Neutral Citation no. (2000) 2114

Ref: KERE3254

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 04/09/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY MARCELLUS McMULLAN FOR JUDICIAL REVIEW

KERR J

Introduction

The applicant, Marcellus McMullan is a publican. By this application he seeks judicial review of the decision of the Department of the Environment for Northern Ireland whereby it refused his application pursuant to Article 15 of the Rates (Northern Ireland) Order 1977 for a refund of part of the rates paid by him in respect of his premises.

Background

Mr McMullan owns public house premises and an off licence in William Street, Lurgan. With effect from 1 April 1990, the net annual value (NAV) of the premises was entered in the Valuation List as £6350. On 28 March 1996 the applicant applied for a revision of the NAV. This was reduced to £3000 by a certificate dated 6 August 1996. By operation of Article 13(1)(f) of the 1977 Order, the effective date of the reduction in the NAV was 1 April 1995.

On 29 August 1996 the applicant appealed against the decision of 6 August. This appeal was dismissed by the Commissioner on 30 September 1997. On 9 September 1998 the applicant's solicitors wrote to the Rate Collection Agency stating that the basis of the appeal had been that an over assessment had occurred "due to an arithmetical or clerical error" and asked for a refund of rates paid from 1 April 1990. This was refused. Correspondence was exchanged between the applicant's accountant and the Rate Collection Agency on the question of whether the overpayment was the result of a clerical error. Ultimately, in early 1999, the applicant abandoned this claim.

On 25 March 1999 the applicant's solicitors made application to the Department of the Environment under Article 15(1)(a) of the 1977 Order for a refund of part of the rates paid for the years 1992/3, 1993/4 and 1994/5 on the grounds that the amount of the entry in relation to the applicant's premises in the Valuation List was excessive. On 1 June 1999 the Rate Collection Agency wrote to the applicant's solicitors refusing the application, stating that Article 15 was not applicable.

The statutory framework

Article 13 of the 1977 Order deals with the effect of an alteration in the Valuation List. Article 13 (1) paragraphs (a) to (e) set out the effect of an alteration in certain circumstances which, it is accepted by both parties, do not apply to this case. Article 13(1)(f) provides :-

> "Where neither sub paragraph (a), (b), (c), (d) nor (e) applies the alteration shall have effect, or be deemed to have had effect -
>
> (i) on and after the date of the commencement of the year in which the application was made for the revision of that valuation list in consequence of which the alteration is made (whether the alteration is made immediately following the revision or on appeal), or, if the alteration is made otherwise than in consequence of an alteration, the year in which a certificate of the alteration was

> served on the occupier of the hereditament (or, if the alteration is made on a review under Article 51 (2) [a review by the Commissioner of his earlier revision of the list] or on appeal, the year in which a certificate of the alteration that is the subject of the review or appeal, or was the subject of any earlier review or appeal, was so served), or
>
> (ii) on and after such later date (if any) as is appropriate in all the circumstances."

Since Mr McMullan had applied for the alteration of his NAV on 25 March 1996, the commencement of the year in which the application was made was 1 April 1995 and the alteration took effect on that date, therefore.

Article 13(4)(a) provides :-

> "Where an alteration affects the amount levied on account of a rate in respect of any hereditament in accordance with the list, the difference -
>
> (a) if too much has been paid, shall be repaid or allowed."

The mandatory terms of this provision distinguish it from the discretionary system of refund provided for in Article 15. It provides :-

> "(1) Without prejudice to Articles 11(4)(b), 13(4)(a), 19(4), 27(5)(a) and 31(5)(a), but subject to paragraph (2), where it is shown to the satisfaction of the Department that any amount paid on account of a rate, and not recoverable apart from this Article, could properly be refunded on the ground that -
>
> (a) the amount of any entry in a valuation list was excessive; or
>
> (b) the rate was levied otherwise than in accordance with the valuation list then in force; or
>
> (c) any exemption or relief to which a person was entitled was not allowed; or

> (d) the hereditament was unoccupied during any period; or
>
> (e) the person who made a payment in respect of the rate was not liable to make that payment,
>
> the Department may refund that amount or a part of it.
>
> (2) No amount shall be refunded under paragraph (1) -
>
> (a) unless application for the refund was made before the end of the sixth year after that in which the amount was paid; or
>
> (b) if the amount paid was charged on the basis, or in accordance with the practice, generally prevailing at the time when the payment was demanded."

Since the repayment was sought by the applicant on 25 March 1999, by virtue of Article 15(2)(a), the earliest period for which a refund could be sought was the year 1992/3.

The parties' arguments

For the applicant it was argued that the Department was mistaken in its view that Article 15 does not apply in circumstances where Article 13 has effect. It was submitted that four conditions only required to be satisfied in order for the applicant to be eligible for a discretionary refund. Firstly, the refund could not be obtained other than by the provisions of Article 15. Secondly, the entry on the Valuation List must be shown to have been excessive. Thirdly, the application must be made before the end of the sixth year after the year in which each of the overpayments was made. Finally, it must be established that the amount paid was not charged on the basis, or in accordance with the practice, generally prevailing at the time when the payment was demanded.

It was submitted that the applicant fulfilled all these conditions. As to the first of these, the applicant argued that rates overpaid *after* the effective date are automatically recoverable under Article 13(4)(a); but rates overpaid *before* the effective date are not recoverable unless under Article 15 because the entry in the Valuation List is conclusive evidence of the valuation of the property (Article 40(7) and (8)). In relation to the second condition, the applicant claimed that the reduction of the valuation from £6350 to £3000 demonstrated that the original entry was excessive. Alternatively, the disparity between the figures was sufficient to justify such a conclusion by the Department. It had not addressed the question because of its mistaken opinion that Article 15 could not apply to the applicant's case.

In relation to the third condition, counsel for the applicant claimed that this had been applied by his advisers in confining the application for a refund to the period from 1992 to 1995. So far as the fourth condition was concerned, the purpose of the "prevailing practice" proviso was to maintain fairness and parity between all ratepayers charged on the same basis and to prevent a major investigation if some development of the law has widespread repercussions - *Stubbs -v- Richmond-upon-Thames LBC* [1989] RA 1,3 per May LJ. In the present case the Commissioner's certificate certified that the reduced valuation was considered "fair and relative to those similar premises in the Craigavon area". It followed that the original valuation must have been unfair and out of parity with such premises before it was revised. There were no widespread repercussions as a result of the correction of the overvaluation.

Counsel for the applicant submitted that it was significant that Article 15 was expressed to be without prejudice to Article 13(4)(a). Section 9 of the General Rate Act 1967 was in virtually identical terms to Article 15. That provision was considered by the House of Lords in *R -v- Tower Hamlets LBC ex parte Chetnik Developments Ltd* [1988] RA 45. Lord Bridge of

Harwich in an *obiter* comment clearly stated that rates overpaid and not automatically recoverable under the equivalent of Article 13 could be recovered under the discretionary refund provision.

For the respondent, counsel pointed out that a number of schemes dealing with possible refunds of rates are provided for in the 1977 Order. The existence of such a variety of schemes for possible refund precluded the possibility of a ratepayer benefiting from more than one, he argued. Thus, under Article 11(4)(b) a refund was possible pursuant to an Order of the County Court; or under Article 19(4) where the ratepayer abandons occupation of the hereditament; or under Article 27(5)(a) (dealing with mixed uses); or under Article 31 where a hereditament is used for specified purposes during any part of the year in question. These were mutually exclusive, counsel argued. So were the schemes under Articles 13 and 15. Each scheme had its own purpose, provisions and procedures.

The respondent also argued that the amounts claimed were outwith the provisions of Article 15(2)(b) in that the amounts paid during the years 1993 to 1995 were charged on the basis and/or in accordance with the practice generally prevailing during those three years. Furthermore, he argued, the amounts claimed by way of refund were recoverable (*i.e.* capable of being recovered) under Article 13(4).

Finally, the respondent suggested that the absence of any cross reference in Article 13 to Article 15 was significant. If the legislature had intended that, after invocation of the repayment provision in Article 13, a ratepayer could have recourse to the refund provisions of Article 15 some expression of this would have appeared in Article 13. It would have been perfectly possible, counsel argued, to have included in Article 13(4)(a) the proviso, "without prejudice to

Article 15". This would have indicated that it was intended that those who benefited from the repayment under Article 13 might also obtain a refund under Article 15. The absence of such a proviso signified the legislature's intention that each of the schemes for repayment or refund of sums paid should be freestanding and mutually exclusive.

Conclusions

The dispute as to the correct interpretation of Articles 13 and 15 of the 1977 Order is best approached, in my opinion, by looking at the scheme of the repayment provisions as a whole. The purpose of the provisions is to restore to the ratepayer moneys paid by him which, as subsequent events have proved, should not have been paid. In the *Tower Hamlets* case in the Court of Appeal Slade LJ said of section 9 of the 1967 Act, (which is the equivalent of Article 15 of the 1977 Order) :-

> "We think it clear that, in broad terms, the purpose of section 9 and its predecessor was to enable rating authorities to give redress and to remedy the injustice that would (at least *prima facie*) otherwise ordinarily arise, if they were to retain sums to which they had no right, in cases where persons had paid rates which they were not liable to pay"

In the House of Lords, Lord Bridge said of the same section :-

> "The provisions of section 9 of the consolidating 1967 Act reproduce provisions first enacted in section 17 of the Rating Act 1961. In general terms it is, of course, obvious that the section authorises the refund of rates overpaid. But, to articulate the apparent principle underlying the section more precisely, it is surely envisaged in each of the five cases where the section authorises refunds of amounts paid in respect of rates which would otherwise be irrecoverable that the ratepayer who has paid rates in compliance with a demand note which he might have successfully resisted may appropriately be relieved of the consequences of his oversight. Thus, with regard to paragraph (a), rates levied in accordance with the value ascribed to a hereditament in the current

> valuation list are normally irrecoverable because the valuation list is conclusive evidence of the appropriate value : section 67(6) [the equivalent of Article 40(7) of the 1977 Order] A successful proposal to alter the valuation list only affects the rates payable in the year in which the proposal was made : section 79 [the equivalent of Article 13]. Accordingly, if a ratepayer only appreciates belatedly that a hereditament has been overvalued, he can only recover overpaid rates in respect of past years under section 9."

Later, after reviewing authorities which dealt with the exception to the rule that money paid under a mistake of law will generally be invoked, Lord Bridge said this :-

> "So it emerges from these authorities that the retention of monies known to have been paid under a mistake at law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a 'high-minded' thing to do, but rather as a 'shabby thing' or a 'dirty trick' and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy to take. … the same principle applies to prevent a rating authority enforcing a liability for current rates without giving credit fort a past overpayment of rates made under a mistake of law."

and

> "…Parliament must have intended rating authorities to act in the same high principled way expected by the court of its own officers and not to retain rates paid under a mistake of law …"

There can be no doubt that the overpayment made by Mr McMullan during the years 1992 to 1995 were made under a mistake of law. It appears to me, therefore, that one should approach the interpretation of Articles 13 and 15 with this general principle in mind:- money paid by a ratepayer under a mistake of law should normally be recoverable under statutory provisions enabling the refund of overpayment of rates.

I do not accept the argument of the respondent that the existence of a number of schemes for the refund of rates indicates that each of these is freestanding and that all are mutually exclusive. There is nothing in the wording of each of the provisions setting up those schemes

which indicates that this should be so. On the contrary, Article 15 expressly states that its provisions are to be regarded as being "without prejudice to [inter alias] Article 13(4)(a)". It appears to me that "without prejudice to" in this context means "so as not to interfere with or inhibit the operation of" Article 13(4)(a). If the schemes were designed to be entirely freestanding, there is no reason that these words should have been included. The inclusion of those words indicates, in my opinion, that it was envisaged that the refund provisions in Articles 13 and 15 could, in appropriate cases, operate together, as envisaged by Lord Bridge in the *Tower Hamlets* case.

It is, in my opinion, misconceived to suggest that the omission of any reference to Article 15 in Article 13(4)(a) betokens an intention on the part of the legislature that, where that provision applies, Article 15 cannot be invoked. Once it is recognised that Article 15 plays a complementary role to that of Article 13, it becomes clear that there is no need for such a proviso. Article 13(4)(a) requires the repayment of the difference between the amount actually paid and the amount that should have been paid. The obligation to repay is confined by Article 13(1)(f) to the year in which the application was made. Repayment for any period before that can only arise under Article 15. Nothing in Article 13(4)(a) can inhibit the operation of Article 15. The introduction of a proviso relating to Article 15 in Article 13(4)(a) is quite unnecessary, therefore.

I have concluded, therefore, that a refund under Article 15 is possible where a repayment under Article 13 has been made. Since it is clear that the respondent concluded that the applicant was not eligible to be considered for a discretionary refund under Article 15 where a repayment had been made under Article 13, it follows that its decision is erroneous in point of law and must be quashed. It does not follow, however, that a refund must automatically be made. Payment of

a refund under Article 15 is discretionary. It is open to the Department to consider afresh whether the applicant fulfils the criteria provided for in Article 15 before deciding whether a refund should be made. In this context, the Department is entitled to examine the question whether the amount paid by the applicant "was charged on the basis, or in accordance with the practice, generally prevailing at the time when the payment was demanded" as provided for in Article 15(2)(b). It appears to me, however, that there is considerable force in the argument of counsel for the applicant that this issue should not prevent a refund in the present case in light of the Commissioner's certificate and in view of the unchallenged assertion that there had been no widespread repercussions as a result of the alteration of the entry relating to the NAV of the applicant's premises in the Valuation List from £6350 to £3000.

I will accede to the application to quash the decision of the Department refusing to make a refund under Article 15 of the 1977 Order. The applicant also seeks an order of mandamus requiring the Department to hear and determine the application for a refund according to law. In light of my decision, I do not believe that this should be necessary. If, contrary to my expectation, the Department refuses to reconsider the application, I would be prepared to hear counsel again on the matter of mandamus.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY MARCELLUS McMULLAN FOR JUDICIAL REVIEW

JUDGMENT

OF

KERR J
