ATTORNEY-GENERAL v. MOTTERSHEAD

SUPREME COURT (Pizzarello, A.J.): April 22nd, 1998

Taxation—income tax—recovery of tax—Income Tax (Pay As You Earn) Regulations, 1989, reg. 14 ultra vires power given by Income Tax Ordinance, s.87, as amended—no power to make director personally liable for company's failure to pay employees' PAYE deductions to Government

The plaintiff sought the payment of arrears of PAYE income tax from the defendant company director.

The defendant was the director of a limited company which had allegedly made deductions of PAYE income tax from its employees over a period of time but had failed to forward them to the Government. The Attorney-General brought the present proceedings against the defendant to recover this money under the Income Tax (Pay As You Earn) Regulations, 1989, reg. 14 of which, it was submitted, created a personal liability on the directors. However, it appeared that in a previous decision of the Supreme Court, it had been held that reg. 14 was *ultra vires* the power given to the Governor to make regulations under s.87 of the Income Tax Ordinance.

The plaintiff submitted that (a) the court was not bound by its previous decision and was entitled to consider the question afresh, in the light of changed circumstances since that decision was made, namely (i) the passing of the Income Tax (Amendment) Ordinance 1996, and (ii) the passing of the Income Tax (Amendment) (No. 4) Ordinance, 1989, by which s.87 was amended (for the interpretation of which the court could consult the *Hansard* report of the debate on the Bill in the House of Assembly); (b) these developments made it clear that the intention of the legislature in passing the original s.87 had been to give the Governor wide powers to make regulations for the administration of the PAYE scheme, including the enforcement of employers in their liabilities to deduct PAYE tax and pay it over to the Government, even though s.87 made no explicit reference to directors' liabilities in this regard; (c) this was also clear from a comparison of s.87 and regulations made thereunder with the previous legislation, which was worded almost identically and which had undoubtedly made directors personally liable (by primary legislation), and it was clear that the same powers were intended under the subsequent legislation; and (d) reg. 14 could not therefore be said to create an unauthorized tax liability, particularly since the tax itself was imposed on the company's employees (by the primary legislation) and not the director, whose liability under the regulations was

merely to ensure that the PAYE deductions made by the company were forwarded to the Government and for this purpose, reg.14 "deemed" the director to be the employer, where the employer was a limited liability company, as in the present case.

The defendant submitted in reply that (a) although the court could depart from its own previous decision, it should give weight to it, since it had been made in identical circumstances to those of the present case; (b) s.87, as amended, was unambiguous and there was no reason to imply into it the power to make a third party personally liable for the payment of another's tax, and had the legislature intended to do so, it would have had to say so explicitly, whereas in fact it had mentioned no such liability; (c) reg. 14 was therefore clearly *ultra vires* and could not be saved by looking at previous legislation, since the power to make regulations was governed entirely by s.87 as it now stood; similarly, subsequent amendments to the primary legislation were of no consequence in the present matter; and (d) the plaintiff's interpretation of s.87 also ran contrary to existing company law, since there was a distinction between a company, as a legal entity, and its directors; the company's liability to make and collect PAYE deductions on behalf of the Government should not be confused with the obligations of directors to manage the company's affairs, and the legislature had clearly not intended to alter the responsibilities of a company director (whether or not he had been guilty of misfeasance), in the absence of express provision.

Held, dismissing the action:

(1) The court was not bound by its own previous decision on the same matter, even though that decision had been made by the same judge, but would consider the question afresh, in the light of the allegedly relevant developments since that decision had been made (and in this regard, the court could consult *Hansard* as an aid to interpretation). However, it was proper to give weight to its earlier judgment (page 285, lines 16–40).

(2) There was no ambiguity in the provisions of the Income Tax Ordinance, as amended. The Ordinance did not give to the Governor the power to make a director of a company personally liable for the payment of arrears of PAYE tax deductions, since it could not be assumed that, in the absence of express words, the legislature had intended to make a director liable to meet the tax liabilities of a third party. Regulation 14 was therefore clearly *ultra vires.* In coming to this interpretation, it was unnecessary to consider the effect of the repealed legislation, as the Governor's powers were governed entirely by the words of the enabling section in its existing form. The legislature was entitled to rely on the court to ensure that the delegated powers were kept within their proper bounds and for these reasons it was unnecessary in the present case for the court to consult *Hansard* (page 295, lines 6–35).

Cases cited:

(1) *Att. Gen.* v. *Antoine*, [1949] W.N. 443; [1949] 2 All E.R. 1000, applied.
(2) *Att.-Gen.* v. *Benson*, Supreme Ct., 1994 H. No. 55, unreported, followed.
(3) *Att.-Gen.* v. *Carlton Bank Ltd.*, [1899] 2 Q.B. 158; (1899), 81 L.T. 115, considered.
(4) *Att.-Gen.* v. *Clarkson*, [1900] 1 Q.B. 156; (1899), 81 L.T. 617, considered.
(5) *Att.-Gen.* v. *Fairley*, [1897] 1 Q.B. 698, considered.
(6) *Balensi, Re*, 1812–1977 Gib LR 112, followed.
(7) *Cape Brandy Syndicate* v. *Inland Rev. Commrs.*, [1921] 2 K.B. 403; (1921), 125 L.T. 108, considered.
(8) *Lo-Line Electric Motors Ltd., In re*, [1988] Ch. 477; [1988] 2 All E.R. 692, followed.
(9) *O'Rourke (Inspector of Taxes)* v. *Binks*, [1992] S.T.C. 703, distinguished.
(10) *Ormond Inv. Co. Ltd.* v. *Betts*, [1928] A.C. 143; [1928] All E.R. Rep. 709.
(11) *Pepper (Inspector of Taxes)* v. *Hart*, [1993] A.C. 593; [1993] 1 All E.R. 42, considered.
(12) *R.* v. *Inland Rev. Commrs., ex p. Chisholm*, [1981] 2 All E.R. 602; [1981] S.T.C. 253, considered.
(13) *R.* v. *Loxdale* (1758), 1 Burr. 445; 97 E.R. 394.
(14) *St. Aubyn* v. *Att.-Gen.*, [1952] A.C. 15; [1951] 2 All E.R. 473.

Legislation construed:

Income Tax (Amendment) (No. 2) Ordinance, 1974, Second Schedule, para. 12:

"Where the employer is a company or body of persons the manager or other principal officer shall be deemed to be the employer for the purposes of this Schedule."

Income Tax Ordinance (1984 Edition), s.87: The relevant terms of this section are set out at page 288, lines 19–25.

s.87, as amended by the Income Tax (Amendment) (No. 4) Ordinance, 1989 (No. 48 of 1989), s.9: The relevant terms of this section are set out at page 288, lines 27–32.

s.87, as amended by the Income Tax (Amendment) Ordinance, 1996 (No. 2 of 1996), s.3: The relevant terms of this section are set out at page 289, lines 19–23.

Income Tax (Pay As You Earn) Regulations, 1989 (L.N. No. 114 of 1989), reg. 11(2):

"An employer who wilfully or without reasonable excuse fails to deduct from emoluments tax which he is required by these regulations to deduct shall be liable to pay such tax as if he had deducted it."

reg. 14: "Where the employer is a Company or a firm any Director or Partner shall be deemed to be the employer for the purposes of these regulations."

Interpretation and General Clauses Ordinance (1984 Edition), s.52: The relevant terms of this section are set out at page 287, lines 6–9.

S.V. Catania for the Attorney-General;
A.A. Vasquez for the defendant.

10 **PIZZARELLO, A.J.:** The parties are agreed that I should first deal with a preliminary point of law, namely, whether a director of a limited company can in law be made personally liable to pay to the Government arrears of PAYE income tax which have been deducted from emoluments paid to the company's employees. It is assumed that such deductions have 15 been made.

This point has already been the subject of a decision of this court in *Att.-Gen.* v. *Benson* (2), in which I was the presiding judge, and the point that is made by the plaintiff is that this court is not bound by its own decision, following the principle in *Re Balensi* (6), in which Bacon, C.J. 20 accepted that the court is not bound by the decision of another judge of co-ordinate jurisdiction (1812–1977 Gib LR at 116). Mr. Vasquez conceded this was so but drew attention to the fact that in the instant case, it is the same judge who is being asked to look at his own decision; furthermore, in *Re Balensi* the learned Chief Justice also stated that he 25 had to give weight to decisions made in identical cases. Notwithstanding my role in the *Benson* case, both counsel are agreed that I should preside in this action and so I do, and rule in the first place that I shall follow the principle accepted by Bacon, C.J. and will consider the matter anew.

It is suggested by Mr. Catania that there are new considerations arising 30 which were not present in the *Benson* case, in which I held that reg. 14 was *ultra vires* s.87 of the Ordinance, and that these considerations may cause this court to take a different view. These matters are (i) the passage of the Income Tax (Amendment) Ordinance, 1996, which purports to clarify s.87; and (ii) a consideration of what was said in the House of 35 Assembly on December 12th, 1989 relating to the enactment of the Income Tax (Amendment) (No. 4) Ordinance, 1989 which evidences the intention of the legislature when enacting the present s.87. He produced a copy of *Hansard* of December 12th, 1989. I accept that I may look at the House of Assembly debate should there be a need for clarification: see 40 *Pepper (Inspector of Taxes)* v. *Hart* (11).

The plaintiff claims that the defendant, as a director of Starplan Ltd., is personally liable to the Government of Gibraltar in the sum of £48,581.60, being arrears of PAYE income tax due by the company to the Government of Gibraltar for the period July 1st, 1990 to June 30th, 1993. 45 The plaintiff alleges that the defendant's personal liability for PAYE

arises as a result of the combined effect of regs. 11 and 14 of the Income Tax (Pay As You Earn) Regulations, 1989, while the defendant claims (a) that on its true construction, reg. 14 does not purport to make a director liable to and chargeable from his personal assets with the payment of PAYE deducted and due by a company; and (b) that if reg. 14 does purport to make a director so liable, the said regulation is *ultra vires* and ineffective as purporting to create a new charge under the Income Tax Ordinance by regulation. It is conceded by counsel for the defendant that subject to constitutional issues, the House of Assembly may pass legislation having that effect and might even delegate power to make such laws, but such delegation must be clear on its face and s.87 does no such thing.

Mr. Catania took me through a detailed analysis of the PAYE scheme. Section 87 (as amended in 1989) gives the Governor power to make the sweeping provisions necessary to carry out the PAYE scheme, and that includes regs. 11 and 14 on which the claim hinges, principally reg. 14. He submitted that the effect of regs. 11 and 14 is that a director is deemed the employer so that where a limited company is the employer under reg. 2, the obligations under the scheme attach directly to the directors, both as to the collection and as to the accounting for the moneys deducted. Regulation 14 links directors and partners together and by linking them, it is clear that where the director is concerned, it is a personal liability that is contemplated. Effectively, the position was the same under the Schedule and s.62A. The expression "deemed" in para.12 of the Schedule and in reg. 14 is a comprehensive definition of liability (*St. Aubyn* v. *Att.-Gen.* (14) ([1951] 2 All E.R. at 498, *per* Lord Radcliffe) and the regulation substitutes the person of the director for that of the company as a tax gatherer for the Government, as it does a member of a partnership. Regulation 11 should be read according to the deeming provisions of reg. 14, that is to say, where the expression "company" appears, that should be substituted by the expression "the director of a limited company" and thus under reg. 11(2), the director who fails to deduct "shall be liable to pay such tax as if he had deducted it." The first point he made was that in the *Benson* case (2), the question here raised, whether reg. 14 makes a director personally liable, was not discussed; underlying the arguments then presented was an acceptance by the parties (and, in his submission, by the court) that the directors were within its ambit, the only point being whether the regulation was *ultra vires*.

Mr. Catania submitted that s.87 is very wide and leaves it to the Governor to carry out the scheme and to decide how the system is to function. Given that the section is so wide, the Governor may define to whom the obligations and liabilities may attach; for the legislation to make sense, he may set out on whom the obligation to pay may fall and, further, how the tax gatherer is to account and make payment to Government. So if reg. 14 makes directors liable, it is *intra vires* the

section. This argument, he submits, is strengthened (a) by the power to regulate in related matters as provided by s.87, which must empower the Governor to state who is to make the payment once the directors have the responsibility to collect; and (b) by the Interpretation and General Clauses Ordinance, s.52, which provides:

> "Where by any Ordinance power is given to any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

This is precisely what the Governor has done.

Mr. Catania recalls that PAYE does not impose tax on the employer—it is on the employee, and what is deducted is set off against the employee's tax liability. Tax is imposed by s.6, which is the main charging section. If the company does not pay, then unless the company is wound up and the necessary certificate is issued, the employee has to pay the tax himself. The employer having deducted the tax, which is his duty, he is liable and has the obligation to account for moneys which pursuant to his duty under the Ordinance he has received: see *Att. Gen.* v. *Antoine* (1) ([1949] 2 All E.R. at 1002). The regulation is, in effect, ensuring that the person responsible for the deduction is liable to account and it attaches liability to that person, namely, the person in control: in the case of an employer which is a limited company, the director or directors, for they have a pre-existing obligation to comply with the requirements of the Income Tax Ordinance (*In re Lo-Line Electric Motors Ltd.* (8) ([1988] 1 Ch. at 487–488)) and they have the duties there described by Browne-Wilkinson, V.-C. Mr. Catania submits that it has to be borne firmly in mind that for this purpose, this is not a taxing statute and even if it were, the proper approach to the interpretation of any statute is that it should be interpreted to give effect to the intention of the legislature (*Att.-Gen.* v. *Carlton Bank Ltd.* (3) ([1899] 2 Q.B. at 164) and *Pepper (Inspector of Taxes)* v. *Hart* (11) ([1993] 1 All E.R. at 50 and at 64)). The intention in this case is, he submits, clear and the statute should not be construed to enable the escape from payment of the tax or as a means of evasion. One has to remember that the directors are handling moneys which are not theirs; they have a relationship with the Government and if they fail then the Government and the employees are hard hit.

Historically, Mr. Catania pointed out, the PAYE scheme was introduced into the Income Tax Ordinance as s.62A in 1974 by the Income Tax (Amendment) (No. 2) Ordinance, 1974 and the 1984 Edition of the statute repeats s.62A in almost identical terms, as s.87. At that stage, the PAYE scheme was contained in primary legislation. Section 62A showed the intention of the legislature by way of a descriptive section in respect of which the Schedule gave it effect, so that by reference to the Schedule, one knows what meaning the legislature attached to s.62A. The Schedule, it is to be noted, contains almost identical provisions to the present

regulation. Paragraph 10(1) of the Schedule is identical to reg. 11 and para. 12 of the Schedule is identical for practical purposes to reg. 14, although the language is different. The relevant difference is the reference in para. 12 to "principal officer" while reg. 14 uses the expression "director," but as a director is a principal officer of a company, there is no difference for the purpose of this case, although the expression "principal officer" is wider. In both para. 12 of the Schedule and reg. 14, the director is "deemed" to be the employer. What is important is that essentially the same words used by the legislature to introduce the Schedule in 1974 introduce, by the 1989 amendment of s.87, the regulations in the same form. The only difference between s.87 before and after the 1989 amendment is the introductory words immediately preceding the expression "for the purpose."

For the purpose of clarity, I set out s.62A which is to all intents and purposes the same as s.87 of the 1984 Edition, and the 1989 amendment of s.87 introduced by the Income Tax (Amendment) (No. 4) Ordinance, 1989.

Section 62A (s.87 of the 1984 Edition):

> "The provisions of the Second Schedule to this Ordinance shall have effect for the purpose of requiring tax to be deducted upon the making of certain payments of or on account of income from office and employments and from pensions; for the purpose of determining the amounts of such deductions, the payment of tax so deducted, the keeping of records, the making of assessments and other related matters."

Section 87, as amended, reads:

> "The Governor may make regulations for the purpose of requiring tax to be deducted upon the making of certain payments of or on account of income from office and employments and from pensions; for the purposes of determining the amounts of such deductions, the payment of tax so deducted, the keeping of records, the making of assessments, and any other related matter."

The relevant change effected by the first few words of the amendment is that those words changed a descriptive provision to an enabling provision and so endowed the Governor with power to make similar provision. The relevance of this, it was submitted, is that the legislature is presumed to use the same language in the same sense when dealing at other times with the same subject matter, so if the legislature uses the same wording to give powers to the Governor and bearing in mind the meaning it attached to the words, the same words must have been intended in the expression used in s.87 (as amended in 1989) to have the same meaning and by extension the same intent as the words in s.62A. So that when s.62A described the Schedule, the same expression in s.87 (of 1989) shows that the legislature intended to give the Governor the power to legislate to a similar extent, since s.87 (of 1989) is not descriptive but enabling. The

Ordinance was enacted in the belief and expectation that the same position would remain. On a reading of it, it is clear that that belief was not misplaced, because that is what the section clearly does: it leaves it to the Governor to prescribe the obligations and liabilities and on whom they may be imposed. Section 87 (of 1989) is wide and the power that is given to the Governor is implicit and if the Schedule as originally enacted achieved the goal of making directors liable, so do the regulations made pursuant to s.87 (of 1989) and thus the courts should give effect to the intention of the legislature. Once the court is certain of the intention of the legislature, then it will make the necessary implications. All that can be deduced from the normal canons of construction.

But if the court is not with him on this, Mr. Catania considered the situation from the alternative standpoint that the legislation is unclear and ambiguous. In that case, he submits that one can turn to (a) *Hansard* of 1989, to see what statements were made in respect of the Bill; and (b) to an amendment of s.87 made by the Income Tax (Amendment) Ordinance 1996, s.3 to help construe s.87; and (c) the Bill introducing that Ordinance. Section 3 of the 1996 Ordinance reads:

> "Section 87 of the principal Ordinance is amended by inserting after the word 'assessments,' the words 'for the recovery of any amounts deducted or due to be deducted by an employer from the employee and, where the employer is a company, the recovery from the company, its Directors or shareholders.'"

This, submitted Mr. Catania, clarified what the legislature previously meant and the implication is that the power was there when s.87 (of 1989) came into force and is now being stated in clearer terms.

Can the court properly conclude that there is an ambiguity? Mr. Catania suggests that it can and that the ambiguity arises in this fashion: When the Governor is empowered to make regulations for the administration of the PAYE scheme, he can regulate the conduct of the directors with regard to the implementation of the scheme; then perforce an obligation has to be placed on them to account and as the alternative is that he has no power to do so and cannot, then the section is not sufficiently specific in that it does not expressly state that regulations can be made making directors of companies which are employers liable. If it is not clear that s.87 includes the power to prescribe on whom the obligations and liabilities may be imposed, then one may look at subsequent legislation on the same matter for help (*Att.-Gen*. v. *Clarkson* (4) and *Cape Brandy Syndicate* v. *Inland Rev. Commrs*. (7) ([1921] 2 K.B. at 414)). In *R*. v. *Loxdale* (13), it was said (1 Burr. at 447; 97 E.R. at 395):

> "Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other."

Mr. Catania also referred to *Ormond Inv. Co. Ltd.* v. *Betts* (10) in this regard. I shall quote more extensively from that case than the passages to which Mr. Catania drew my attention and to which I also refer. Lord Buckmaster said in his speech ([1928] A.C. at 155–156):

> "Now, there are several important distinctions between wills and codicils and successive Acts of Parliament. In the first place, however long the will has preceded the codicil, they both operate from the same moment, and, by the ordinary rules of construction, are construed together. In an Act of Parliament this is not so. The first Act will operate from its fixed date, so that its interpretation becomes at once a matter of necessity, and great unfairness may ensue if an interpretation which an Act of Parliament would fairly bear unaided by subsequent statutes was inferentially changed by other words in a subsequent Act. I find it difficult to assimilate the comparison between private individuals, who are masters of their own estate, and the claims of beneficiaries under their dispositions to the operations of a Legislature which apply equally to all His Majesty's subjects.
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> The case of *Attorney-General* v. *Clarkson* . . . does not really advance the respondent's argument, since there the earlier Act had been the subject of judicial decision and the second Act proceeded on the hypothesis that the decision was correct. As Lindley M.R. said, the later Act 'adopts' the construction put upon the earlier, and in another sentence he says it 'recognises' the construction. I find myself unable to agree with Sir F.H. Jeune when he says 'the Legislature have acted as their own interpreters of the earlier Act.' It is the function of the Courts to interpret and of the Legislature to enact.
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> The case of *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* . . . follows in effect the case of *Attorney-General* v. *Clarkson* . . . as is seen in the following passage from the judgment of Lord Sterndale: 'I think it is clearly established in *Attorney-General* v. *Clarkson* . . . that subsequent legislation on the same subject matter may be looked to in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceeded upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.' This is, in my opinion, an accurate expression of the law, if by 'any ambiguity' is meant a phrase fairly and equally open to divers meanings, but in this case the difficulty is not due to ambiguity but to the application of rules suitable for one purpose to another for which they are wholly unfit. The only possible ambiguity is in considering whether the words 'as directed in Case I' are specially limited to the solitary

> rule to which I have referred or to all rules applicable to Case I. This to my mind is not ambiguous, and there is no need to have recourse to the later statute for its interpretation."

Mr. Catania drew a parallel between *Clarkson* (4) and the instant matter. In that case under s.5(1)(*a*) of the Finance Act 1894, settlement estate duty was payable in respect of property which was settled and the facts were that the property was contingently settled. The taxpayer sought to distinguish *Att.-Gen.* v. *Fairley* (5), in which that duty had been allowed. It was argued that "settled" did not include "liable to be settled," that s.14 of the Finance Act 1898 had no application and that that Act was not an adoption by the legislature of *Att.-Gen.* v. *Fairley*, which had so ruled. The court looked at the 1898 Act and concluded that if the testator had died after the passing of the 1898 Act (he had died in 1895), it would be impossible to argue that the settlement estate duty was not payable. Lindley, M.R said in *Clarkson* ([1900] 1 Q.B. at 164): "It appears to me that s.14 of the Act of 1898 is a parliamentary adoption of the construction put by the court on s.5 of the Act of 1894." Sir Francis Henry Jeune said (*ibid.*, at 165):

> "Without the Act of 1898 I should have great doubt whether the decision in *Attorney-General* v. *Fairley* . . . was right . . . . But, having regard to that Act, it seems to me that it is impossible for us to take any other view of the construction of s.5 than that which, in my opinion, the Legislature have imposed upon us."

That meant that the legislature had accepted the ruling in *Fairley*. How could the construction of s.5 be different depending on whether the death took place before or after the Act of 1898 came into operation? Mr. Catania submits that the situation is the same here: s.87 does not explicitly give the Governor power to make a director liable, but does not say that he cannot, so there is an ambiguity and if in *Clarkson* the court looked at a subsequent Act, why not here? The principle is the same, so the court can look at the 1996 Ordinance.

Mr. Vazquez, for the defendant, does not dissent from the propositions put forward by Mr. Catania but submits that attention must be given to the fact that in the instant case, the ambiguity, if any, does not exist in the primary legislation where one can call on other primary legislation *in pari materia* to resolve the ambiguity. Here the court is dealing with the relationship between primary and subsidiary legislation. What he says is that before the principles referred to by Mr. Catania can be brought into play to resolve any ambiguity, there must first be an ambiguity. In *Clarkson*, the issue was in the word "settled"; did that include "contingent settlement"? There was room for ambiguity, but, in contrast, the situation under s.87 is quite clear. The Governor has power to make regulations:

(a) for the purpose of requiring tax to be deducted;
(b) upon the making of certain payments of or on account of income;
(c) from office and employments and from pensions;

(i) for the purposes of determining the amount of such deductions;
(ii) the payment of tax so deducted;
(iii) the keeping of records;
(iv) the making of assessments; and
(v) any other related matter.

Paragraphs (a), (b) and (c) do not empower the Governor to charge anyone by way of tax or otherwise, neither do (i), (ii), (iii) or (iv). The expression "and any other related matter," wide as it is, has to be construed in the context of the enabling powers the Governor has been given and what he has not been given power to do is to charge anyone with an obligation to pay anyone else's tax or debt. The plaintiff's argument, that the implementation of the PAYE scheme requires liability to attach to a third party, is not a necessary requirement, because all the regulations establish is an administrative scheme. This is an argument on which he expanded a little later in relation to his submissions as to the extent of the Scheme. The charging provisions are contained in the Ordinance itself and as far as s.87 is concerned, there is no ambiguity. To charge a person with an obligation to pay a tax or a debt or to charge someone with the personal responsibility to pay someone else's obligation to make payment requires a legislative declaration and s.87 does not do that on its face. That is the effect of the *Benson* case (2), and it is right because there is no ambiguity.

Furthermore, argued Mr. Vasquez, the Commissioner of Income Tax appears to have accepted that decision because the Attorney-General, in whose name the action was brought, never appealed against the decision. Instead, the legislature amended s.87 in 1996. The explanatory note to the Bill publicizes that the Bill "also clarifies enabling powers in respect of the recovery of pay as you earn income," but there is no *Hansard* report on the matter and so the actual intent of the legislature is unknown and the court is left to construe the amendment with no help from that quarter, other than the actual words of that Ordinance. If that piece of legislation is to be used to construe s.87 (as amended in 1989) then, submits Mr. Vasquez, it does not help the plaintiff one jot, because the 1996 Ordinance amended s.87 in such a way that by no stretch of the imagination could s.87 as amended in 1989 be said to extend to charge a shareholder of a company. So that in his submission, that Ordinance does not clarify; it amends. Even when the regulations existed, so to speak, in primary legislation as a Schedule governed by s.62A, the legislature had not gone to such lengths. The suggestion goes contrary to the recognized concepts of company law, where the company is a legal person in its own right and the shareholders have limited liability. So, submits Mr. Vasquez, it is crystal clear that reg. 14 is *ultra vires* when it purports to charge a director personally with the debt of the true employer, the company. Mr. Catania, he says, in transposing, by reference to the deeming

provision of reg. 14, a director for a company where there is a reference to a company in the regulations, is quite wrong and falls into the error of confusing two different matters, *viz.* the liability and obligation of the company to pay the deduction, and the responsibilities and duties of a director for the day-to-day management of the company to ensure that it discharges its obligations.

The second line of defence advanced by Mr. Vasquez is this. Regulation 14, on its true construction, does not make a director personally liable. Once again, Mr. Vasquez notes that from 1974, when PAYE was introduced by s.62A and the Schedule, it was not until 1995 that the Commissioner of Income Tax raised any claim of this sort against any director, and this indicates that the Commissioner of Income Tax never considered a director liable. Be that as it may, it is important to appreciate that PAYE and the regulations are simply administrative provisions for the collection of income tax: reg. 14 is but an example of this and the fact that directors and partners are referred to in the same regulation does not help the plaintiff, for it is beyond doubt that partners are liable in their own right and at the same time they have the same duties that a director has to deduct PAYE from their employees. That in essence is what the legislature has left to the Governor to do: to set up an administrative system, which is what the legislature had done by way of s.62A and the Schedule. The liability to pay tax can only arise under the Ordinance under charging provisions, either directly in the Ordinance itself or by delegated authority, provided it does so specifically and clearly.

Mr. Vasquez points out that the Gibraltar PAYE regulations differ materially from the PAYE regulations made in England pursuant to s.203 of the Income Tax and Corporation Tax Act 1988, which specifically provides that "any such regulations shall have effect notwithstanding anything in the Income Tax Acts." Such provision does not exist in Gibraltar, where one has to look at the enabling power. Furthermore, s.203 specifies the scope of the regulations in far greater detail than s.87 of the Income Tax Ordinance does and, of course, as previously submitted, s.87 is quite inadequate as an enabling provision to create an entirely new liability to tax (more accurately, a new liability to be responsible for the payment of moneys due). It is wrong for the plaintiff to argue that once a company falls within the definition of "employer" in reg. 2, then the duty to account for PAYE as director becomes an obligation *qua* employer and that as a result, the directors, not the company, become liable under the regulation. That is to treat the company and its directors as completely interchangeable entities.

The consequence, if the plaintiff is right, is that (a) it ignores the doctrine that a corporation is a legal entity in its own right distinct from its members and officers, which is the foundation of modern company law; (b) it transfers liability for a debt from a company to an individual;

(c) it transforms a company's obligation to deduct tax and account for it into an obligation on a director to guarantee payment of that tax/debt from an entirely different source and effectively imposes a tax (certainly a burden) on directors by placing a charge on their estate, and this without any statutory authority and in a manner not contemplated by the legislature—the Governor may make a person responsible and that is within the scope of s.87, but he may not make him liable for its payment; (d) the alleged liability arises whether or not there is misfeasance or fraud on the part of the director; and (e) it alters the definition of the duties of directors that have been evolved over decades under the common law and the Companies Ordinance.

Mr. Vasquez submits that if the legislature had so intended, it would have done so straightforwardly in a manner similar to s.48 (in respect of trustees) and s.56 (in respect of joint trustees). All this is avoided by a proper reading of the regulations as the machinery whereby tax finds its way into Government coffers. If the directors do not discharge their duties, the legislature has provided for that in the default provisions of reg. 19. Mr. Vazquez further pointed out that in the English case of *R.* v. *Inland Rev. Commrs., ex p. Chisholm* (12), a director was held liable for unpaid PAYE which he had received as employee and was aware that he was receiving salary without deduction of PAYE.

Finally, Mr. Vasquez asks me to consider whether, as the decision of *Benson* (2) still stands, there are any grounds to believe it was wrong and is there any fresh material to persuade me that I was wrong? The only significant development has been the 1996 amendment to the Income Tax Ordinance and for the reasons he has adumbrated, that provides concrete confirmation that the decision was entirely correct.

In reply, Mr. Catania disagreed that reg. 14 gave rise to a charge. PAYE regulations make the employer a statutory agent for the Government. He submitted that all the system was doing was translating a director's duty to account into an obligation to account. Responsibility to account as agent leads logically to a liability to account for a sum to the principal. He repeated that if the Governor's power does not extend to the person who may be made liable, that is an ambiguity. In *O'Rourke (Inspector of Taxes)* v. *Binks* (9), Scott, L.J. said ([1992] S.T.C. at 707): "An ambiguity in a statutory provision may arise in more than one way." It was held in that case, according to the headnote in *Simon's Tax Cases* (*ibid.*, at 703):

> "The natural construction of s.72(4), in its statutory context, was that it was limited to cases where the amount of capital distribution was comparatively small. However, the absence of any express limitation of s.72(4) to small distributions, made it possible to treat the subsection as applicable to all distributions whatever the size . . . . That ambiguity could be resolved by taking into account the anomalies produced, the comparable provisions in the 1979 Act and the antecedent legislation."

As for reg. 14, he submits that the obligations of a director can hardly be different from that of a normal employer. Both have to deduct a sum and pay to Government as it is a collection system. Finally, he submits that reg. 19, which creates offences, strengthens the argument that under the 5 deeming provisions a director is the employer.

I have read and re-read s.87, as amended in 1989. The provisions of the Income Tax Ordinance which prevail in this case are those in force pursuant to that amendment. That amended section gives the Governor wide powers but there is no ambiguity about it. I do not accept Mr. 10 Catania's contention that an ambiguity arises because the legislature did not give the Governor the power to do what the plaintiff suggests. It did not; it did not have to. I do not see why that should raise any ambiguity. The limitation on the Governor's enabling powers is clear and the situation is different to *O'Rourke (Inspector of Taxes)* v. *Binks*, in which 15 there was a "contrast between the limitation that would be inferred from a reading of the subsection in its statutory context on the one hand, and the absence of any express limitation on the other hand." As far as "any related matters" is concerned, that expression goes to expand on what s.87 states as I have set out above, but it can in no way be deduced or 20 inferred that the Governor is empowered to take moneys away from someone's personal estate to meet the obligations of a third party. Even s.52 of the Interpretation and General Clauses Ordinance cannot help. This court is dealing with subsidiary legislation and the empowering legislation does not go that far. It does not help to pray in aid what the 25 legislature enacted as s.62A and the Schedule. That was repealed. The Governor was given enabling powers and had a clean slate to work on. He was not circumscribed in any manner, other than by the restrictions imposed on him by the enabling section. The legislature is entitled to look to the court to ensure that those to whom it has entrusted the responsi-30 bility to legislate keep within the bounds of their empowering legislation. I do not therefore have to look at either the *Hansard* of 1989 or the 1996 amendment, but it is my view that were I to do so, the latter would not help the plaintiff for the reasons advanced by Mr. Vasquez set out above.

I am not persuaded that I should not follow my decision in *Att.-Gen.* v. 35 *Benson*.

Suit dismissed.