[1999–00 Gib LR 17]

ATTORNEY-GENERAL v. MOTTERSHEAD

COURT OF APPEAL (Neill, P., Russell and Waite, JJ.A.):
September 18th, 1998

Taxation—income tax—recovery of tax—Income Tax (Pay As You Earn) Regulations, 1989, reg. 14 not ultra vires power vested by Income Tax Ordinance, s.87, as amended—director personally liable as "employer" to pay employees' PAYE deductions to Government if not paid over by company

The appellant applied for an order for the payment of PAYE income tax arrears from the respondent company director.

The respondent 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 proceedings against the respondent to recover this money under the Income Tax (Pay As You Earn) Regulations, 1989, reg. 11(2), on the basis that reg. 14—deeming a director to be an employer for the purposes of the regulations—imposed a personal liability on directors. The respondent opposed the application, citing a previous decision of the Supreme Court ruling that reg. 14 was *ultra vires* the power vested in the Governor to make regulations under s.87 of the Income Tax Ordinance (as amended).

The Supreme Court (Pizzarello, A.J.) held that it was not bound by its own previous decision on the same matter and considered the question afresh in the light of developments since that case. However, it found that reg. 14 was clearly *ultra vires*, since it could not be assumed, in the absence of express words, that the legislature had intended to make a director liable to meet the tax liabilities of a third party. It was unnecessary to consider the effect of the legislation in its previous form, as the Governor's powers were governed entirely by the words of the enabling section in its existing form. The proceedings in the Supreme Court are reported at 1997–98 Gib LR 282.

On appeal, the Crown submitted that (a) reg. 14 unambiguously imposed personal liability on directors for the payment over of PAYE deductions; (b) there was no reason why this liability should have been lost when the legislative scheme changed in 1989 from primary legislation—whereby para. 12 of the Schedule to the Ordinance deemed the principal officer of a company to be an employer for the purposes of the Schedule—to secondary legislation containing effectively the same

provision in the form of reg. 14; (c) nor had a subsequent amendment in 1996, expressly conferring power to impose direct liability, indicated the legislature's acceptance that reg. 14 had been *ultra vires* s.87, since an explanatory memorandum accompanying the bill stated that it *clarified* enabling powers.

The respondent submitted in reply that (a) s.87 and the 1989 Regulations imposed purely administrative functions and duties on directors, and were not to be given the oppressive construction contended for by the Crown; (b) alternatively, the court's finding of *ultra vires* was correct, since the liability imposed by reg. 14 was (i) absolute, making no exception for cases of hardship, (ii) indiscriminate, applying regardless of the director's level of participation in the company, and (iii) invasive of Constitutional property rights; (c) by reg. 14, the Governor had imposed a tax on directors which only the legislature had authority to impose; and (d) the subsequent amendment to s.87 in 1996 confirmed that the Governor had not previously been empowered to make directors directly liable.

Held, allowing the appeal:

(1) In construing s.87 of the Income Tax Ordinance and reg. 14 of the Income Tax (Pay As You Earn) Regulations, 1989, the court bore in mind that the repealed version of s.87 and the Schedule to the Ordinance were to be construed on the assumption that the legislature used the same language in the same sense when dealing with the same subject in successive enactments and that any change in language indicated a change of intention. Furthermore, the provisions of s.87 had no more or less effect than para. 12 of the Schedule, and the two were to be read together for the purpose of interpretation (para. 16).

(2) Prior to 1989, the legislative scheme, read as a whole, had intended that directors be personally liable for the deduction and payment on of PAYE. When s.87 was re-enacted in 1989 in identical language, the legislature clearly intended to give the Governor power to achieve by subsidiary legislation what the Schedule had done as primary legislation. Accordingly, reg. 14 could not be *ultra vires* the new s.87. No new tax liability on directors had been introduced, since it had already existed. Moreover, the clarification of this overall intention in the 1996 amendment of s.87 did not mean that its predecessor was to be construed otherwise. The Supreme Court's earlier decision on the same point had been incorrect (paras. 19–23).

(3) Although reg. 14, literally construed, was far-reaching and contradicted the general company law principle that directors were not liable for the debts of the company, it fell within the scope of plausible legislative intention as being necessary for the enforcement of the PAYE scheme. The existence of a criminal sanction against employers for non-payment did not preclude the imposition of a civil one (paras. 17–18).

(4) The court would make a declaration that the respondent, as a company director, was a person deemed to be the "employer" of the company's employees under reg. 14, and was therefore personally liable for the arrears of PAYE claimed (para. 24).

Cases cited:

(1) *Att.-Gen.* v. *Benson*, Supreme Ct., 1994 H. No. 55, December 28th, 1995, unreported, not followed.

(2) *Att.-Gen.* v. *Wilts United Dairies* (1922), 91 L.J.K.B. 897; 38 T.L.R. 781, considered.

(3) *Att.-Gen.* v. *Wood*, [1897] 2 Q.B. 102; (1897), 66 L.J.Q.B. 522, *dicta* of Vaughan Williams, J. applied.

(4) *Inland Rev. Commrs.* v. *Gittus*, [1920] 1 K.B. 563; (1919), 89 L.J.K.B. 313, *dicta* of Lord Sterndale, M.R. applied.

Legislation construed:

Income Tax Ordinance 1952, s.62A, as added by the Income Tax (Amendment) (No. 2) Ordinance, 1974, s.6: The relevant terms of this section are set out at para. 5.

Second Schedule (as added by the Income Tax (Amendment) (No. 2) Ordinance, 1974, s.7), para. 1: The relevant terms of this paragraph are set out at para. 6.
para. 2: The relevant terms of this paragraph are set out at para. 6.
para. 5: The relevant terms of this paragraph are set out at para. 6.
para. 7: The relevant terms of this paragraph are set out at para. 6.
para. 9: The relevant terms of this paragraph are set out at para. 6.
para. 10: The relevant terms of this paragraph are set out at para. 6.
para. 12: The relevant terms of this paragraph are set out at para. 6.
para. 13: The relevant terms of this paragraph are set out at para. 6.
para. 17: The relevant terms of this paragraph are set out at para. 6.

Income Tax Ordinance (1984 Edition), 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 para. 8.

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 para. 10.

Income Tax (Pay As You Earn) Regulations, 1989 (L.N. No. 114 of 1989), reg. 14: The relevant terms of this regulation are set out at para. 9.

S.V. Catania for the appellant;
A.A. Vasquez for the respondent.

1 **WAITE, J.A.:** Mr. Douglas Mottershead, the respondent to this appeal by the Attorney-General on behalf of the Crown in right of its government of Gibraltar, was formerly a director ("the director") of Starplan Ltd. ("the company"). From July 1st, 1990 to June 30th, 1993 the company paid wages and emoluments to various employees, from

which it made deductions for the purposes of PAYE income tax in the sum of £144,693. The company transmitted to the tax authorities £96,112 from the moneys so deducted, but failed and refused to transmit the balance, amounting to £48,581.

2 The company went into liquidation. The Crown sued to recover this balance of PAYE from the director. He contended that he was not liable, asserting in his defence that on the true construction of the relevant regulations, a director (as distinct from the company itself as an independent legal personality) had no liability in respect of the deductions made for PAYE or, alternatively, that if they did have the effect contended for by the Crown, the regulations were *ultra vires* the enabling statute. The issue thus raised, being one of pure statutory construction, was ordered to be tried as a preliminary issue.

3 On April 22nd, 1998, Pizzarello, A.J. found in favour of the director in his latter contention, holding that the Income Tax (Pay As You Earn) Regulations, 1989 were *ultra vires* (reported at 1997–98 Gib LR 282). He dismissed the Crown's action. From that decision the Crown now appeals. In reaching his conclusion, the judge followed his own decision in the earlier case of *Att.-Gen.* v. *Benson* (1), but only after hearing full argument and giving the question fresh consideration. It is common ground that the same issue of principle arises in both cases, and that if this appeal succeeds the decision in *Benson* cannot stand.

The legislative history

4 In cases where there have been a series of enactments dealing consecutively with the same subject-matter and an issue arises as to the true effect of a particular enactment at any one stage of that process, it is well established that the court will look at the whole history of the legislation for any light it may throw on the presumed intention of the legislator. This is a case where there has been just such a series, and both sides have relied—for different purposes—upon the legislative sequence. Before turning, therefore, to the particular enactment whose construction is in issue in the present case, I will refer—as briefly as possible—to the statutory devolution of which it forms part.

5 PAYE tax was introduced in Gibraltar by an amendment to the Income Tax Ordinance 1952 ("the principal Ordinance") effected by the Income Tax (Amendment) (No. 2) Ordinance, 1974, inserting a new s.62A which read as follows:

> "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 purposes 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."

6 The Second Schedule contained detailed provisions from which it is relevant to cite or summarize the following paragraphs. Paragraph 1 was a definitions paragraph, which included the following definition: "'employer' means any person paying emoluments whether on his own account or on behalf of any other person to an employee. . ." Paragraph 2 read: "Where . . . any payment of or on account of emoluments is made by an employer, tax shall . . . be deducted and withheld therefrom by the employer. . ." By para. 5, tax-tables were to be provided by the Commissioner to "enable employers to ascertain . . . the tax to be deducted in respect of [each] employee." Paragraph 7 laid down provisions for fixing the amount of the deductions for PAYE. Paragraph 9 required every employer to maintain records in the form of deduction cards showing the amount of "the employee's gross emoluments . . . and the tax deducted from the gross emoluments. . ." Paragraph 10 must be recited in full. It reads:

"(1) On or before the fifteenth day of every month the employer shall report to the Commissioner on the appropriate form the total amount of tax deducted by him from emoluments during the preceding month in accordance with this Schedule and shall at the same time pay that total amount into the Treasury in accordance with the instructions on such form; and every such total amount shall be a debt due to the Government of Gibraltar and shall be recoverable as such.

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

Paragraph 12 must also be recited in full, and reads: "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." Paragraph 13 provided that "in the event of the death of an employer, the duties which . . . he would have been required to carry out under this Schedule shall be performed by his executor." Finally, para. 17 provided that any employer who "wilfully or without reasonable excuse" failed to make the deductions payments and records required by the Schedule "is guilty of an offence."

7 In 1984 the Laws of Gibraltar underwent a process of restatement under which the numbering of s.62A became changed to s.87, but no

substantive change was made to the section or to the Schedule to the Ordinance.

8 On December 28th, 1989 the following legislative steps took place:

1. By the Income Tax (Amendment) (No. 4) Ordinance, 1989 ("the 1989 Ordinance"), first, s.87 of the principal Ordinance was repealed and replaced by a new s.87, reading as follows:

> "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."

Secondly, the Schedule to the principal Ordinance (including the Second Schedule incorporating the paragraphs which I have quoted) was repealed.

2. The Acting Deputy Governor approved the Income Tax (Pay as You Earn) Regulations, 1989 ("the 1989 Regulations") which were expressed to have been made under the new s.87 referred to above.

It will be noted that the new s.87 was identical to the section which it replaced, save that the opening words now conferred a regulatory power on the Governor in place of the reference to scheduled provisions, and the phrase "other related matters" had been replaced by "any other related matter."

9 The 1989 Regulations were identical to the repealed provisions of the former Second Schedule referred to in the former s.87, save in the following respects:

1. The paragraphs were renumbered (as regulations) to take account of the insertion of a new opening paragraph (reg. 1) stating the short title and a new reg. 12, containing powers for the Commissioner in cases of default in payment to make his own assessment of the amount of the deductions and serve notice to recover them.

2. Regulation 14 of the 1989 Regulations (replacing para. 12 of the Schedule) read as follows: "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." It will be seen that this involved two changes to the former para. 12 of the Schedule, in that (i) partners are included in the category of deemed employers, and (ii) "manager or other principal officer" is replaced by "Director."

10 Following the decision in *Benson's case* (1), a further Ordinance was enacted—the Income Tax (Amendment) Ordinance, 1996 ("the 1996 Ordinance")—which received the Governor's assent on February 15th,

1996 (*i.e.* at a date well after that on which the deductions claimed by the Crown in this case had fallen due). It amended s.87 by adding new words, with the result that the section, as thereby amended, now reads (with the new words shown in italics) as follows:

> "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 *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*, and any other related matter."

11 The Bill which that Ordinance enacted was accompanied by an Explanatory Memorandum reading, so far as is relevant, as follows: "The Bill . . . clarifies enabling powers in respect of the recovery of pay as you earn income tax."

12 That being the history of the legislation, certain points need to be stated about it. First, although it closely follows the comparable PAYE legislation in the United Kingdom, it by no means mirrors it exactly. In the English legislation (the Income Tax (Employments) Regulations 1965) an "employer" is defined simply as meaning "any person paying emoluments." There is no deeming provision corresponding to para. 12 of the repealed Schedule and reg. 14, extending the definition of employer to include the directors of an employer company. Secondly, the differences of language between para. 12 and reg. 14 are now acknowledged to be distinctions without a difference. Mr. Vasquez has very fairly and properly conceded that a director is to be regarded as a "principal officer" of a company and that both provisions apply to all directors, whether they be directly involved in the day-to-day management of the company or not. He accepts that the introduction of partners is of no great significance, because they are jointly and severally liable under contracts of employment and would, as such, have been included in the original definition of employers in any event.

The issue

13 It is common ground that the link in that legislative chain which has to be construed for present purposes is the enabling s.87 of the principal Ordinance as it became enacted on December 28th, 1989, and the 1989 Regulations made thereunder by the Governor so as to come into effect on the same date. The question is whether, as a matter of interpretation of those enactments when read together in their entire statutory context, their effect is to render a director liable, independently of the company's

own liability, for payment of the deductions from wages for PAYE, and (if that is their effect) whether the 1989 Regulations are in that respect *ultra vires* the enabling section (s.87).

The arguments

14 Mr. Vasquez, for the director, repeating in this court the argument which was successful before the learned judge, points to the extreme severity of the liability imposed by reg. 14. First, it is absolute: There is no exception for hardship cases. Secondly, it is indiscriminate: Many companies have family members on the board of directors who may have no role to play at all in the payment of wages or salaries or the collection of PAYE—yet the most innocent director is swept into the net of liability. Thirdly, it is expropriatory, in the sense that it creates a liability attaching to the assets of the director, pursuing them even into the hands of his personal representatives after death. He submits that:

1. Section 87 and the 1989 Regulations, when read together, constitute a legislative scheme which imposes merely administrative functions and duties on directors and should not, in the absence of clear words to that specific effect, be given what (he submits) would be an oppressive—indeed an expropriatory—effect by construing them as introducing a personal liability on directors to pay a debt to the Crown which is properly due from the company alone.

2. Alternatively, if (contrary to the first submission) the 1989 Regulations do, as a matter of construction, have the effect of imposing a personal liability on directors in respect of PAYE deductions due to the Crown, the Regulations are, to that extent, *ultra vires*.

3. Following the decision in *Benson* (1), the express enactment of words in the 1996 Ordinance making directors directly liable indicates tacit acceptance by the legislature that the interpretation of reg. 14 adopted in *Benson* was correct.

15 Mr. Catania, for the Crown, submits that the wording of reg. 14 is clear and unambiguous in imposing a personal liability on a director of a limited company, over and above the liability imposed on the company itself, in regard to the making of, accounting for, and making payments to the Crown in respect of, deductions from wages through PAYE. When the history of the legislation is looked at, he further submits, it becomes impossible to argue that provisions which had enjoyed validity when contained in a Schedule to an Ordinance until December 1989 lost their *vires* when re-enacted on the same day, in virtually identical language, through the slightly different legislative medium of Governor's regulations. As for the 1996 Ordinance, that was purely, he submits, an exercise in clarification, and cannot be relied on as embodying tacit support for

any particular construction of antecedent legislation adopted in previous case law.

16 In dealing with those submissions, certain principles of statutory construction need to be stated at the outset. The first is that provisions found in the main body of a statute have neither more nor less effect than those to be found in a Schedule. They must each be read together with the other, and each will determine the interpretation of the other. Thus, Lord Sterndale, M.R. in *Inland Rev. Commrs.* v. *Gittus* (4) (quoted in Bennion, *Statutory Interpretation*, 2nd ed., at 492 (1992)) said ([1920] 1 K.B. at 576):

> "If the Act says that the schedule is to be used for a certain purpose and the heading of the part of the schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the schedule as though the schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the schedule or by the purpose mentioned in the Act for which the schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the schedule and the definition of the purpose of the schedule contained in the Act."

The second principle relates to the consequences of repeal and re-enactment. It is summed up in *Maxwell on Interpretation of Statutes*, 11th ed., at 36 (1962) in these terms:

> "The language and provisions of expired and repealed Acts on the same subject, and the construction which they have authoritatively received, are also to be taken into consideration, for it is presumed that the legislature uses the same language in the same sense, when dealing at different times with the same subject, and also that any change of language is some indication of a change of intention."

I will now turn to the three heads relied on by Mr. Vasquez.

Construction

17 The literal construction of reg. 14 (and of para. 12 of the repealed Schedule) produces a result, Mr. Vasquez submits, so demonstrably unfair and invasive of the property rights upheld by the Constitution that it ought to be disregarded altogether and treated as being outside the range of anything that the legislator could possibly have intended. Persuasively

though it was urged, I would reject that submission. The deeming provision in reg. 14 is indeed far-reaching, and does indeed invade the fundamental principle of company law that directors are not, in general, liable for the liabilities of a company. It has nevertheless to be borne in mind that companies, as legal personalities, cannot function independently of their directors, and it can fairly be said, in mitigation of the apparent harshness of this provision, that something of the kind could reasonably have been regarded by the legislature as necessary to ensure that compliance by corporate employers with the machinery for the collection of PAYE was backed by sanctions against directors personally.

18 Nor is it enough, in my view, to say that there is already a criminal sanction in place under reg. 19 (identical to para. 17 of the repealed Schedule). The legislature was perfectly entitled to take the view that the additional sanction of a civil liability—making every director a debtor to the Commissioner under reg. 11(1) (identical to para. 10(1) of the repealed Schedule) in respect of unpaid instalments of PAYE—was required.

Ultra vires

19 This submission founders, in my judgment, on the application of the two principles of statutory construction that I have already summarized. Taking first the situation as it was before December 1989, it could no doubt be fairly said of s.87, when read in isolation, and even when read in conjunction with the Schedule in all its terms save those of para. 12, that the persons *prima facie* contemplated as responsible for the making of deductions from emoluments and the payment on of those deductions to the Commissioner were employers properly so called, that is to say, the paying parties under the relevant contracts of employment. In the case of a company, that would be the corporation itself and not any of its directors. Nevertheless, when (following the first principle) the Schedule and the Ordinance are read together, and when para. 12 is given its place in that survey, it becomes impossible to apply that *prima facie* meaning. What is plainly intended is that directors of an employing company should themselves be rendered personally liable for the deduction of PAYE from the salaries or wages of company employees and for payment on to the Commissioner. That is, moreover, a pervasive intention, to be attributed to the legislator not only when enacting the Schedule but also when enacting the empowering provisions of s.87.

20 What was the effect of the repeal and re-enactment in December 1989? At that point the second principle comes into play. The new s.87 was re-enacted (so far as the definition of its enabling powers is concerned) in language word-for-word identical to that of the old s.87. The inference becomes inescapable that the legislature intended to grant

the Governor power to achieve by regulations what the repealed Schedule had achieved by primary legislation. It therefore becomes impossible to say that the 1989 Regulations were *ultra vires* the new s.87 in so far as they included the terms of the old para. 12, now reproduced in the new reg. 14.

21 Mr. Vasquez rightly drew attention to the principle, enshrined in *Att.-Gen.* v. *Wilts United Dairies* (2), that no person should be subjected to any taxation except under the authority of Parliament. But the history that I have recited demonstrates that the legislature in 1989 did indeed confer on the Governor the power to impose liability on a director of a company. Regulation 14 reproduced, with modifications which for present purposes are immaterial, the provisions which had previously been set out in para. 12 of the Schedule to the Ordinance.

The effect of the 1996 Ordinance

22 The fact that a particular construction of antecedent legislation is adopted in subsequent legislation does not, by any means, necessarily imply that such a construction was not available to be applied before the later enactment took effect. Mr. Catania quoted to us the words of Vaughan Williams, J. in *Att.-Gen.* v. *Wood* (3), in which he said ([1897] 2 Q.B. at 110):

> ". . . [I] do not think that the fact that s. 14 of the Finance Act, 1896 (59 & 60 Vict. c. 28), contains an enactment in the sense of the construction which I am now putting on s. 5, sub-s. 3, of the Act of 1894 shews that that construction is wrong because, if it were right, the amending Act might be said to be useless. The amending Act may be merely declaratory to clear up doubts, and, even if not so intended, the presence of the section in the later Act cannot determine the construction of the earlier."

23 At a practical level, it is easy to feel some sympathy with the director. The Crown did not choose to appeal in *Benson's case* (1). It elected instead to procure enactment of the 1996 Ordinance which put the question beyond doubt by, in effect, reversing *Benson* for the future. Having gone to those lengths, he might understandably ask himself why the Crown should now take the trouble to pursue this claim against him on the footing that *Benson* was wrong in any event. Unfortunately for him, however, the enforcement of tax collection is not a game to be regulated by the finer points of fair play. The Crown is entitled to argue that the 1996 Ordinance was passed in the interests of clarification and, for my part, I would be prepared to presume that this was the purpose of the relevant part of that Ordinance, and to reach that conclusion without any necessity for reference to the explanatory note attached to it at the Bill stage.

Conclusion

24 For all those reasons, I would allow the appeal and substitute for the order of the judge on the preliminary issue a declaration that the respondent, Douglas Mottershead, is a person deemed to be the employer within the terms of reg. 14 of the Income Tax (Pay As You Earn) Regulations 1989.

NEILL, P. and **RUSSELL, J.A.** concurred.

Appeal allowed.