



13 June 2018

PRESS SUMMARY

JP Whitter (Water Well Engineers) Limited (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2018] UKSC 31
On appeal from [2016] EWCA Civ 1160

JUSTICES: Lord Mance, Lord Sumption, Lord Carnwath, Lord Lloyd-Jones and Lord Briggs

BACKGROUND TO THE APPEAL

This appeal concerns the legislation which governs the Construction Industry Scheme (“the CIS”), which was introduced in order to counter widespread tax evasion by sub-contractors in the construction industry. It requires certain contractors to deduct and pay over to Her Majesty’s Revenue and Customs (“HMRC”) a proportion of all payments made to the sub-contractor in respect of labour under a sub-contract. The amount deducted and paid over is, in due course, allowed as a credit against the sub-contractor’s liability to HMRC. However, sub-contractors with statutory certificates of gross payment registration are exempt from those requirements. That tends to make any sub-contractor holding a certificate a more attractive party for a contractor to deal with. It also improves the sub-contractor’s cash flow by enabling the sub-contractor to receive the contract price without deduction.

The appellant company (“the company”) is a family-run business of water well engineers, started in 1972. In around 1984 the company registered for gross payment under the CIS. It then underwent regular reviews to determine whether it ought to retain its registration certificate. It first failed a review in July 2009, when its registration was cancelled. The same occurred in June 2010. On both occasions the registration was reinstated by HMRC following an appeal.

Between August 2010 and March 2011 the company was late in making PAYE payments on seven occasions. The delays were generally of a few days, but on one occasion of at least 118 days. It is accepted that the company failed to comply with the requirements of the CIS without reasonable excuse. At that time the company had about 25 employees and an annual turnover of about £4.4m, much of it derived from contracts with a small number of major customers. A further review followed. On 30 May 2011 HMRC, acting under section 66(1) of the Finance Act 2004, cancelled the company’s registration. In doing so, HMRC took no account of the consequences for the company’s business.

The company’s appealed to the First-tier Tribunal (“FTT”) which accepted the company’s evidence that the cancellation, once it took effect, would have had a seriously detrimental impact on the company. The FTT allowed the company’s appeal, holding that HMRC had been wrong not to take account of the likely impact on the company’s business. However, that decision was overturned by the Upper Tribunal with which the Court of Appeal agreed. The company now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Carnwath gives the judgment, with which Lord Mance, Lord Sumption, Lord Lloyd-Jones and Lord Briggs agree.

REASONS FOR THE JUDGMENT

The statutory requirements for registration for gross payment are highly prescriptive. They are contained in the Finance Act 2004. They include a requirement that the applicant for registration complied, within the previous 12 months, with various tax obligations subject to an exception for non-compliance with reasonable excuse. Section 66(1) of the Act provides that “the Board of Inland Revenue may at any time make a determination cancelling a person’s registration for gross payment” where certain conditions are satisfied. The word “may” imports an element of discretion. The dispute is as to the scope of that discretion [5-8].

The company makes two arguments. First, that the discretion under section 66 is unfettered in its terms, which do not exclude consideration of the consequences of cancellation for the company. The company argues that, without any indication to the contrary, the impact on the company must be a relevant consideration [16-17].

Second, the company relies on right to protection of property under Article 1 of the First Protocol to the European Convention on Human Rights (“A1/P1”). It argues that cancellation clearly involves an interference with the possessions represented by (at least) the sub-contractor’s entitlement to the full contract price or the bundle of rights inherent in registration [18]. A1/P1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

HMRC generally adopt the reasoning of the Court of Appeal and do not accept that cancellation involves an interference with a possession for the purposes of A1/P1. Alternatively, HMRC rely on the wide margin afforded to Member States under the Convention in fiscal matters [19-20].

The Supreme Court holds that the Court of Appeal was correct. Apart from the Convention, the company’s first argument, that the discretion under section 66 is unfettered, overlooks the basic principle that any statutory discretion must be exercised consistently with the objects and scope of the statutory scheme. The discretion does not extend to consideration of matters which relate neither to the requirements for registration for gross payment, nor to the objective of securing compliance with those requirements. The scheme is highly prescriptive, setting out narrowly-defined conditions for registration in the first place, including a record of tax compliance. The same conditions are brought into the cancellation procedure by section 66. The mere fact that the cancellation power is discretionary rather than mandatory is unsurprising. Some element of flexibility allows for cases where the failure is limited, temporary and poses no practical threat to the objectives of the CIS. It is wholly inconsistent with that tightly drawn scheme for there to be implied a general dispensing power [21-22].

Turning to A1/P1, there is force in the argument of HMRC that, even if the rights conferred by registration amount to “possessions”, they cannot extend beyond the limits set by the legislation by which they are created. However, it is unnecessary to decide the appeal on that basis, since the Court of Appeal correctly held that any interference with A1/P1 rights was proportionate. Once it is accepted that the statute does not in itself require the consideration of the impact on the individual taxpayer, there is nothing in A1/P1 which would justify the court in reading in such a requirement [23].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>