Neutral Citation Number: [2020] EWCA Civ 1744

Case No: C1/2019/3125 & C1/2020/0040

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MRS JUSTICE COCKERILL
[2019] EWHC 3382 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2020

Before :

LORD JUSTICE LEWISON
and
LADY JUSTICE ROSE

- -

Between :

THE QUEEN
on the application of
(1) CARTREF CARE HOME LIMITED
(2) GWYN TUDOR WILLIAMS
(3) BRIAN DAWSON ENGINEERING SERVICES LTD
(4) BRIAN DAWSON
(5) COBBLED CLOSE LLP — **Appellants**

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Respondents**

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Mr David Southern QC and **Mr Michael Avient** (instructed by **Levy & Levy**) for the Appellants
Ms Sadiya Choudhury (instructed by **General Counsel and Solicitor to HMRC**) for the Respondent

Hearing date : 16 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Friday 18 December 2020 at 10:30am.

Lady Justice Rose:

1. This ruling disposes of an adjourned application by the First Appellant, Cartref Care Home Ltd ('Cartref') for permission to appeal against the dismissal of its judicial review claim. The claim was dismissed by order of Cockerill J dated 13 December 2019 following her judgment handed down on that date: [2019] EWHC 3382 (Admin). At the end of the hearing we announced that we would refuse permission to appeal. These are my reasons for coming to that conclusion.

2. The judicial review proceedings were brought to challenge the imposition of a charge to tax under the Schedule 11 to the Finance (No. 2) Act 2017. The aim of the legislation was to tackle tax avoidance schemes whereby people received what HMRC referred to as "disguised remuneration" in the form of a loan on which they asserted that they were not liable to pay income tax or national insurance contributions. According to Schedule 11, wherever a loan fell within HMRC's Disguised Remuneration Rules and was outstanding as at 5 April 2019, the amount of the loan so outstanding was deemed by the legislation to be taxable income in the tax year 2018/2019. The imposition of the tax is referred as the Loan Charge. The Disguised Remuneration Rules applied not just to employer/employee relationships but to relationships between an independent contractor and the person engaging him and to the relationship between a company director and the company where it was a close company as defined for that purpose.

3. The judicial review application was lodged on 20 February 2019 by a number of claimants in addition to Cartref. In the section of the form setting out the details of the decision to be judicially reviewed, there was a list of six decisions by HMRC said to be contained in letters dated between 16 November 2018 and 21 January 2019. Some of the letters indicated HMRC's intention to impose the Loan Charge and some said that HMRC would issue partnership follower notices to the tax payer. The decision relevant to Cartref, the main appellant for our purposes, was a decision contained in the letter of 16 November 2018 to impose the Loan Charge on Cartref or alternatively on the Second Appellant, Mr Williams, in respect of the loan to Mr Williams from GBF Capital Ltd by reason of his participation in Premiere Sovereign Corporate. According to the chronology in the Grounds for Judicial Review, Mr Williams completed the arrangements which generated the Loan Charge in December 2010. The arrangements involving all the other claimants were entered into on later dates. The remedy sought in the claim form was an order quashing the follower notices issued to the claimants and an incompatibility declaration, that is to say a declaration under section 4(2) of the Human Rights Act 1998, that the legislation imposing the Loan Charge was incompatible with the tax payers' rights under Articles 6 of the ECHR and A1P1. The Article 6 claim is not pursued before us.

4. The aspect of the Loan Charge scheme which has caused particular controversy is the fact that although it related to loans outstanding in April 2019 it applied to arrangements with tax payers going back to 6 April 1999. So, very broadly, if a loan was made to the tax payer at any time on or after 6 April 1999 and was still outstanding in 2019 it was deemed to be payment of

disguised remuneration, the amount of the remuneration being the amount of the outstanding loan. The Claimants alleged that this retrospective legislation was a disproportionate interference with their enjoyment of a possession contrary to A1P1 of the ECHR.

5. Cockerill J heard a rolled-up permission hearing and substantive hearing of the claims. She refused permission to apply for judicial review to all the claimants except for Cartref. That was on the basis that they were not victims of the alleged infringement and/or their applications were premature and/or they did not have a relevant possession that was subject to interference by the legislation for the purposes of A1P1.

6. Cockerill J did, however, grant permission to Cartref and went on to consider the allegation that the legislation was unlawful. She dismissed the claim on the basis that the retrospective element of the legislation was not outside the margin of appreciation accorded to the legislature: [224]. In her order of 13 December 2019 dismissing the applications she also ordered the Claimants to pay HMRC's costs to be assessed on the standard basis if not agreed.

7. The Claimants immediately sought permission to appeal to this court from Cockerill J on the basis of grounds prepared on 13 December 2019. On 18 December 2019 Cockerill J made an order refusing permission.

8. Cartref lodged an application to this court for permission to appeal on 6 January 2020. The application described the appeal as directed to the order refusing permission whereas it should have been directed against the substantive order dismissing the claim. But HMRC has treated the application all along as an appeal against the order of 13 December 2019 and I shall do so as well. Some of the other Claimants have lodged an appeal against Cockerill J's refusal to grant them permission to apply for judicial review. However, those other claimants recognise that their appeals should only proceed if Cartref is granted permission to appeal to argue that the legislation is incompatible with Cartref's human rights. The grounds relied on in the application to this court were the same as the grounds relied on when seeking permission from Cockerill J.

9. The judicial review proceedings were not the only forum in which protests about the imposition of the Loan Charge were made. Concerns that the Loan Charge legislation was operating in an unfair and oppressive way were raised by the All Party Parliamentary Loan Charge Group which published a report in April 2019 critical of the effect of the legislation. This led the Government in September 2019 to invite Sir Amyas Morse to carry out an independent review of the Loan Charge. Sir Amyas published his report on 20 December 2019, shortly after Cockerill J's judgment was handed down and the two orders bringing those proceedings to a close had been made. The Morse report was also critical of the Loan Charge though it did not address questions about the legality of the charge or the compatibility of it with the tax payers' human rights. At the same time as the Morse report was published, the Government published its response, accepting almost all Sir Amyas' recommendations.

10. The Government therefore brought forward substantial amendments to Schedule 11 in the Finance Act 2020. According to HMRC, the expected result of the amendments is that more than 30,000 individuals will benefit by either being removed from the Loan Charge altogether (around 11,000 individuals) or by paying less tax under the Loan Charge (around 21,000 individuals).

11. The amendments made by the Finance Act 2020 were commenced in July 2020 and include the following:

    i) The Loan Charge now applies to arrangements made on or after 9 December 2010 as opposed to 5 April 1999 (s. 15 FA 2020). The retroactive element of the legislation has thus been reduced from 20 years to 9 years;

    ii) Those affected by the Loan Charge can elect to spread the tax due over three years as opposed to paying tax on the whole amount in one year (s. 16 FA 2020);

    iii) It does not apply to loans made in tax years before 6 April 2016 provided that reasonable disclosure of the use of a disguised remuneration scheme was made by the tax payers within the relevant tax year and HMRC did not respond by, for example, opening an enquiry into that tax year.

12. On 4 August 2020 while Cartref's application for permission to appeal was still pending, HMRC wrote to the court describing the enactment of the Finance Act 2020 and the amendments it made to Schedule 11. They asserted that the legislation challenged in the appeal was no longer relevant to the tax position of Cartref or any other claimant. The appeal was now of academic interest only and permission should not be granted for that reason as well as for the other reasons on which they relied to argue that none of the grounds put forward had any prospect of success.

13. Cartref wrote to the court on 28 August 2020 saying that the appeals were not academic for two reasons. First, the order of the High Court that the Claimants should pay HMRC's costs of the proceedings needed to be re-examined in the light of what had happened. They also said that the relevant provisions of the Finance Act 2017 had not been revoked completely. There were elements of the Schedule that had not been amended by the Finance Act 2020 and which still affected the Claimants. Cartref also issued an application to be able to admit into evidence in the appeal the Morse report and the Government response to that report.

14. When the applications for permission to appeal came before me on the papers in October 2020, I concluded that I could not determine them without some greater clarity as to whether the retrospective amendment of the legislation had rendered the appeals academic or not. I therefore directed that an oral hearing should take place to consider Cartref's application for permission, the application for permission to appeal by the other Claimants who had been

refused permission to apply for judicial review by Cockerill J and Cartref's application to adduce the Morse report and the Government response.

15. In the light of the written and oral submissions that have been made, I am now firmly of the view that most of the grounds of appeal have no prospect of success, that the retrospectivity issue as argued by the Appellants is now academic and that permission should be refused on all grounds on both appeals.

16. The first ground of appeal is a complaint that Cockerill J in rejecting the claim expressed a conclusion, not a test. Where an incompatibility declaration is sought, Cartref submits, it is essential to consider all materials and circumstances. The judge looked at the relevant matters in isolation and selectively, rather than considering their cumulative effect.

17. In my judgment, regardless of the question of the amendment of the legislation, this ground has no prospect of success. The judge clearly understood and applied the test weighing the relevant factors as appropriate. She recorded at [178] that the parties agreed that there is no problem *per se* with tax legislation being retrospective. The European Court of Human Rights has held that retrospective taxation is not prohibited under the Convention, provided it strikes a fair balance between the public and private interests involved and does not impose an unreasonable burden on the taxpayer: *MA & others v Finland* [2003] 37 EHRR CD210. She then posed the question whether the interference with Cartref's A1P1 rights constituted a reasonable and proportionate interference: [186]. She said that there was not much dispute as to how she should approach the question and that the exercise was about the question of fair balance. In considering that, the state has a wide margin of appreciation.

18. She noted that Cartref relied on a combination of factors, one of which was retrospectivity and others were the effective reopening of closed tax years and the generation of hardship. She said at [210] that the greatest concern in the case was the question of retrospectivity, although she recognised that it was both acceptable and common place in trying to deal with tax avoidance schemes. She noted at [218] that this legislation does reach back a long way – to a time before HMRC started warning people that these kinds of schemes were unacceptable: [218]. She said that "it seems at least possible that a less temporally extravagant measure could have been used". She referred to the submissions in relation to hardship said to have been caused by the legislation but held that there was no real evidence to support that. She was not persuaded that the legislation exceeded the margin of appreciation: [225].

> "225. It cannot be said that this approach to tax is illegitimate or lacked a reasonable foundation. The purpose of the legislation is not one which can be sensibly impugned; it is to deprive tax avoidance schemes of oxygen, and to ensure that people and companies bear their fair burden of tax, rather than throwing unfair weight on others – in particular those who do not have the opportunity to use such schemes. The legislation is rationally connected to its objective. Whether or not a less

> intrusive measure could have been used (which I do not need to decide), there is an insufficient proper evidential basis to form a counterweight to these factors."

19. I can see no possible error in the way the judge approached her task and Ground 1 has no prospect of success.

20. Ground 2 is a straightforward challenge to the Judge's conclusion on whether the retrospectivity of the Loan Charge was a proportionate interference with the tax payers' rights. At the hearing, Mr Southern QC appearing for Cartref argued that there were still three elements of Schedule 11 that the Appellants wished to argue were a disproportionate interference with their Convention rights. They wanted to argue that the retrospectivity to 9 December 2010 was still excessive as it applied to close company scheme even if it might be proportionate for other kinds of disguised remuneration. The legislation should not reach back further than March 2016 which was, he said, the first time that HMRC indicated that close company directorships would be included in the Disguised Remuneration Rules, which is what led to them being caught up in the Loan Charge. Two other elements that they criticise are found in paragraphs of the Schedule that were not affected by the 2020 amendments. The first is the way that the Loan Charge interacts with inheritance tax and the second is the possibility of the Loan Charge being the subject of an accelerated payment notice. Both of these, Cartref wishes to argue, could give rise to double taxation. Mr Southern accepted that neither of these issues was raised in the Grounds of Appeal served with his notice. They were not dealt with in Cockerill J's judgment and, he said, were only raised in correspondence following the hearing. If permission were to be given by this court, the grounds of appeal would need to be substantially revised.

21. I agree with HMRC's submissions that the legislative amendments have rendered the issue considered by the judge, namely whether the provisions Schedule 11 as at the date she considered them were disproportionately retrospective, an academic one. If Cartref was allowed to reformulate its claim to argue that for close company loan schemes even reaching back to December 2010 goes too far, that would in effect be allowing it to mount on appeal a fresh claim requiring fresh evidence and different arguments from those considered below. As regards the other two elements to which Cartref now objects, those were not referred to in the judicial review claim. Leaving aside the question whether Cartref is entitled to raise them since it is a company and so not subject to inheritance tax and further, it has not been served with an accelerated payment notice, those grounds would also amount to an entirely fresh claim which cannot be asserted for the first time on appeal.

22. Cartref argued that even if we were to hold that Ground 2 had become academic, the Court should still entertain the appeal in order to do justice between the parties. The issue of appeals on grounds which have become academic was discussed in the cases *R (Salem) v Secretary of State for the Home Department* [1999] 1 AC 450 at p.457 and more recently by Lord Neuberger of Abbotsbury MR in *Hutcheson v Popdog Ltd. (News Group Newspapers Ltd., third party) (Practice Note)* [2012] 1 WLR 782. In *Hutcheson* at [15] Lord Neuberger said that there were three requirements to

be satisfied before the court will consider an appeal which is academic: (i) the court must be satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal must agree to it proceeding, or at least be completely indemnified on costs and not otherwise inappropriately prejudiced; (iii) the court must be satisfied that both sides of the argument will be fully and properly ventilated.

23. The first two requirements are not satisfied here. There is no point of importance as to whether the unamended legislation was compatible with human rights, now that it will not form the basis for assessing the liability of any person to tax. HMRC do not agree to the appeal proceeding and they would be prejudiced by the appeal going forward since it would, as I have said, amount to a fresh claim which has not been determined at first instance.

24. Ms Choudhury appearing for HMRC rightly drew our attention to the Postscript in the judgment of this court in *R (oao Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 handed down on 1 December 2020. The Court there (the Lord Chief Justice, King and Singh LJJ) emphasised the need for procedural rigour in judicial review cases. They particularly deprecated the trend towards what has become known as a "rolling" approach to judicial review in which fresh decisions which have arisen after the original challenge are sought to be challenged by way of amendment. In my judgment, to allow Cartref to amend its appeal either to challenge the legislation in its post-July 2020 form or to add criticisms about 2017 provisions which were not challenged in the judicial review claim form would be precisely to contribute towards the trend of which the Court in *Dolan* expressed its strong disapproval.

25. Ground 3 challenges the Judge's treatment of the report by the All Party Parliamentary Group published in April 2019. She dealt with this at [162] onwards. She considered briefly the application of Article 9 of the Bill of Rights 1689 and whether she was being asked to question or impeach any proceedings if she admitted the APPG report into evidence. She held that she was not precluded from looking at the report on that ground. She held that so far as Cartref sought to rely on the truth of the facts set out in the APPG report, it was not admissible evidence: [171]. So far as it contained opinions they were not admissible opinion evidence: [172]. She concluded that the weight she could give to the evidence was therefore extremely limited.

26. Mr Southern argued that it was an error of law to exclude this material from her consideration because when the court is considering whether to make a declaration of incompatibility under the Human Rights Act a wide range of Parliamentary material should be available as background material: see *per* Lord Nicholls of Birkenhead in *Wilson v First County Trust (No 2)* [2004] 1 AC 816, at [61] – [67].

27. I do not see that Lord Nicholls' analysis assists Cartref here. There is nothing in Cockerill J's consideration of the APPG which could amount to an arguable error of law. In any event, the legislation at which the APPG aimed its criticism in the legislation that has been retrospectively amended so there is no reason to pursue this ground.

28. Ground 4 also challenges the judge's conclusion that there had been insufficient evidence adduced by the claimants as to the disproportionate effect that the legislation had on them. Cartref argues that since they were challenging the legislation itself and not the tax assessment made in their specific case, the judge was wrong to complain about a lack of evidence of the effect of the legislation.

29. There is no merit in this point. The was the Claimants who raised the issue of the hardship caused by the legislation as a factor pointing to it being disproportionate. It is up to a claimant as the victim of the alleged interference to adduce proper evidence of the effect of the legislation if the claimant wishes to rely on such evidence in support of its challenge.

30. Ground 5 argues that the purpose of the legislation was to overcome the problem created for HMRC by the fact that earlier financial years were closed years so that HMRC were too late to reopen them by enquiry; this was an improper purpose. This ground is unarguable now for two reasons. First, it is not open to the court to conclude that the purpose for which primary legislation is enacted is in some way improper. Secondly, these provisions have been amended by the Finance Act 2020 so that HMRC cannot enquire into closed years if the taxpayer made reasonable disclosure of his use of the scheme in his tax returns for those years. This ground has no prospect of success.

31. The final issue is the costs of the High Court proceedings. Mr Southern argued that if Cockerill J had known when she was considering whether to order the Claimants to pay HMRC's costs that the Government was about to limit the retrospective reach of Schedule 11 so substantially, she might have made a different order from the one she made. He suggests that people in the Government, even if not those in HMRC directly concerned with the proceedings, must have known that the Government was about to accept the recommendations of the Morse report since the Government response was published within a few days of the judgment being handed down.

32. The difficulty with Mr Southern's submission is that it is common ground between the Appellants and HMRC that the amendment of the legislation has not reduced or expunged the liability of the Appellants to the loan charge. All the arrangements that they entered into are still caught by Schedule 11 because they were made within the new, shorter reach back period. I do not need to consider whether, if the Finance Act 2020 amendments had taken the Appellants out of the charge, there might have been an argument that because they had in the end achieved the result they had pursued in the proceedings, a different costs order was appropriate. As it is, the Claimants have not succeeded either within or outside the confines of the proceedings and there is no basis for disturbing the judge's costs order.

33. I would therefore refuse permission to appeal for all the Appellants on all the grounds raised.

Lord Justice Lewison:

34. I agree.