[2007–09 Gib LR 130]

ATTORNEY-GENERAL v. VILLALTA

SUPREME COURT (Dudley, J.): August 6th, 2007

Companies—directors—personal liability—director holding office when company's income tax due, personally liable (jointly and severally with other directors) under Income Tax (Pay As You Earn) Regulations 1989, reg. 14, to pay employees' PAYE deductions to Government if not paid over by company

Taxation—income tax—recovery of tax—PAYE deductions are "tax" within Income Tax Act 1952, s.87, therefore recoverable from directors of company liable for payment—claim for recovery of "tax" exempt from limitation under Limitation Act 1960, s.36

The claimant sought an order for summary judgment against the defendant for the payment of PAYE income tax arrears.

The defendant was one of the directors of L&P Ltd. from July 1998 to July 2003. L&P had failed to account to the Government income tax deductions from its employees between July 1st, 1998 and June 30th, 2002. In July 2003, L&P entered into an agreement acknowledging the amount overdue for 2000–02. The claimant sought recovery of the outstanding payments from the defendant, who accepted he was *prima facie* liable to pay the sums due, but opposed the claimant's action.

The claimant submitted that (a) the defendant was liable for the payment of the overdue tax deductions by reason of his personal liability

as a director of L&P pursuant to reg. 14 of the Income Tax (Pay As You Earn) Regulations 1989; (b) although the agreement acknowledging the amount overdue gave L&P time to pay the amount overdue, it could not exempt the defendant from liability; and (c) the claim was not time-barred since the unpaid sums were a "tax" within the meaning of s.87 of the Income Tax Act 1952 and by virtue of s.36 of the Limitation Act 1960, limitation did not apply to the recovery of taxes.

In reply, the defendant submitted, *inter alia*, that (a) his obligations arising from his position as a director were as a surety for L&P which, following the agreement acknowledging the indebtedness, had been given time to pay the sums due which discharged his responsibility as a surety; and (b) the amounts overdue were not taxes *per se* but a statutory duty on an employer to account for money since reg. 11(1) of the Income Tax (Pay As You Earn) Regulations provided that the such payments were "a debt due to the Government . . . recoverable as such." This meant that the claim was time-barred by the six-year limitation period for actions for the recovery of statutory liabilities contained in s.4(1)(d) of the Limitation Act 1960.

Held, granting the application:

(1) The defendant was liable to pay the outstanding PAYE deductions. The application was neither invalid nor statute-barred. The unpaid sums were a "tax" within the meaning of s.87 of the Income Tax Act 1957. Consequently, they were recoverable from the defendant and he could not rely on limitation as a defence, since s.36 of the Limitation Act 1960 exempted the recovery of taxes from limitation. Had the claim been subject to a limitation period, limitation would have been unavailable to the defendant as a defence as it had not been specifically pleaded, contrary to the CPR, Practice Direction 16, para. 13.1 (para. 14; para. 16).

(2) The defendant could not rely on the agreement acknowledging the unpaid sums as a defence to the claim for payment because, as a director at the time the payments were due, reg. 14 of the Income Tax (Pay As You Earn) Regulations made him jointly and severally liable with the other directors (as if they were the employer) to make the payments. The defendant could not be a surety for L&P as he was not a third party assuming responsibility for L&P's debt but was directly and personally liable to pay the PAYE deductions by reg. 14 (paras. 21–22).

Cases cited:

(1) *Att.-Gen.* v. *Antoine*, [1949] 2 All E.R. 1000, distinguished.
(2) *Att.-Gen.* v. *Mifsud*, 1995–96 Gib LR 360, referred to.
(3) *Att.-Gen.* v. *Mottershead*, 1999–00 Gib LR 17, *dicta* of Waite, J.A., followed.

Legislation construed:

Income Tax Act 1952, s.87: The relevant terms of this section are set out at para. 10.

Income Tax (Pay As You Earn) Regulations 1989, reg. 11: The relevant terms of this regulation are set out at para. 9.
reg. 14: The relevant terms of this regulation are set out at para. 2.

Limitation Act 1960, s.4(1)(d): The relevant terms of this paragraph are set out at para. 5.
s.36: The relevant terms of this section are set out at para. 5.

C. Cumming for the claimant;
C.A. Gomez for the defendant.

1 **DUDLEY, J.:** There is an application before me by the claimant seeking summary judgment on a claim for £32,375.17 in respect of outstanding income tax (PAYE) deductions which should have been paid by Larsen & Parkwell (International) Ltd. ("L&P") for the period July 1st, 1998 to June 30th, 2002.

2 Regulation 14 of the Income Tax (Pay As You Earn) Regulations, 1989 provides that "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."

3 The present action is brought against the defendant on the basis that he was a director of L&P from July 29th, 1998 to July 1st, 2003. On the day of his resignation, L&P entered into an agreement with the Government of Gibraltar acknowledging an indebtedness in the sum of £16,058.54 which related to outstanding PAYE deductions for the financial years 2000–01 and 2001–02 and interest in the sum of £2,676.42. Albeit not material for present purposes, it is not accepted by the claimant that the defendant did not have knowledge of this agreement.

4 For the defendant, it is accepted that he was *prima facie* liable to pay the PAYE deductions to the Commissioner of Income Tax. The application is, however, opposed by the defendant on the grounds that part of the claim is statute-barred and also on the basis that the agreement affording L&P time to pay discharged the defendant from his obligation.

Limitation

5 By virtue of s.4(1)(d) of the Limitation Act 1960, "actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture" shall not be brought after the expiration of six years from the date of the accrual of the cause of action. Section 36 of the Limitation Act 1960, however, provides that it "shall not apply to any proceedings by the Crown for the recovery of any tax . . ."

6 Mr. Gomez relies on *Att.-Gen.* v. *Antoine* (1) and upon reg. 11(1) of the Income Tax (Pay As You Earn) Regulations, 1989 in support of his

argument that PAYE deductions from employees and payable by an employer to the Commissioner of Income Tax are not a tax but rather a sum payable by virtue of a statutory duty to account for moneys.

7 *Att.-Gen.* v. *Antoine* is authority for the proposition that PAYE moneys deducted by an employer remain the property of the employer until they are paid over to the Commissioners of Inland Revenue. The simple facts of that case were that an employer deducted tax from her employee's wages and set aside in cash the moneys deducted. The money was stolen and not recovered, as stated by Croom-Johnson, J. ([1949] 2 All E.R. at 1002):

> "In those judgments is enshrined the well-known constitutional proposition that there can be no tax without the authority of Parliament. The trouble I have in seeking to apply that proposition is to be certain that I am not falling into the error of confusing two things: (i) a tax which is demanded of the employer, which this is not, and (ii) a liability to account for moneys which, pursuant to her duty under the Act of Parliament, she has deducted from the wages of her employees, which this is."

8 Mr. Gomez also relies upon reg. 11 of the Income Tax (Pay As You Earn) Regulations 1989. His argument is, in effect, that reg. 11(1) provides for the recovery, by Government, of PAYE deductions from an employer as a debt, and that therefore, it is subject to a six-year limitation period.

9 It is useful to set out reg. 11 in full:

> "(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 months in accordance with these Regulations, 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 and shall be recoverable as such.*
>
> (2) An employer who willfully 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.
>
> (3) In the event that such total amount as is provided for by sub-regulation (1) shall not have been paid into the Treasury by the date specified in that subregulation, such total amount may, at the discretion of the Commissioner, be increased by a penalty equivalent to 2% of that total amount for each month by which any such payment into the Treasury is delayed, such penalties to be calculated at a compound rate; *and references to 'total amount' and to 'amount of tax' in this regulation and in regulation 12, shall be taken to be*

> *references to the tax deducted or the tax specified, in accordance with regulation 12(1), increased by the penalty and any such penalty shall be deemed to be part of the tax.*" [Emphasis supplied.]

10 The enabling provision in s.87 of the Income Tax Act 1952 provides:

> "The Minister 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 employer* and where the employer is a company, the recovery from the company, its Directors or shareholders and any other related matter." [Emphasis supplied.]

11 Ms. Cumming argues that the phrase in reg. 11(1), "shall be a debt due to the Government and shall be recoverable as such," is to be construed in the context of the Regulations as a whole and of the enabling section in the Act. In particular, she relies upon the language of reg. 11(3) which provides that the "total amount . . . shall be taken to be references to the tax deducted . . ." It is useful as well to take account of the phrase ". . . shall be liable to pay such tax" in reg. 11(2). She submits that if reg. 11(1) is read in context, "debt" is a generic term for a tax debt, and that what the regulation does is establish the mechanism for the collection of the employee's tax liability from the employer, but that the nature of the debt remains that of a tax and therefore this claim comes within the scope of s.36 of the Limitation Act in that these are proceedings for the recovery of a tax.

12 The other limb to Ms. Cumming's argument is that the phrase "shall be a debt due to the Government and shall be recoverable as such" in reg. 11(1) is permissive as opposed to mandatory. She relies upon *Att.-Gen.* v. *Mifsud* (2) as authority for that proposition. She goes on to argue that the mode of recovery as a debt not being mandatory, the moneys may be recovered as a tax. Curiously, *Att.-Gen.* v. *Mifsud* was a case involving the recovery of income tax arrears from an employer in respect of PAYE deductions from employees. It was, it would appear from the report, accepted that recovery from the employer was a recovery of tax. It is apparent that the point before me was not argued in that case and indeed the respondent did not appear and was not represented before the Court of Appeal. However, in my view, there is merit in the argument that by making the recovery of the moneys as a debt permissive, a proper inference to be drawn is that moneys deducted under the PAYE scheme are not in the nature of a simple debt, but rather a liability in respect of a tax deduction.

13 Ms. Cumming further argues that *Att.-Gen.* v. *Antoine* (1) is simply

authority for the proposition that PAYE is a tax on the employee and not the employer, but that this does not preclude the debt retaining its nature as a tax and that therefore by virtue of s.36 of the Limitation Act, the claim is not statute-barred.

14 Whilst Mr. Gomez's submissions are superficially attractive, I am of the view that on a proper construction of the Income Tax Act and the Regulations, the PAYE sums deducted and payable by an employer retain the character of a tax, and that these are caught by the wide concept of "any tax" in s.36 of the Limitation Act.

15 In making this determination, I acknowledge that I do not apply the decision in *Att.-Gen.* v. *Antoine* (1). Two things arise in this regard. The first is that it is a decision of the English High Court and therefore, whilst persuasive, certainly not binding given that it is by a court of equal jurisdiction. More significantly, however, I take the view that *Att.-Gen.* v. *Antoine* is capable of being distinguished on the facts—that an employer retains the risk in respect of moneys deducted by him does not mean that an action for the recovery of those moneys is not for the recovery of a tax, albeit not a tax payable by the employer but rather collected by him.

16 Although it is not of significance given my determination, an issue arises which was not raised in argument. On perusal of the amended defence, it appears that limitation has not been pleaded. Limitation, of course, is a matter which must be specifically pleaded (see CPR, Practice Direction 16, para. 13.1). In the circumstances, the pleadings are as presently drafted (but subject to a successful application to amend), limitation could not, in any event, be relied upon to resist the application for summary judgment.

Release from liability

17 The second limb of Mr. Gomez's argument is that by the claimant entering into an agreement with L&P giving it time to pay, the defendant was discharged of its obligation to pay the claimant.

18 The effect of reg. 14 was considered by the Court of Appeal in *Att.-Gen.* v. *Mottershead* (3) where Waite, J.A., giving the only judgment of the court, said (1999–00 Gib LR 17, at para. 19):

> "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."

19 Mr. Gomez, whilst accepting that the defendant was *prima facie* liable to pay the deductions, submits that he was also entitled to an indemnity from L&P. He relies upon 20 *Halsbury's Laws of England*, 4th ed. (1993 Reissue), para. 348, at 223, which provides:

> "A right to indemnity based on an implied contract or an obligation imposed by law may arise in various ways. Such a right may arise where money is paid at the request of another. Similarly, where one person has been compelled by law to pay, or, being compellable by law, has paid money to another which a third party was ultimately liable to pay so that the third party obtains the benefit of the payment by the discharge of his liability, the person who made the payment may recover the amount of the payment from the third party."

20 On the back of this, he submits that the defendant's obligation which arises by compulsion of law is in the nature of a surety. Following on, and on this, I think there can be no issue that a surety is discharged by a creditor giving the principal debtor time without the surety's agreement.

21 Whilst certainly an ingenious argument, it is one which fails to address a fundamental issue. A suretyship arises where there is an assumption in the second degree for a debt in respect of which a third party is primarily liable. It does not arise where the debt is the debt of both. Notwithstanding that a director may have recourse against the company in respect of PAYE paid by the director, the deeming provision in reg. 14 does not create a statutory suretyship, rather the effect of the regulation is to make a director jointly and severally liable. Respectfully adopting the language of Waite, J.A. in *Att.-Gen.* v. *Mottershead* (3) (1999–00 Gib LR 17, at para. 18), the regulations make "every director a debtor to the Commissioner" as opposed to a surety or guarantor.

22 In the circumstances, the agreement giving L&P time to pay does not afford the defendant a defence to the claim.

Application granted.