

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY STEPHEN CORR  
FOR JUDICIAL REVIEW

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**WEATHERUP J**

The Construction Industry Scheme.

[1] The Inland Revenue recognise a scheme known as the Construction Industry Scheme (CIS). A Sub-contractors Tax Certificate (STC) is issued to qualifying sub-contractors whereby contactors will make payments to sub-contractors without deduction from payments for labour of an amount on account of the sub-contractors' tax and national insurance contribution liability. The nature of the construction industry is such that many sub-contractors are also contractors for the purposes of the CIS. In order to qualify for an STC, the relevant certificate being known as CIS6, the sub-contractor must satisfy a business test, a turn-over test and a compliance test. The compliance test requires that for a period of three years ending with the date of application, the sub-contractor must have completed and returned all tax returns, supplied any information about tax requested by the tax office, paid all tax and national insurance contributions due, and where also engaged as a contractor, paid any PAYE tax and national insurance contributions due and paid all deductions made as contractor. A sub-contractor who does not qualify for an STC is issued with a Registration Card (CIS4) and the contractor engaging such a sub-contractor must make a deduction from all payments for labour of an amount on account of the sub-contractors' tax and national insurance contribution liability.

[2] This is an application for judicial review of a decision of the General Commissioners of Income Tax made on 15 September 2004 rejecting the applicant's appeal against the decision of the Inland Revenue refusing the applicant an STC. The applicant was a contractor as well as a sub-contractor.

Mr Kelly BL appeared for the applicant and Mr McLaughlin BL appeared for the respondent.

[3] The statutory scheme is contained in the Income and Corporation Taxes Act 1988 as amended. Individuals must satisfy the requirements of section 562 which include the following –

(1) In the case of an application for the issue of a certificate under section 561 to an individual (otherwise than as a partner in a firm) the following conditions are required to be satisfied by that individual.

(8) The applicant must, subject to subsection (10) below, have complied with all obligations imposed on him by or under the Tax Acts or the Management Act in respect of periods ending within the qualifying period and with all requests to supply to an inspector accounts of, or other information about, any business of his in respect of periods so ending.

(10) An applicant or company that has failed to comply with such an obligation or request as is referred to in subsection (8) above shall nevertheless be treated as satisfying that condition as regards that obligation or request if the Board are of the opinion that the failure is minor and technical and does not give reason to doubt that the conditions mentioned in subsection (13) below will be satisfied.

(13) There must be reason to expect that the applicant will, in respect of periods ending after the end of the qualifying period, comply with such obligations as are referred to in subsections (8) to (12) above and with such requests as are referred to in subsection (8) above.

(14) In this section "the qualifying period" means –

(a) in relation to a person who is within subsection (5) above, the period starting at the beginning of the last period of three years before his application throughout which he has been employed as mentioned in subsection (3) above

(or is by virtue of subsection (6) above treated as having been so employed) and ending on the date of his application; and  
(b) in the case of any other person, the period of three years ending with the date of his application.

At the heart of the present application is Section 562(10) which requires that any failure to comply with obligations in relation to income tax and national insurance contributions in the three years prior to application for the STC shall be treated as satisfying the requirements if the Board are of the opinion that the failure is "minor and technical" and does not give reason to doubt that the applicant will after the end of the qualifying period comply with all the obligations.

The application for a Sub Contractors Tax Certificate.

[4] The applicant's application for an STC was refused by the Inland Revenue on 27 May 2004 on five grounds -

- (i) The Contractors return (CIS36) (being the annual return of the applicant as a contractor) for the year ended 5 April 2003 due on 19 May 2003 was not received until 28 July 2003. A £300 penalty had been charged.
- (ii) CIS24 vouchers for payments (being contractors vouchers for payments made to sub-contractors) made to CIS6 certificate holders in the year ended 5 April 2002 were not received.
- (iii) No CIS25 vouchers for payments made to Registration Card (CIS4) holders during the years ended 5 April 2003 and 2004 were sent in by the 19<sup>th</sup> of the tax month in which the payment was made. The first vouchers for the year ended 5 April 2003 were not received until 28 July 2003.
- (iv) Deductions from Registration Card Holders were not being paid to the Inland Revenue within 14 days of the end of the tax month (or quarterly when quarterly payments had been agreed). Payments had therefore been made more than 14 days late on more than two occasions.
- (v) CIS25 vouchers for payments made to Registration Card holders during the year ended 5 April 2004 were outstanding.

[5] The applicant appealed to the General Commissioners of Income Tax and a hearing was conducted on 15 September 2004. The Tribunal Chairman was Tom Donnelly and the Commissioner was Deidre Stewart. The Clerk to

the Tribunal was Pauline Knight. The Presenting Officer for the Inland Revenue was James Anthony Murray, HM Inspector of Taxes. The applicant was represented by Joseph Quinn, an accountant and Michael Kelly of Counsel. At the outset of the hearing the Tribunal was informed by Mr Murray that the Inland Revenue did not intend to rely on grounds 2 and 5 set out in the letter of 27 May 2004 and would continue its objection to the grant of an STC to the applicant on grounds 1, 3 and 4. The applicant did not dispute that breaches 1, 3 and 4 had occurred but contended that the STC should be granted as the failure was minor and technical and did not give reason to doubt that the applicant would comply with his obligations. The Tribunal retired at the end of the hearing and returned to inform the applicant of its decision that the breaches were not minor and technical. Accordingly the appeal was refused and an STC was not granted. By letter dated 24 September 2004 the decision was confirmed in writing to the applicant.

[6] By letter dated 7 October 2004 from the applicant's accountant, J. Quinn and Company, it was pointed out that at the hearing the Inland Revenue had conceded that they were not standing over the grounds of their original decision and that the Commissioners had not specified the breaches on which they were relying in refusing the applicant an STC. Ms Knight as Clerk to the Commissioners replied by letter dated 22 October 2004 pointing out that the Revenue had not relied on grounds 2 and 5 and "the breaches referred to were in respect of late submissions of CIS25 vouchers and late payment of deductions from Registration Card holders (being grounds 3 and 4). This letter did not refer to ground 1 which had not been abandoned by the Inland Revenue at the hearing and in an affidavit sworn 10 February 2005 Ms Knight referred to her omission of the applicant's late submission of the annual return (CIS36) for the year ended 5 April 2003 "which was ground 1 in the refusal letter and relied on at the hearing."

#### The grounds for Judicial Review.

- [7] The applicant's grounds for judicial review resolved to four matters -
- (i) Procedural irregularity in that a written submission prepared by the Inland Revenue was alleged to have been furnished to the Tribunal without notice to the applicant.
  - (ii) Mistake by the Tribunal in that it was alleged that the Tribunal proceeded on the basis that the five breaches specified by the Inland Revenue in the letter of 27 May 2004 had been admitted by the applicant.
  - (iii) Failure to give reasons for the dismissal of the applicant's appeal.
  - (iv) The decision was unreasonable.

### Procedural Irregularity.

[8] In his affidavit sworn 10 February 2005 the Chairman stated that the Inland Revenue had prepared a written submission which was made available to the Tribunal at the hearing and a copy of the written submission was exhibited. Further the Chairman stated that a copy of the decision in Shaw (HMIT) v Vicky Construction Limited was included with the papers submitted to the Tribunal. The written submission was entitled "Brief for General Commissioners Hearing (Belfast Division) 15/09/03". In the course of the submission the Inland Revenue set out grounds 1, 3 and 4 from the letter of 27 May 2004 and did not set out grounds 2 or 5. However the written submission contained an additional ground namely "Payments made to sub-contractor D. Barr who had not a valid Registration Card for the year ended 05/04/2004. A valid Registration Card was only issued on 07/09/2004 for one year".

[9] Mr Quinn then filed an affidavit sworn 3 March 2005 indicating that at no stage had the applicant had sight of the Inland Revenue written submission nor had the issue of payments made to sub-contractor D. Barr been raised in the letter of 27 May 2004 or in any other correspondence nor had it been mentioned at the hearing on 15 September 2004.

[10] By a further affidavit sworn 6 April 2005 the Chairman stated that he had reconsidered the issue of the Inland Revenue written submission and concluded that it had not been submitted to the Tribunal and that he had been informed by Ms Knight that it was her recollection that the Inland Revenue had not handed in any written submission during the course of the hearing. Further an affidavit was sworn by Mr Murray on 6 April 2005 setting out his recollection that the written submission was not submitted to the Tribunal nor shared with the applicant but was used purely for the purposes of Mr Murray's oral presentation. In correspondence from Mr Murray to Mr Quinn and by the affidavit of Alison Bell, the solicitor from the Crown Solicitors' Office with conduct of this matter on behalf of the respondent, it appears that the Inland Revenue mistakenly forwarded to the Crown Solicitors' Office a copy of the written submission on the basis that it had been supplied to the Tribunal and the Chairman had sworn his first affidavit believing that to be the case. The affidavits of the Chairman and Mr Murray indicate that there are occasions when the written briefs prepared by the Inland Revenue are submitted to the Tribunal and to the other side, but having reviewed the matter they indicate that the written brief was not forwarded to the Tribunal on this occasion.

[11] Further the Chairman refers to having received a copy of the decision in Shaw with the papers submitted to the Tribunal. The Inland Revenue's written submission refers to the Shaw decision. Mr Murray's affidavit states his recollection that he referred the Tribunal to the Shaw decision. Mr Kelly

states from the Bar that there was no reference to the Shaw decision at the Tribunal hearing. Mr Kelly contends that if the Shaw decision was furnished to the Tribunal by the Inland Revenue, the Chairman's retraction of his recollection of the furnishing of the written submission to the Tribunal must be in doubt when it can therefore be established that there were indeed some papers furnished to the Tribunal that were not forwarded to the applicant.

[12] It is elementary that in any adversarial hearing the decision maker should not receive from one party material that may be relevant to the decision and is not provided to the other party. Having considered the affidavits of the Chairman and Mr Murray and Ms Bell I have not been satisfied that the Inland Revenue's written submission was furnished to the Tribunal. Had the written submission been so furnished it would have represented a material irregularity as the written submission contained additional information adverse to the applicant and not otherwise disclosed to the applicant. In relation to the copy of the Shaw decision I am satisfied that this was furnished to the Tribunal by the Inland Revenue but not satisfied that it was furnished to the applicant. Further, the Chairman refers to the copy of the Shaw decision being furnished with other papers, although the possible identity of those other papers has not been established. This may be a recollection by the Chairman that is coloured by the faulty recollection in relation to the written submission. On the other hand it may be that a copy of the Shaw decision was indeed furnished with other papers. There is no record available of the papers in the possession of the Tribunal.

[13] It is an aspect of procedural fairness that there should be transparency in the process. There is confusion as to what materials may have or may not have been provided to the Tribunal by one of the parties. Overall I am satisfied that there is the appearance of procedural irregularity and I propose to quash the decision of the Tribunal. In those circumstances I shall refer only briefly to the remaining grounds relied on by the applicant.

#### Mistake.

[14] The applicant contends that the Tribunal proceeded on a mistaken basis namely that the applicant admitted the five alleged breaches set out in the letter of 27 May 2004. He relied on the Chairman's statement in paragraph 17 of his first affidavit that "the appeal proceeded on the basis that the breaches identified in the refusal letter were admitted but that they were of a minor and technical nature." However this statement must be read in the context of the affidavit as a whole. At paragraph 11 the Chairman noted that at the outset of the hearing he had been informed by the Revenue that grounds 2 and 5 would not be relied on and that the Revenue objection would continue on grounds 1, 3 and 4 alone. In paragraph 17 of the affidavit the sentence after that quoted by the applicant reads "Submissions were made by the applicant in respect of each of the grounds relied on by the Revenue."

[15] I am satisfied that the Chairman was not treating the applicant as having admitted all five breaches referred to in the letter of 27 May 2004 and that the Tribunal conducted the hearing on the basis that the grounds relied on by the Revenue were limited to grounds 1, 3 and 4. Ms Knight's minute of proceedings before the Tribunal notes that grounds 2 and 5 in the Revenue letter of 27 May 2004 were not relied on by the Revenue at the hearing of 15 September 2004. I do not accept the applicant's contention that the Tribunal proceeded on a mistaken basis or took into account grounds not relied on by the Inland Revenue.

[16] The applicant contends that ground 2 had been misunderstood by the Tribunal. Ground 2 had stated that CIS24 vouchers for payments made to CIS6 certificate holders in the year ended 5 April 2002 had not been received. The Inland Revenue did not proceed with ground 2, having accepted that the CIS24 vouchers were not the responsibility of the applicant. The applicant contends that CIS24 vouchers are the responsibility of sub-contractors and that the Chairman was mistaken in paragraph 5 of his first affidavit where he states that the contractor should obtain a CIS24 voucher to be submitted to the Inland Revenue. As I am satisfied that the Tribunal did not rely on ground 2 of the letter of 27 May 2004 any mistake contained in paragraph 5 of the Chairman's first affidavit was not material to the decision, nor does any such mistake represent any lack of understanding of the Scheme that might have impacted on the Tribunal's decision on the extant grounds.

#### Reasons.

[17] The applicant contends that the Tribunal did not furnish reasons for its decision. The General Commissioners (Jurisdiction and Procedure) Regulations 1994 provide at Rule 16 -

“(2) The final determination may be made orally by a Tribunal at the end of the hearing or may be reserved and in either event shall be recorded in a document which shall be signed and dated by the Tribunal.

(3) The clerk shall send to each party a notice setting out the final determination recorded under paragraph (2).”

[18] In the present case the final determination was given orally by the Tribunal at the end of the hearing, namely that the appeal was dismissed as the breaches were not minor and technical. Further the Clerk sent to the applicant on 24 September 2004 a notice setting out the final determination, namely that the appeal was not allowed as the breaches were not minor and technical.

[19] The guidance notes on procedure issued to the General Commissioners provide at paragraph 6.11.1 that the Tribunal must give reasons for its decision. The respondent accepted that the applicant was entitled to reasons for the refusal of the appeal and contended that reasons had been given to the applicant. The issue of reasons for decisions in a planning context has been considered by the House of Lords in South Buckinghamshire District Council v Porter [2004] 4 All ER 775. Lord Browne reviewed the authorities governing the approach to a reasons challenge in the planning context and summarised the position at paragraph 36 as follows -

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But some adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlining the grant of permission may impact upon future such applications. Decision letters must be read in a straight-forward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

[20] The principal important controversial issue at the hearing on 15 September 2004 was whether the three outstanding breaches relied on by the Inland Revenue and which were admitted by the applicant were minor and technical and if so whether the failures gave reason to doubt that the



applicant's obligations would be satisfied. The Tribunal decided that the breaches were not minor and technical and stated that to be the reason for refusing the appeal. In the context of the present scheme and of the issue between the parties I am satisfied that the decision states the essence of the reason for the conclusion and provides an adequately reasoned decision. I am not satisfied that the applicant has been substantially prejudiced by any failure to provide an adequately reasoned decision. The response to the written decision was not to question directly the basis on which the finding was made that the breaches were not minor in technical but rather to concentrate on the identity of the breaches found against the applicant.

Reasonableness.

[21] The applicant contends that the finding that the breaches were not minor and technical was unreasonable. The conclusion reached by the Tribunal was within the range of decisions that the Tribunal was entitled to make in the circumstances. As this decision is being quashed on procedural grounds and referred back to a Tribunal I do not propose to examine further the rationality of the decision.

[22] The decision of the Tribunal will be quashed on the basis of the procedural irregularity set out above and the appeal should be reconsidered by a differently constituted Tribunal.