Neutral Citation no. [2006] NICA 50 | ***Ref:*** **KERH4825.T**

Judgment: approved by the Court for handing down | ***Delivered:*** **12/12/06**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

MALLUSK COLD STORAGE LTD

(Plaintiff) Appellant;

and

DEPARTMENT OF FINANCE & PERSONNEL

(Defendant) Respondent.

and

BETWEEN:

ANGLO BEEF PROCESSORS LTD

(Plaintiff) Appellant;

and

DEPARTMENT OF FINANCE & PERSONNEL

(Defendant) Respondent.

Before Kerr LCJ, Campbell LJ & Sheil LJ

Extempore judgment

KERR LCJ

[1] As a result of the recent decision in the House of Lords in *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners of Inland Revenue* it has now been established that the restitutional remedy made for payments made under a mistake of law applies to payments of tax, and applying that principle *mutatis mutandis* to the payment of rates it is now clear that payments made by the appellants under a mistake, whether of fact or of law, may be recovered unless, as Mr Hanna QC has put it, the respondent is entitled to rely on one of the recognised restitutionary defences.

[2] In this case the defence upon which the respondent relies is that the appellants' claims in respect of payment are bound by Articles 4 and 71(1) (c) of the Limitation (Northern Ireland) Order 1989. The critical issue in the case is whether the appellants can avoid the effect of Article 4 by recourse to Article 71(1) (c) which provides that:

> "… where in any action for which a time limit is fixed by this Order, …
>
> (c) the action is for relief from the consequences of a mistake, the time limit does not begin to run until the plaintiff has discovered the … mistake, … or could with reasonable diligence have discovered it."

The central issue in the case, therefore, is whether the appellants in this appeal could have, with reasonable diligence, discovered that the refusal to treat the premises as predominantly industrial was a mistake of law.

[3] Mr Thompson QC, on behalf of the appellants, accepts, correctly, that the onus of showing that they acted with reasonable diligence lies on the appellants and in a nutshell he says that they cannot be expected by recourse to the reasonable diligence principle to launch an appeal whose outcome was uncertain, and that it was not until the decision of the Tribunal in the *Granville* decision became known that they could have discovered the mistake of law.

[4] Mr Hanna in riposte to that argument submits that the *Granville* case exemplifies the measures that were available to the appellants. It would have been open to them, firstly, to bring to the attention of the District Valuer the facts and circumstances which were exposed in the *Granville* appeal before the Lands Tribunal. This would have at least, he says, as a matter of probability, have brought about a change of heart in relation to blast freezing, and that, in any event, the success of *Granville* before the Lands Tribunal demonstrated that reasonable diligence would have required, first of all, the assembly of the relevant material and, secondly, the presentation of that to the District Valuer and ultimately to the Lands Tribunal.

[5] In support of that argument he has referred, in particular, to the judgment of Millett LJ in the case of *Paragon Finance Plc v D B Thakerar & Co* and the relevant passage reads:

> "The question is not whether the plaintiffs should have discovered the fraud sooner, but whether they could with reasonable diligence have done so."

Mr Hanna submits that it is beyond question that the appellants in this case could have discovered that the Valuation Office had made a mistake in law by pursuing their appeal to the Lands Tribunal. Millett LJ continues:

> "The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take."

Paraphrasing that, Mr Hanna submits that in the present case the appellants cannot be heard to say that they could not have discovered that a mistake of law had been made without exceptional measures which they could not reasonably have been expected to take. Once more he refers to the fact that *Granville* did bring about the desired outcome. Returning then to Millett LJ's judgment:

> "In the course of argument, May LJ observed that reasonable diligence must be measured against some standing, but the six-year limitation period did not provide the relevant standing. He suggested that the test was how a person, carrying on a business of the relevant kind, would act if he had adequate, but not unlimited staff and resources and were motivated by a reasonable, but not excessive, sense of urgency."

[6] During submissions in the present appeal, it was pointed out to Mr Hanna that there appeared to be some tension between the earlier formulation of the test by Millett LJ and his explicit adoption of the formulation presented by May LJ. He accepted, in our view correctly, that there was a measure of tension between the two formulations.

[7] It appears to us that such tension as exists, can best be reconciled by returning, as one must always do, to the words of the statute themselves. They stipulate that the time limit does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. What will constitute reasonable diligence will depend uniquely on the circumstances of the individual case. This, it seems to us, will always be a fact-specific inquiry. In the present case one can recognise that there are competing arguments on both sides of the issue. On the one hand, as Mr Hanna has pointed out, we may now be confident in retrospect that had the appellants pursued their appeal to the Lands Tribunal that a successful outcome, such as was secured by *Granville*, would have been obtained. On the other hand, as Mr Thompson has pointed out, the prospect faced by the appellants at the time when the decision had to be taken was that the matter would be contested all the way by the rating authorities and that, even if a successful outcome before the Lands Tribunal was obtained, that would not necessarily have meant an end to litigation. A judgment had to be made at that particular time.

[8] It is, of course, seductively tempting to look at the issue with the benefit of hindsight and to realise that the appellants would have been successful, as were the appellants in *Granville*, but I think that the reasonable diligence principle must be assessed on the basis of the contemporary evidence and the judgment that was then required to be made by the appellants. We have concluded firmly that the appellants have discharged the onus which rests upon them of showing that they had not failed to act with reasonable diligence in pursuing an appeal beyond the appeal that Coghlin J has referred to in paragraph 3 of his judgment. We, therefore, consider that the rescue available under Article 71(1) (c) of the Limitation Order is available to the appellants and to that extent the appeal must succeed.