argument from redundancy carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway."

31. Although the context of that remark was different from that in the present case, Lord Hoffmann was making a general comment. It seems to me that it is relevant to the applications before me.

32. I do not accept that the Board could not delegate the function of authorising under section 20(8A) to Mr Brannigan because Mr Brannigan could not authorise "by order of the Board". Whatever those words mean, their purpose is to describe how and at what level that authorisation is to be given. It has to be by "order". The statute could have said that the authorisation must be in writing. The subsection also provides that the authorisation has to be given at Board level. But that is not to say that the Board may not delegate the giving of the authorisation to a duly authorised officer. It merely means that Parliament has not identified the level of officer empowered to grant the authorisation: it has left that to the Board. I therefore agree with Mr Goldberg that the words "by order of the Board" do not describe a separate function (of making an order) which is distinct from the function of authorising an application. He is right to submit that, even if the TMA is a "Tax Act" within the meaning of section 828(1) of ICTA, section 20(8A) does not create a power to "make an order" of the kind that is subject to section 828(1). Section 20(8A) merely describes the method by which, and the level at which, the function of authorising applications by inspectors is required to be made.

33. I agree with Mr Goldberg that one of the purposes of the statutory scheme is to set safeguards in the public interest to ensure that the intrusive powers accorded to the Revenue are properly exercised. But that does not shed any light on the question whether section 4A of IRRA is disapplied in relation to the exercise of the power given by s.20(8A) of TMA. The section 20(8A) powers is not the most intrusive or draconian power created by section 20 of TMA. That accolade must surely go to section 20C, which gives the Revenue the power to enter premises, if necessary by force. In my view, it is significant that this is the only power in respect of which Parliament has expressly disapplied section 4A of IRRA. Moreover, section 20(8A) has in any event a number of in-built safeguards. In particular, the Special Commissioner may not give consent to the issue of a notice unless no fewer than four conditions are satisfied.

34. I turn finally to Mr Goldberg's reliance on the Revenue press release, and the note published for clause 118 when the Finance Bill was before Parliament in 1988. Mr Goldberg concedes that this is not within Pepper v Hart [1993] AC 593, 640B-D (Lord Browne-Wilkinson). These documents are not admissible as an aid to construction. In any event, even if they were, I do not consider that they shed any light on the question whether section 4A is disapplied by section 20(8A).

35. For these reasons, I am not persuaded by the arguments of Mr Goldberg, taken both individually and cumulatively, that section 4A of IRRA was impliedly disapplied by section 20(8A) of TMA. Since there is no suggestion that Mr Brannigan was not authorised by the

Board to authorise applications under section 20(8A), the answer to the first issue is that Mr Brannigan could authorise such applications.

*The second issue: was there an authorisation by Mr Brannigan in this case?*

36. The relevant evidence is not in dispute. The Special Commissioner was satisfied that Mr Brannigan had been fully briefed and that he had approved the application under section 20(8A). Mr Goldberg accepts in those circumstances that Mr Brannigan orally authorised the making of the application. The only document in existence that is put forward by the Revenue as a written authorisation is the letter from Mr Brannigan to the Special Commissioner dated 11 March 1999, in which he wrote "I have authorised the above application in accordance with the delegated authority from the Board of Inland Revenue dated 25 October 1993".

37. Mr Goldberg submits as follows. Section 20(8A) requires something that can properly be described as an "order". It must be some formal executive act which orders or directs or instructs that something be done. Moreover, the order must have a certain formality: it must be in writing, and it must be published, so that the person affected by the consent of the Special Commissioner (if given) may be able to challenge the notice, for example, on the ground that the inspector had no authority to give it. Mr Goldberg relies on R v. Clarke [1969] QB 91, 97B-C and Ryall v. Cubitt Heath [1922] 1 KB 275, 289.

38. On his interpretation of "order", Mr Goldberg accepts that the juxtaposition of "authorised" with "by order of" is an oxymoron. In many contexts, to authorise A to do something gives him a discretion whether or not to do it, whereas to order him to do it gives him no discretion. This juxtaposition suggests that in the present context the position may be different. In my view, it is clear that in section 20(8A) Parliament was only concerned to ensure that an application by an inspector was approved and authorised by the Board. This is clear when it is appreciated that notices given under subsection (8A) "are but a subset of notices which may be given under subs.(3)": see per Morritt LJ in R v. Inland Revenue Commissioners ex parte Ulster Bank Ltd [1997] STC 832, 838D. The power in an inspector to give a notice under subsection (3) is plainly discretionary, viz: "an inspector may...". It must follow that subsection (8A) is dealing with a case where an inspector wishes to exercise the discretion to give a notice under subsection (3), without naming the taxpayer concerned. I do not consider that when an inspector has been "authorised by order of the Board" to make the application under section 20(8A), he is obliged to make the application. The subsection itself makes clear that, even if the Special Commissioner gives his consent, the inspector still has a discretion whether to give the notice, viz: "the inspector may give such notice..."

39. Read in the context in which they appear, in my view the words "by order of the Board" are not intended to be prescriptive or directory. If Mr Goldberg's argument were right, one would surely have expected the subsection simply to say "If, on an application made by order of the Board". This is not an argument based on the redundancy of "authorised". It is that authorising an application to be made is different from directing that it be made.

40. I prefer the submission of Mr Brennan that, in the context of section 20(8A), "by order of" means the same as "by decision of", and that it does not connote any prescribing. Nor do I see why the "order" should take any particular form. If Parliament had intended that the order should be in writing, or that it should be published, then it could have said so. In my judgment, an oral "order" is sufficient for the purposes of section 20(8A). I do not find the authorities relied on by Mr Goldberg of any real assistance. In R v. Clarke, there was a question as to whether the Breath Test Device (Approval) (No 1) Order 1968 was an order within the meaning of section 2 of the Documentary Evidence Act 1868. The question was whether section 2 could be invoked so that production of the Order would be prima facie evidence of the approval of the device. The Court of Appeal said:

"There would seem no good reason for giving the word "order" any narrower meaning when issued under the authority of a Government department or officer. Moreover, bearing in mind that in 1868 there were no statutory rules and orders, let alone statutory instruments, the court is satisfied that the word "order" in the Act should be given a wide meaning covering at any rate any executive act of government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament. This is all the more so when the Acts in question are merely designed to facilitate proof of matters which can be clearly proved otherwise, albeit in a less convenient manner.

41. But the subject matter and context of that case are far removed from the present case. In Ryall v. Cubitt Heath, a local authority served on a house owner a notice to execute certain works. The statute provided that any person aggrieved "by an order of the local authority" could appeal. The question was whether the notice was an order. An "order" was defined as the order made by the local authority "under their seal and authenticated..." The court held that the notice was not an order within the meaning of the statute. They held that the notice was not an order at all. Branson J said at page 289:

"I do not myself place much reliance on the definition in s.86 of the Act of 1890, which seems to me to relate rather to the formalities to be adopted in making an order or giving a notice than to distinguish between an order and a notice as such. I think that the notice referred to in s.28, sub-s. 1, is not an order, because it does not order anybody to do anything; it is simply a notice given to the owner, which he may disregard without any penalty or any infraction of the notice at all."

42. Once again, the subject matter and context are far removed from the present case. The use of the word "notice" in one provision, and "order" in another enabled the court to draw a clear distinction between the two, and to say that "order" was an order to do something. For the reasons that I have given, I am of the view that in the context of section 20(8A), an order of the Board is not an order or instruction by the Board to an inspector to make an application to the Special Commissioner.

43. If I am right as to what "by order of" means, it must follow that, since the application in this case was authorised orally by Mr Brannigan under the authority of the Board, the application was "authorised by order of the Board".

*The third issue: what remedy is appropriate?*

44. It is common ground that, if I decide the first two issues in their favour, I should grant the Revenue a declaration that the Special Commissioner ought not to have refused his consent to the application. Mr Goldberg submits that I should not grant relief in any wider terms than this. He contends that the matter will then have to be remitted to the Special Commissioner for reconsideration: the Special Commissioner will have to decide whether it is appropriate in all the circumstances current at the time of his reconsideration to grant consent to the application. Mr Goldberg argues that the passage of time since the date of the Special Commissioner's decision of 14 May 1999 has resulted in material prejudice to UBL. The bank has stood down the team that it had assembled to deal with any notice that might be served under the New Notice Agreement, and it has incurred considerable expense in storing documents in the meantime. It has lost the benefit of finality that it believed it had achieved by negotiating a settlement agreement under which the Revenue could serve only one further notice, and then only if it did so by 31 March 1999. In addition, Mr Goldberg prays in aid the

onerousness of the notice. He submits that, if the Revenue is free to resile from the settlement agreement, UBL ought to be allowed to reopen the question of onerousness. He argues that the work that the bank is being required to do is, while fair in the context of the settlement agreement, unfair and onerous when viewed outside the context of the agreement, and wholly disproportionate to any benefit to the Revenue.

45. Mr Brennan submits that the Revenue is entitled to a declaration that the Revenue was, **and is**, entitled to consent by the Special Commissioner to the issue of the notice. It would be quite wrong to refuse relief on any basis that might have the effect of depriving the Revenue of the consent that it should have received pursuant to its application in March 1999. This is particularly the case since UBL has chosen to insist that the Special Commissioner was correct, thus occasioning much of the delay which has occurred, and on which the bank now relies. Mr Brennan relies on the consent that the Special Commissioner gave on 19 May. Although this consent was given on grounds that were “legally irrelevant”, nevertheless the Special Commissioner did give his consent.

46. In my judgment, it would be quite wrong to make any order which would permit the matter to be remitted to the Special Commissioner for him to reconsider from scratch, and reach a decision in the light of the current circumstances. It is plain from his decision of 14 May that Mr Wallace would have given his consent to the application if he had considered that it was authorised by order of the Board. I have held that it was so authorised. His error, as I have held it to be, was not caused or contributed to by the Revenue. The "by order of the Board" point was taken by Mr Wallace. Mr Goldberg says that the Revenue could have made the order that they made on 18 May before 31 March, and made a fresh application before the cut-off date. This is true, but then so could UBL have conceded that Mr Wallace was in error, thereby avoiding the delay and expense of these proceedings. In my view, the Revenue is entitled to a declaration that it was and is entitled to the consent of the Special Commissioner to the issue of the notice

*The fourth issue: was the May application a fresh application?*

47. In view of my decisions on the first and second issues, this issue does not arise. It has, however, been fully argued, and I will briefly express my conclusions on it. Mr Goldberg submits that the application made following the making of the order on 18 May was, as a matter of law, a further application. Once Mr Wallace published his decision on 14 May, he had completed his consideration of the application that had been made on 18 March. He had made a final decision on the sole question that was before him, namely whether he should give consent to the application. Mr Goldberg referred me to General Commissioners of Income Tax, ex parte G R Turner Ltd 32 TC 335, R v General Commissioners for St Marylebone, ex parte Hay [1983] STC 346, 359, and Lamer v Warrington (H M Inspector of Taxes) 58 TC 557, 565. But all of these are distinguishable from the present case.

48. The issue here is not whether, following his decision of 14 May, the Special Commissioner had jurisdiction to change his mind on the point of construction, and give his consent pursuant to the application that was before him. The question in the present case is whether the application that was undoubtedly made to Mr Wallace when Mr Staples appeared before him on 19 May was an application made before the cut-off date of 31 March. On the facts of this case, that issue resolves into the question whether the application of 19 May was in fact the application of 14 March. There are only these two possibilities. It was either, as Mr Goldberg submits, a fresh application made for the first time on 19 May; or, as Mr Brennan submits, it was “a renewal or continuation of the original application, with correction of the formal error”.

49. I am in no doubt that Mr Goldberg is right. It was plainly a fresh application following

the refusal of consent pursuant to the first application. The second application was made by Mr Staples pursuant to a formal order in writing by the Board. The first was not. Moreover, the Board itself clearly understood that the application of 19 May was a fresh application. I have already referred to the order of the Board made on 18 May, in which they stated that they “hereby authorise an application”, and “a copy of the proposed application is attached marked Annex A” (emphasis supplied). In his letter to the Clerk to the Special Commissioners dated 18 May enclosing the order, Mr Dickinson wrote on behalf of the Board:

"I enclose an order made by the Board of Inland Revenue in relation to the application for the consent of a Special Commissioner to the issue of the notice. The application is the same in all respects as the previous application dated 18 March 1999 save for the attached order.

Please let me know how the special Commissioner wishes to proceed in hearing the application" (emphasis supplied).

50. Accordingly, if I had held that the Special Commissioner was right to withhold his consent to the application of 14 March, I would have held that it was not open to him to give his consent to the application of 19 May, because that was a fresh application made after 31 March, and therefore in breach of clause 2(iv) of the New Notice Agreement

#### *Conclusion*

51. In the result, the Revenue succeeds on the first two issues, and is entitled to a declaration that that it was and is entitled to the consent of the Special Commissioner under section 20(8A) of TMA to the giving of a notice to UBL, with approval under section 20B(6) to the exclusion of the restriction of the time limits in section 20(B)5.