

Neutral Citation No.: [2008] NIQB 104

Ref: **GIR7273**

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

Delivered: **26/09/08**

2000 No 5100

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION**

BETWEEN:

HER MAJESTY'S CUSTOMS AND EXCISE

Plaintiff;

and

DEREK B S ISHERWOOD

Defendant.

GIRVAN LJ

[1] This matter comes before the court as an application by the defendant in the proceedings for an order staying the proceedings for want of prosecution and/or alternatively on the ground that the defendant has not had a fair and public hearing within a reasonable time for the purposes of Article 6 of the Convention. The plaintiffs' claim is to recover a sum in excess of £2.5 million paid to the defendant pursuant to claims for drawback of duty on alcoholic liquor. The plaintiffs purport to have exercised powers contained in Regulation 13 of the Excise Goods (Drawback) Regulations 1995 under which the Commissioners may at any time cancel drawback granted in accordance with the Regulations where they are satisfied that there has been a contravention of any conditions whether imposed by or under the Regulations or by an Order under the principal Act.

[2] The defendant's argument proceeds along the lines that the Customs and Excise have been guilty of inexcusable delay in bringing forward the information and material substantiating their claim; that the delay in bringing the matter to trial has been inordinate and inexcusable and that the delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as to be likely to cause or to have caused serious prejudice to the defendant. Mr Orr QC on behalf of the defendant further relied on Article 6 of the Convention contending that everyone is entitled to a

fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. While it was accepted that tax disputes form an exception to the evolving rule that public law matters of a pecuniary nature are civil matters, Mr Orr argued that Convention case law is developing to the point where tax litigation is included within the remit of Article 6. He also called in aid the decision of the European Court of Human Rights in National Provincial Building Society v. United Kingdom dealing with retrospective legislation prevent restitutionary claims for overpaid tax. The present case, it was argued, was analogous to a claim in restitution for duties paid. Alternatively, this matter involves the determination of a criminal charge. On the question of the rights guaranteed by Article 6(1) the defendant's right is to a hearing within a reasonable time. This he has not received. The right to a fair trial within a reasonable time has a higher normative force than under the common law and the complainant does not have to show himself by the delay. It was the defendant's case that delay in the present case goes well beyond a reasonable time and the court should vindicate the Article 6 breach by striking out the proceedings.

[3] In considering the Article 6 argument put forward by the defendant it is necessary to take into account the House of Lords decision in Attorney General's Ref (No 2 of 2001) [2004] 1 All ER 1049 and, in particular, what Lord Bingham states at paragraph [21]:

"As the Court of Appeal recognised, a rule of automatic termination of proceedings on breach of the reasonable time requirements cannot sensibly be applied in civil proceedings. A non meritorious defendant might no doubt be very happy to seize on such a breach to escape his liability but termination of the proceedings would defeat the claimant's right to a hearing altogether."

That Attorney General's Reference related to criminal proceedings but the reasoning of the House of Lords is also persuasive in connection with civil proceedings having regard to the House's conclusion that only if the delay renders a trial unfair could a stay be considered appropriate. There are other lesser remedies which may be just if a trial can fairly be heard. In the present context, for example, the court may consider that the plaintiffs' claim for interest may be disallowed or reduced to take account of culpable delay. In the light of Lord Bingham's statement, I do not consider that Article 6 gives the defendant any different right to a stay in respect of delay under the want or prosecution line of authorities. Lord Hope in that case said that it is important to start with domestic law when one is considering the question of any remedies under Article 6. He went on to say -

“It would hardly ever be thought appropriate for civil proceedings to be terminated under our domestic system because of an unreasonable delay on the part of a public authority in the determination of the party’s civil rights and obligations. In practice an attempt by one party to have the proceedings terminated on this ground would almost always be rejected. The appropriate time to seek a remedy for the delay would be at the end when the proceedings are all over (see for example Porter v. Magill [2002] 1 All ER 463)”.

In the light of the statements of Lord Bingham and Lord Hope, I do not consider that Article 6 gives the defendant any greater right to a stay of proceedings in respect of delay than such right as he has under the want or prosecution line of authorities at common law.

[4] In any event for reasons I discuss below in relation to the question of limitation the claim is in essence a claim for a duty or tax and thus falls out with the remit of Article 6 (see Ferrazzini v. Italy [2001] STC 1314 and X v. Austria [1980] 21 DR 246). These authorities are clear in their analysis and National and Provincial Building Society v UK relied on by Mr Orr does not change the convention law in this field. It dealt with the validity of retrospective legislation dealing with restitutionary claims for monies which were mistakenly paid as taxes.

[5] Although the defendant was interviewed in connection with possible criminal charges he was never charged. He is the subject of a claim for repayment of duty allegedly wrongly paid back. This cannot be regarded as a claim for a punitive or deterrent purpose. The claim does not arise out of the defendant’s arrest but out of the demand of 23 July 1997. The argument that the defendant is facing a criminal charge is in reality unarguable.

[6] Turning to the defendant’s argument that the proceedings should be stayed or struck out for want of prosecution it is apparent that on 18 January 2005 Master Wilson dismissed the defendant’s application for dismissal for want of prosecution he found inordinate and inexcusable delay but he did not consider that the delay caused or had caused serious prejudice to the defendant and he held that a fair trial of the action could still take place. No appeal was brought against that decision and thus its correctness cannot be questioned in these proceedings. The question which now arises is whether the plaintiffs have been guilty of inordinate and inexcusable delay likely to have caused serious prejudice to the defendant beyond the period dealt with in the judgment of Master Wilson. The question, thus, is whether the delay after 2005 can be attributed to the plaintiff’s conduct of the case and whether that further delay has produced a prejudice to the defence of the case.

[7] It is clear that for much of the period between 18 January 2005 and the present the parties spent a considerable time dealing with the question of discovery. For a protracted period the defendant unjustifiably obstructed the return by the plaintiff to him of the defendant's original business records asserting that the documents were contaminated by the presence of extraneous material. Clearly he could have accepted the return of the records which were his and handed back any extraneous material. Such material did not contaminate his documents but was simply irrelevant and extrinsic. The defendant did not issue a summons for further and better discovery until 6 June 2006 having received the plaintiff's list on 15 June 2005. There was further protracted correspondence passing between the parties' solicitors between March 2007 and November 2007 leading to a summons for further discovery on 3 December 2007. While the period taken to deal with the question of discovery was protracted the defendant could have pressed on with summonses more quickly than he did and his delay in accepting the return of the business records was unnecessary. Having reviewed and considered the timetable of events and the affidavits and exhibited correspondence and documentation I have not been persuaded that the plaintiff was in the period from January 2005 to date guilty of inordinate and inexcusable delay and moreover it has not been established that the defendant has suffered additional prejudice as a result of the passage of time brought about by the conclusion of pre trial preparations and discovery during that period. Against the passage of time and the defendant's concern about the consequences of delay he did not himself use to their best advantage the mechanisms available to him to press the matter on to trial.

[8] The plaintiffs argued that it would in any event be pointless to strike out the claim because it would still be open to the plaintiffs to bring further proceedings to recover the sum claimed by way of draw back of duty since such a claim would not be barred by limitation. Article 74(2) of the Limitation (Northern Ireland) Order 1989 provides that the Limitation Order does not apply to proceedings for "the recovery of any tax or duty or interest thereon or of any fine or penalty due in connection with any tax or duty." No authority has been cited on the question whether a claim to recover a sum recoverable as cancelled drawback is an action for "recovery of duty". Applying first principles it would appear clear that a drawback claim is a claim to recover a tax leviable on goods unless certain conditions are fulfilled. The plaintiffs' claim is to recover a sum representing what the plaintiffs assert was properly due as a duty and which had been wrongly repaid to a party liable for that duty. Such proceedings I conclude are indeed proceedings brought by the Crown to recover a duty and are thus not subject to limitation. Accordingly if the present proceedings were struck out there would be no bar to the issue of fresh proceedings. In Birkett v. James the House of Lords recognised that it would ordinarily be pointless to dismiss an action for want of prosecution if a new suit could be issued by the plaintiff. It recognised that there might be

exceptional cases where such an order should be made there is however nothing exceptional in the present case and it seems inevitable that if proceedings were struck out the plaintiffs would issue fresh proceedings.

[9] Mr Hanna QC argued that in fact in this case the plaintiff is bound to win its claim since under Regulation 13 the right to recover drawback arises once the Commissioners are satisfied that a contravention of any conditions of the payment of drawback has taken place. He argues that the plaintiff did satisfy themselves that a contravention of conditions had taken place. He relied on the contents of the letter of 23 July 1997 as showing it was so satisfied. There was no challenge to the Commissioners' decision that they were so satisfied and accordingly the statutory basis for recovery was established. If this line of argument is correct then, of course, delay is irrelevant. By the same token if the letter fails to establish that the Commissioners had properly satisfied themselves under Regulation 13 it may be that the statutory precondition to a claim has not been established. Here again delay would be irrelevant. It is, however, unnecessary for the court at this stage to consider or determine those issues suffice it to say that if I had been in doubt as to whether or not to strike out because of the passage of time it might very well have been appropriate to direct the determination of a preliminary issue on Mr Hanna's Regulation 13 point because, if correct, the question of delay prejudicing the trial would not have arisen at all. The point identified by Mr Hanna nevertheless is an important one and depending on the outcome of these issues questions might arise as to where the onus of proof lies (a) in establishing that duty had or had not been paid on the goods in the first place and (b) in establishing whether or not the goods had been exported within 6 months of the making of the claim for drawback. Those are issues however for consideration at a later stage.

[10] The application is dismissed and costs are reserved to the trial judge. The proceedings shall be transferred to the Commercial List.