UKSC 2019/0136

In the Supreme Court of the United Kingdom

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
(CIVIL DIVISION)

BETWEEN:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

(1) IGE USA INVESTMENTS LIMITED (FORMERLY IGE USA INVESTMENTS)
(2) GE CAPITAL INVESTMENTS
(3) GE CAPITAL FINANCE
(5) GE CAPITAL CORPORATION (HOLDINGS)
(6) GE (HOLDINGS)
(7) INTERNATIONAL GENERAL ELECTRIC (U.S.A.)

Respondents

- and –

TAXWATCH

Proposed Intervener

TAXWATCH'S WRITTEN SUBMISSIONS IN SUPPORT OF THE APPELLANTS' APPLICATION FOR PERMISSION TO APPEAL

A. INTRODUCTION

1. TaxWatch is a UK charity dedicated to compliance and sound administration of the law in the field of taxation. TaxWatch seeks to make submissions in the public interest in this case and thus makes these written submissions to the Supreme Court in support of the Appellants' application for permission to appeal and requests that the Court takes them into account, pursuant to rule 15 of the Supreme Court Rules 2009.

2. TaxWatch respectfully submits that the two agreements between the Appellants ("HMRC") and the Respondents ("GE") in this case concern the recovery of tax and are thus covered by section 37(2)(a) of the Limitation Act 1980 ("LA 1980"), which provides that the Act shall not apply to "any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty".

3. These proceedings have, however, proceeded so far on the basis that the agreements are covered by section 37(1)(a) of the LA 1980, which provides that the Act "shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects." According to Lord Justice Henderson in the Court of Appeal:

> "The single question raised by this appeal is whether the six-year limitation period for claims founded on the tort of deceit, under section 2 of the Limitation Act 1980, at least arguably applies 'by analogy', pursuant to section 36(1) of the 1980 Act, to a claim for equitable rescission of a contract for fraudulent misrepresentation."

4. HMRC's long-standing practice that a "contract settlement" (which is "an agreement made in connection with any person's liability to make a payment to the Commissioners under or by virtue of an enactment"[1]) falls within the ambit of section 37(1)(a) of the LA 1980 is set out in their internal manuals. For example, the Debt Management and Banking Manual states:

> "In England and Wales only, the Limitation Act 1980 provides that recovery action for debts should commence within six years from the debt becoming payable. But Section 37(2) of the Act excludes proceedings for recovery of tax or duty and interest on tax or duty thus there is no time limit for those debts.
>
> Other debts that are not tax, for example contract settlements ..., are subject to the Limitation Act, and action must be taken within six years 'from the date on which the cause of action accrued'."[2]

5. This interpretation of section 37 of the LA 1980, which has never been tested in court before to the best of our knowledge, fails to distinguish two fundamentally different types of agreements HMRC can enter into pursuant to their powers under the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005"):

   (a) an agreement reached by HMRC pursuant to their "initial functions" of "the collection and management of revenue" under section 5 of the CRCA 2005 (or a "contract settlement" or "an agreement made in connection with any person's liability to make a payment to the Commissioners under or by virtue of an enactment"[3]), such as the agreements with GE in this case, to which the application of the general law of contract is qualified by principles of administrative law (such as legitimate expectation) and to which the Limitation Act "shall not apply" because they are "for the recovery of any tax or duty or interest on any tax or duty" in the words of section 37(2)(a) of the LA 1980; and

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[1] Paragraph 8, Schedule 1AB to the Taxes Management Act 1970; Paragraph 13F of Schedule 12 to the Finance (No. 3) Act 2010 and Schedule 13 to the Finance 2020.

[2] DMBM595080 - Pre-enforcement: limits in enforcement proceedings: limitation legislation https://www.gov.uk/hmrc-internal-manuals/debt-management-and-banking/dmbm595080

[3] Paragraph 8, Schedule 1AB of the TMA 1970. See also

(b) an agreement reached by HMRC pursuant to their "ancillary powers" under section 9 of the CRCA 2005 to do anything which they think "necessary or expedient in connection with the exercise of their functions" or "incidental or conducive to the exercise of their functions", such as their Strategic Transfer of Estate to the Private Sector ("STEPS") contract with Mapeley STEPS Contractor Ltd, to which the general law of contract (such as estoppel) applies in full and to which the Limitation Act applies "in like manner as it applies to proceedings between subjects" in the words of section 37(1) of the LA 1980.

6. The rest of this document expounds TaxWatch's submission that the two agreements in this case concern the recovery of tax and are thus excluded from the LA 1980.

B. THE APPLICATION OF SECTION 37(2) OF THE LIMITATION ACT 1980 TO "CONTRACT SETTLEMENTS"

7. The powers of the Commissioners of Inland Revenue to enter into "contract settlements" derived from the Inland Revenue Regulation Act 1890 ("the 1890 Act") and the Taxes Management Act 1970 ("TMA 1970").

8. Section 1 of the 1890 Act provided so far as material that:

> "(1) It shall be lawful for Her Majesty the Queen to appoint persons to be Commissioners for the collection and management of inland revenue, and the Commissioners shall hold office during Her Majesty's pleasure.
>
> (2) The Commissioners shall have all necessary powers for carrying into execution every Act of Parliament relating to inland revenue".

9. Section 13(1) of the 1890 Act provided that:

> "The Commissioners shall collect and cause to be collected every part of inland revenue, and all money under their care and management, and shall keep distinct accounts thereof at their chief office."

10. Section 1(1) of the TMA 1970 provided that:

> "Income tax, corporation tax and capital gains tax shall be under the care and management of the Commissioners of Inland".

11. The application of these provisions to "contract settlements" was confirmed by the House of Lords in the *Fleet Street Casuals'* case (*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260). According to Lord Wilberforce (at 265):

> "The Commissioners of Inland Revenue are a statutory body. Their duties are, relevantly, defined in the Inland Revenue Regulation Act 1890 and the Taxes Management Act 1970. Section 1 of the 1890 Act authorises the

> appointment of commissioners 'for the collection and management of inland revenue' and confers on the commissioners 'all necessary powers for carrying into execution every Act of Parliament relating to inland revenue'. By s 13 the commissioners must 'collect and cause to be collected every part of inland revenue and all money under their care and management and keep distinct accounts thereof'.
>
> The 1970 Act provides (s 1) that 'Income tax ... shall be under the care and management of the Commissioners'. This Act contains the very wide powers of the Board and of inspectors of taxes to make assessments on persons designated by Parliament as liable to pay income tax."

12. The House of Lords' decision that the Revenue had the power to enter into a bargain involving an "amnesty" with regard to past tax shows the breadth of their discretionary powers. According to Lord Diplock (at page 269):

> "[T]he Board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the Board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection."

13. In *IRC v Nuttall* [1990] BTC 107, in which it was held that the Inland Revenue had the power to make agreements with taxpayers for the payment of back duty, even in the absence of assessment and appeal, the Court of Appeal cited the *Fleet Streets Casuals* case with approval. Lord Justice Parker said (at page 111):

> "If it is right that the Board had power to enter into a bargain involving the 'amnesty' with regard to past tax, it appears to me to follow that they must also have power, had they wanted to, to make a bargain whereby some sum would have been paid in respect of that past tax."

14. Lord Justice Bingham (as he then was) similarly stated (at page 118):

> "It would seem to me extraordinary, and also regrettable, if the Revenue could not achieve by agreement that which it could undoubtedly achieve by coercion.
>
> The power to make agreements with taxpayers for the payment of back duty, even in the absence of assessment and appeal, is in my view a power necessary for carrying into execution the legislation relating to Revenue within the meaning of s 1 of the 1890 Act. It is, of course, a power to be exercised with circumspection and due regard to the Revenue's statutory duty to collect the public revenue.

15. The CRCA 2005 gave effect to the merger of the Commissioners of Inland Revenue and the Commissioners of Customs and Excise. Section 1 provides so far as material:

"(1) Her Majesty may by Letters Patent appoint Commissioners for Her Majesty's Revenue and Customs.
...

(4) In exercising their functions, the Commissioners act on behalf of the Crown."

16. Section 5 of the CRCA 2005 provides so far as material:

"**Commissioners' initial functions**

(1) The Commissioners shall be responsible for—
(a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
(b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section".

17. Section 1 of the TMA 1970 (substituted by CRCA section 53(1)[4]) provides that:

"The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—
(a) income tax,
(b) corporation tax, and
(c) capital gains tax."

18. HMRC's power to enter into a "contract settlement" (which appears to have received statutory definitions after 2005) derive from section 5 of the CRCA 2005 and section 1 of the TMA 1970.

19. Paragraph 8(1) and (7) of Schedule 1AB to the TMA 1970 entitled "Recovery of overpaid tax etc" demonstrate this clearly"

"**Contract settlements**

(1) In paragraph 1(1)(a) the reference to an amount paid by way of income tax or capital gains tax includes an amount paid under a contract settlement in connection with income tax or capital gains tax believed to be due from any person.
...
(7) In this paragraph—
'contract settlement' means an agreement made in connection with any person's liability to make a payment to the Commissioners under or by virtue of an enactment".[5]

[4] Sch. 4 para. 12; S.I. 2005/1126.
[5] Inserted by Finance Act 2009 (c. 10), Sch. 52 para. 2 (with Sch. 52 paras. 10, 11).

20. The same definition can be found in Paragraph 13F of Schedule 12 to the Finance (No. 3) Act 2010 and Schedule 13 to the Finance 2020.

21. In relation to penalties for offshore tax evasion, paragraph 30 of Schedule 18 to Finance (No. 2) Act 2017 ("Requirement to correct certain offshore tax non-compliance") provides so far as material:

> "**Publishing details of persons assessed to penalty or penalties under paragraph 1**
>
> (1) The Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') may publish information about a person (P) if in consequence of an investigation they consider that sub-paragraph (2) or (3) applies in relation to P.
>
> (2) This sub-paragraph applies if—
> (a) P has been found to have incurred one or more relevant penalties under paragraph (and has been assessed or is the subject of a contract settlement), and
> (b) the offshore potential lost revenue in relation to the penalty, or the aggregate of the offshore potential lost revenue in relation to each of the penalties, exceeds £25,000.
> ...
> (13) For the purposes of this paragraph a penalty becomes final—
> (a) if it has been assessed, when the time for any appeal or further appeal relating to it expires or, if later, any appeal or final appeal relating to it is finally determined, and
> (b) if a contract settlement has been made, at the time when the contract is made.
>
> (14) In this paragraph 'contract settlement', in relation to a penalty, means a contract between the Commissioners and the person under which the Commissioners undertake not to assess the penalty or (if it has been assessed) not to take proceedings to recover it."

22. Despite the necessary difference in wording, the common feature of both definitions of "contract settlement" is their origins in HMRC "initial functions" of "the collection and management of revenue".

23. HMRC's power to enter into the two agreements with GE in this case derived from section 5 of the CRCA 2005 and section 1 of the TMA 1970.

24. Mr Justice Zacaroli provided a very useful summary of the relevant facts for present purposes as follows [2020] EWHC 2121 (Ch):

> "1. By the Finance (No.2) Act 2005, the UK introduced 'Anti-Arbitrage Rules', designed to prevent tax avoidance through the exploitation of the tax treatment of 'hybrid' entities in different jurisdictions. Hybrid entities are those which are considered in some jurisdictions to have separate legal personality for tax purposes and in others to be tax transparent.

> 2. The defendants are entities in the GE group. I will refer to them, collectively, as 'GE'. GE approached HMRC in 2005 for clearance in relation to a number of transactions. One such transaction (entered into in 2004) concerned the investment by UK entities within the GE group in an Australian subsidiary (the "Australian Transaction"). On or about 21 December 2005, GE entered into two agreements with HMRC: a settlement agreement, concerning existing transactions, including the Australian Transaction (the 'Settlement Agreement'), and a clearance agreement, concerning the ongoing treatment of various of GE's activities (the 'Clearance Agreement').
>
> 3. From 2011 onwards, HMRC began to accumulate information concerning the Australian Transaction which, they claim, painted a different picture to that which had been presented to them during the course of the discussions seeking clearance in 2005 (the 'Clearance Discussions'). After extensive discussions with GE, HMRC purported to rescind the Settlement Agreement in a letter dated 16 October 2018. The basis of the purported rescission was expressed to be material misstatements of fact and/or a failure to provide adequate disclosure.
>
> 4. On 23 October 2018, HMRC issued these proceedings seeking a declaration that the Settlement Agreement had been validly rescinded, and other declaratory relief. It is HMRC's contention that if the Settlement Agreement was validly rescinded it is able to recover the tax that arises upon the application of the Anti-Arbitrage Rules because the limitation period for raising discovery assessments against GE (being 20 years) has not expired."

25. The paragraphs of HMRC's Particulars of Claim that confirm that their power to enter into the two agreements with GE derived from section 5 of the CRCA 2005 and section 1 of the TMA 1970 also show how their long-standing failure to distinguish the two types of agreements set out in paragraph 5 above vitiated these proceedings (emphasis supplied):

> "6. The Claimants ('HMRC') are responsible for the collection and management of revenue in the United Kingdom. At all material times HMRC has operated clearance procedures by which taxpayers can obtain advice about the operation of applicable tax legislation. The clearance procedures that operated at all material times were contained in HMRC Code of Practice 10.
>
> 7. Further, as a matter of law, HMRC is empowered, in certain circumstances and subject to its statutory duties, to enter into agreements with taxpayers to settle their tax liabilities. **The general law of contract applies to such agreements**."

26. Consequently, the same error appears in the key paragraph of the judgment of Lord Justice Henderson (emphasis supplied):

> "61. It cannot make all the difference that, once the Settlement Agreement has been rescinded in equity, HMRC could then use their statutory powers to recover the tax which they allege they were wrongfully prevented by the Settlement Agreement from recovering in the first place. **In the exercise of their care and management powers, HMRC decided in December 2005 to reach a contractual settlement with GE in relation to certain transactions for which GE had sought clearance under the new legislation in the Finance (No.2) Act 2005 which was enacted to counter tax avoidance through the use of hybrid entities. Having decided to go down this contractual route, rather than rely on their tax-gathering powers, the rights and obligations of HMRC under the Settlement Agreement then sounded in contract, not in tax law.** Accordingly, I can see no reason why ordinary principles should not apply when deciding whether, and within what time limits, HMRC should be able to seek rescission of the Settlement Agreement for fraudulent misrepresentation, or pursue the alternative remedy of an action for damages in deceit. The six-year limitation period in section 2 of the 1980 Act would admittedly have applied to any action for damages which HMRC chose to commence, but once that period (or any extension of it under section 32) had expired, such action would have been time-barred. It is precisely because that opportunity was always available to HMRC, but they did not take advantage of it, that the same time limit should be applied, by way of analogy, to their attempt in the present proceedings to achieve substantially the same result by setting aside the Settlement Agreement in equity and then using their statutory powers to recover the tax allegedly underpaid."

27. The general law of contract applies without qualification to agreements reached by HMRC pursuant to their "ancillary powers" under section 9 of the CRCA 2005, such as their STEPS contract to which the Limitation Act applies "in like manner as it applies to proceedings between subjects" in the words of section 37(1) of the LA 1980.

28. By contrast, the application of the general law of contract to agreements reached by HMRC pursuant to their "initial functions" of "the collection and management of revenue" under section 5 of the CRCA 2005 (or a "contract settlement" or "an agreement made in connection with any person's liability to make a payment to the Commissioners under or by virtue of an enactment"), such as the agreements with GE, is qualified by principles of administrative law (such as legitimate expectation) and the Limitation Act "shall not apply" because they are "for the recovery of any tax or duty or interest on any tax or duty" in the words of section 37(2)(a) of the LA 1980. GE's "parallel tax appeal and judicial review proceedings"[6] (presumably for breach of legitimate expectation) demonstrate this.

29. Said "parallel tax appeal and judicial review proceedings"[7], particularly the "claim for judicial review dated 16 January 2019"[8] that preceded HMRC's Particulars of Claim

[6] Paragraph 21 of HMRC's Particulars of Claim dated 22 February 2019 and paragraph 13.3 of GE's Defence and Counterclaim dated 18 April 2019.
[7] Ibid.
[8] Paragraph 3.3 of GE's Defence and Counterclaim dated 18 April 2019.

dated 22 February 201, also show that HMRC did not need to issue these proceedings "seeking a declaration that the Settlement Agreement had been validly rescinded" in order to be "able to recover the tax that arises upon the application of the Anti-Arbitrage Rules". In other words, HMRC can take steps "to recover the tax that arises upon the application of the Anti-Arbitrage Rules because the limitation period for raising discovery assessments against GE (being 20 years) has not expired" and then defend any resultant tax appeal and judicial review proceedings by GE.

30. Having issued these proceedings "[i]n exercising their functions ... on behalf of the Crown" under section 1(4) of the CRCA for "the collection and management of revenue" under section 5(1)(a), however, HMRC lack the power to deny the Crown (and thus the public) the privilege of section 37(2)(a) of the LA 1970, which provides as follows:

> "**Application to the Crown and the Duke of Cornwall**
>
> (1) Except as otherwise expressly provided in this Act, and without prejudice to section 39, this Act shall apply to proceedings by or against the Crown in like manner as it applies to proceedings between subjects.
>
> (2) Notwithstanding subsection (1) above, this Act shall not apply to—
> (a) any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty".

31. As stated above, matters would be different if HMRC were exercising their functions under section 9 of the CRCA which provides so far as material:

> "**Ancillary powers**
>
> (1) The Commissioners may do anything which they think—
> (a) necessary or expedient in connection with the exercise of their functions, or
> (b) incidental or conducive to the exercise of their functions."

32. HMRC inherited the STEPS contract referred to above under these powers. According to a recent report by the National Audit Office:

> "STEPS is a 20-year private finance initiative (PFI) deal set up in 2001 with Mapeley STEPS Contractor Ltd (Mapeley). Under the deal, HMRC sold its freehold properties, which comprised two-thirds of its estate, to Mapeley for £370 million. HMRC immediately leased back the properties from Mapeley, with Mapeley providing facilities management and maintenance services. As HMRC has reduced its workforce over this period, it has moved out of some of these buildings each year. The remaining third of HMRC's current estate is managed under smaller PFI deals and individual leases with landlords."[9]

[9] Comptroller and Auditor General, *Managing the HMRC estate*, HC 726, 9 January 2017, page 5.

33. The general law of contract applies to this contract in full and the Limitation Act will apply to any resultant proceedings "in like manner as it applies to proceedings between subjects" by virtue of section 37(1) of the LA 1980.

34. Any agreement between the parties resulting from the contract will not be a "contract settlement" or "an agreement made in connection with any person's liability to make a payment to the Commissioners under or by virtue of an enactment."

C. CONCLUSION

35. While TaxWatch's submission is on a pure point of law, it believes that it is in the public interest that HMRC's allegations of fraud against GE, which is said to have cost the public revenue more than $1 billion, should be heard by the courts and should not be excluded on a technicality.

36. TaxWatch also believes that, in the absence of any judicial sanction, HMRC's long established practice that "contract settlements are subject to the Limitation Act, and action must be taken within six years from the date on which the cause of action accrued", which must have cost the public revenue billions of pounds over the years, should not be endorsed by default and without consideration by the Supreme Court.

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