IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 3195 (Admin)

No. CO/2788/2021

Royal Courts of Justice

Thursday, 4 November 2021

Before:

MR JUSTICE CHAMBERLAIN

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
MARK SIBLEY — Claimant

- and -

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS — Defendant

MR R. MULLAN QC (instructed by Wright Hassall LLP) appeared on behalf of the Claimant.

MR B. ELLIOTT (instructed by HMRC Solicitors Office) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE CHAMBERLAIN:

1 The claimant, Mark Sibley, renews his application for permission to apply for judicial review of a decision of Her Majesty's Revenue and Customs ("HMRC") made on 20 May 2021 to refuse repayment of sums paid pursuant to a settlement agreement entered into between him and HMRC on 3 April 2019 ("the Settlement Agreement"). The claimant had applied for repayment under the Disguised Remuneration Repayment Scheme 2020 ("the Scheme"). Permission was refused on the papers by Sir Ross Cranston, sitting as a High Court judge, on 21 September 2021.

2 Although the claim is framed as a challenge to HMRC's decision on the claimant's application under the Scheme, para.1 of the statement of facts and grounds makes clear that it is, in essence, a challenge to the legality of the Scheme itself. There are two pleaded grounds, though Mr Rory Mullan QC, for the claimant, advanced a third for the first time in oral argument before me. I shall come to that later.

The claimant's claim under the Scheme

3 The claimant was provided with loans from an employee trust in the period 14 April to 27 October 2003, referable to tax years 2001-2003, in the sum of £1,065,000. It is agreed that HMRC did not take relevant procedural steps to impose any tax liability in respect of these loans. As a result of a Supreme Court decision in 2017, it was established that the transactions gave rise to employment income. Schedule 11 to the Finance (No. 2) Act 2017 ("the 2017 Act") amended and supplemented Part 7A of the Income Tax, Earnings and Pensions Act 2003 ("the 2003 Act"). The effect of this was to make the claimant and others in his position liable to income tax and national insurance contributions in respect of the proportion of the loans outstanding as at 5 April 2019. This is known as the "Loan Charge".

4 The effect of the Loan Charge is described in para.5 of the claimant's Statement of Facts and Grounds as follows:

> "The claimant would have been liable to a charge to income tax in respect of the loans unless he voluntarily settled historic, unprotected liabilities relating to the loans or repaid the loans before 5 April 2019."

5 The claimant chose to enter into a settlement agreement on terms which he says were "dictated by HMRC". He indicated his agreement to those terms on 4 March 2019 and signed the agreement on 28 March 2019. It was executed by HMRC on 3 April 2019. In order to pay the sums the subject of the agreement the claimant had to sell a property on which one of the loans was secured. However, the trustees would only permit him to do this if he repaid the loans. This he did on 29 March 2019. The trustees then paid the sums due under the Settlement Agreement to HMRC on 11 April 2019 and loaned the remaining amounts in the employer trust back to the claimant on 17 April 2019.

6 The claimant then made a claim under the Scheme. This was, in due course, refused by HMRC on 20 May 2021 following a review. The grounds for refusal were that the claimant did not satisfy the conditions in para.3.1.27.2 of the Scheme as interpreted in accordance with para.4.4.1 and 4.4.2.

The loan charge

7 The background to the loan charge is summarised by Butcher J in *R (Clamp) v HMRC* [2021] EWHC 2360 (Admin) at [4] to [12]. As noted at [10], it had by 2019 become controversial. This led to the Government commissioning Sir Amyas Morse to carry out an independent review. He recommended that the Loan Charge should not apply to loans

entered into by either individuals or employers before 9 December 2010, that being the point at which legislation made clear what had hitherto been unclear, namely, that the loans were income and, thus, chargeable to income tax.

The primary legislation under which the Scheme was made

8 The recommendations of Sir Amyas Morse were given effect by s.20 of the Finance Act 2020, which provides as follows:

> "Repaying sums paid to HMRC under agreements relating to certain loans etc
>
> (1) The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") must establish a scheme under which they may on an application made to them before 1 October 2021—
>
> > (a) repay the whole or part of a qualifying amount paid or treated as paid to them under a qualifying agreement, or
> >
> > (b) waive the payment of the whole or part of a qualifying amount due to be paid to them under a qualifying agreement.
>
> (2) An agreement is a qualifying agreement if—
>
> > (a) it is an agreement with the Commissioners,
> >
> > (b) it is made on or after 16 March 2016 and before 11 March 2020, and
> >
> > (c) it imposes an obligation on any party to the agreement to pay an amount of income tax that is referable (directly or indirectly) to a qualifying loan or quasi-loan.
>
> (3) An amount paid, treated as paid or due to be paid under a qualifying agreement is a qualifying amount if—
>
> > (a) the amount is referable (directly or indirectly) to a qualifying loan or quasi-loan, and (b) the amount is one that an officer of Revenue and Customs had no power to recover at the time the agreement was made…
>
> 7) A loan or quasi-loan is a qualifying loan or quasi-loan if it is made on or after 6 April 1999 and before 6 April 2016.
>
> (8) In this section—
>
> …"loan" and "quasi-loan" have the meaning they have in Part 1 of Schedule 11 to Finance (No.2) Act 2017 and Schedule 12 to that Act…"

9 Section 21 of the 2020 Act made further provision in relation to the Scheme. It provides as follows in material part:

> "Operation of the scheme

(1) The scheme may make provision—

(a) in relation to all qualifying agreements or specified descriptions of qualifying agreements only, and

(b) in relation to all qualifying amounts or specified descriptions of qualifying amounts only…

(3) The scheme may make provision about the making of applications under the scheme, including—

(a) provision as to who is or is not eligible to apply,

(b) provision as to the conditions that must be met in order to apply,

(c) provision as to the form, manner and content of an application, and

(d) provision as to information or evidence to be provided in support of an application.

(4) The scheme may make provision about the determination of applications under the scheme, including—

(a) provision in accordance with which the Commissioners must determine whether to exercise their discretion to repay or waive the payment of a qualifying amount, and

(b) provision in accordance with which the Commissioners must determine how much of any qualifying amount to repay or waive…

(9) The scheme may make—

(a) different provision for different purposes or cases,

(b) provision generally or for specific cases,

(c) provision subject to exceptions, and

(d) incidental, supplementary, consequential or transitional provision."

10 The Scheme came into force from 22 July 2020. Under it, an applicant who makes a valid application is eligible for repayment of any "voluntary restitution" (see para.7.4). For an amount to be "voluntary restitution" it must satisfy the conditions in para.3.1.27. The claimant summarises these in terms which I accept are correct at para.22 of the Statement of Facts and Grounds: "An amount referable to income or national insurance contributions, referable to a loan made between 6 April 1999 and 5 April 2016 and treated for the purposes of a settlement agreement as an amount which HMRC had no power to recover."

11 Paragraph 4.4.1 provides that: "An amount of income tax or national insurance contributions is 'referable (directly or indirectly) to a loan or quasi-loan' if and only to the extent that it is, at the Commissioners' discretion, charged on or arises on or in respect of an amount of income that is or overlaps with such of the subject of that loan or quasi-loan as was outstanding at the time the settlement agreement was made."

12 Paragraph 4.4.2 provides that: "For these purposes, whether the subject of a loan or quasi loan was outstanding is to be determined in accordance with the provisions of Schedule 11 to the Finance (No. 2) Act 2017 or Schedule 12 to that Act and does not depend on the loan or quasi-loan subsisting at the time the settlement agreement was made.

13 Schedule 11 to the 2017 Act treats a loan as outstanding if the relevant principal amount exceeds the "repayment amount". The repayment amount is limited to (a) the amount of principal that has been repaid before 17 March 2016 and (b) payments in money made by the relevant person on or after 17 March 2016 by way of repayment of principal under the loan. Sums paid in connection with the tax avoidance with a tax avoidance arrangement do not count towards the repayment amount.

14 The claimant and HMRC agree that the effect of these provisions is to introduce into the Scheme a precondition for payment under the Scheme which is not present in the 2020 Act. The precondition is found in the final words of para. 4.4.1 of the Scheme, which require that the subject of the loan or quasi-loan was "outstanding at the time the Settlement Agreement was made". And by para. 4.4.2, the word "outstanding" has the special meaning ascribed to it by Schedule 11 to the 2017 Act.

Ground 1

15 The claimant's ground 1 may be summarised as follows. By excluding qualifying amounts relating to loans which had been repaid at the date on which at settlement agreement was made, HMRC unlawfully frustrated the legislative purpose for which its powers were granted and usurped Parliament's function of deciding whether a subject is to be taxed or not. Reliance is placed on the famous observation by Lord Wilberforce in *Vestey v IRC* [1980] 1 AC 1148 at 1172E-F:

> "A proposition that whether a subject is to be taxed or not or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle."

16 In my judgment, however, it is important to read that statement in context. Lord Wilberforce's very next words were these:

> "It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it but unless it is done so the courts, acting on constitutional principles, not only should not but cannot validate it."

17 The key question in this case is whether Parliament has, or has not, conferred power on HMRC to decide which qualifying amounts will be repaid under the Scheme. In my judgment, the answer to that question is clearly in the affirmative. Section 20(1) provides that the Commissioners *must* establish a scheme under which they *may* repay the whole or part of a qualifying amount paid or treated as paid to them under a qualifying agreement. I accept Mr Elliott's submission that this language makes clear that HMRC is not required to pay every sum which fulfils the statutory definition of qualifying amount.

18 Section 21(1) puts the matter beyond doubt. It provides expressly that the scheme pay make provision in relation to all qualifying agreements or specified descriptions of qualified agreements only, and in relation to all qualifying amounts or specified descriptions of qualifying amounts only. Section 21(3)(b) makes clear that the scheme may make provision as to the conditions that must be met in order to apply. This is distinct from s.21(3)(c), which authorises HMRC to make provision as to the form, manner and content of an application.

19 In my judgment, the terms of s. 21 are flatly inconsistent with the claimant's submission that the scope of HMRC's scheme-making power is limited to dealing with administrative matters such as the form of application. On the contrary, it is plain from language used that Parliament intended HMRC to have a much broader discretion, both as to the substantive conditions under which repayment would be made and as to the procedural and formal requirements for applications under the Scheme. That discretion must, of course, be exercised according to the usual public law principles. Subject to that, however, Parliament provided that it was HMRC which was to decide which qualifying amounts would be repaid and under what conditions.

20 The claimant's argument that paras 4.4.1 and 4.4.2 of the Scheme frustrate the legislative purpose depends ultimately on the proposition that that purpose can be discerned from pre-legislative materials, including the terms of Sir Amyas Morse's report. The argument can be summarised as follows. The purpose of ss. 20 and 21 of the 2020 Act was to give effect to the Morse Report. The Morse Report recommended that voluntary settlements which would not have been entered into but for the Loan Charge should be refunded because the Loan Charge should not be used to leverage taxpayers to pay tax in circumstances where HMRC had failed to raise an assessment or open an inquiry. Paragraphs 4.4.1 and 4.4.2 undermine this purpose and therefore frustrate the purpose of the legislation.

21 In my judgment, this argument is itself constitutionally flawed. Pre-legislative documents, such as reports and White Papers, are admissible to construe legislation which is ambiguous. The 2020 Act is not ambiguous. It expressly confers on HMRC the power to decide which qualifying amounts are to be repaid under the Scheme and under what conditions. There is no relevant ambiguity in the provisions of s.20 and 21 read together. The Morse Report cannot be used to cut down the scope of an unambiguously broad power.

22 The constitutional solecism at the heart of the claimant's case is the same as identified by the House of Lords in *R (Spath Holme) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349. In that case, the House decided that ministerial statements in Hansard were, in general, inadmissible to identify the scope of a statutory power, as distinct from the meaning of ambiguous statutory language. If that is true of ministerial statements made during the passage of the legislation in question, it must be true *a fortiori* of pre-legislative materials such as the Morse Report.

23 In those circumstances, it is not strictly necessary for me to consider HMRC's argument that paras 4.4.1 and 4.4.2 do, in fact, implement the terms of the Morse Review by limiting repayment to those cases where the Settlement Agreement prevented the loan charge from applying.

24 In essence, Mr Elliott submits that in a case where the relevant loan was not outstanding at the date of settlement because the repayment of the loan had already prevented the loan charge from applying. It is not possible to establish an objectively verifiable causal connection between the loan charge and the settlement agreement. This argument seems to me to have considerable force for the reasons given by Sir Ross Cranston in refusing

permission. The requirement that the loan be outstanding introduces a bright line eligibility condition which avoids the need for potentially difficult assessments as to the subjective reasons why the settlement was agreed. It is inherent in any such requirement that some settlements which do not meet the bright line rule will not qualify, even though they were subjectively connected to the Loan Charge.

25 Following the refusal of permission by Sir Ross Cranston, the claimant recast his argument, characterising the condition introduced by the last line of para. 4.4.1 as amounting to a policy framed in absolute terms. It is a well-established public law rule that a policy governing the exercise of a statutory discretion should not be framed in absolute terms that have the effect of barring from consideration a person who falls outside its terms but within the statute itself. This is the rule against fettering, famously stated by the House of Lords in *British Oxygen v Minister of Technology* [1971] AC 610, but the rule applies in cases where Parliament has conferred a discretion but no express power legislatively to limit the circumstances in which it is applied. In such cases, the intention may be inferred that the discretion is to be exercised in the full range of cases permitted by the statute. The adoption of a rigid policy is incompatible with that intention.

26 Here, by contrast, Parliament has, in express terms, conferred a power to legislate for, among other things, the conditions for repayment under the Scheme. In doing so, it has signalled with clarity that the legislator (here HMRC) may cut down the range of cases in which repayment is due. In my judgment, the contrary is not reasonably arguable.

Ground 2

27 The claimant's ground 2 is that the terms of paras 4.4.1 and 4.4.2 involve arbitrary distinctions and the decision to adopt them was therefore irrational. Four in particular are relied upon and these are set out at para. 46 of the claimant's skeleton argument for this hearing.

28 Mr Elliott submits that all of these situations are materially different from the present one because in each of them there is a clear causal connection between the loan charge and the Settlement Agreement. In any event, the difficulty with all these points is that in making a scheme such as this, HMRC was exercising a legislative discretion. The threshold for stigmatising the exercise of such a discretion as irrational is high. In the field of taxation, the maker of the scheme is entitled to favour bright line rules because they make it easier for applicants to understand and apply for payment and easier for HMRC to administer it.

29 In this case, HMRC fixed on a bright line rule for establishing the causal connection between the settlement and the Loan Charge. It could, no doubt, have adopted some other rule. Any bright line rule is likely to give rise to hard cases which would or might have had a different result if a different rule had been adopted. But if it were possible to impugn a provision in secondary legislation on that basis, much secondary legislation in the field of taxation would be liable to challenge.

30 In my judgment, it is not reasonably arguable in this highly technical area that the decision to limit repayment to cases where loans were outstanding at the date of settlement was outside the range of responses rationally open to HMRC. Whether or not HMRC was right to regard such a rule as necessary for a faithful implementation of the recommendations of the Morse Report, it is impossible to impugn HMRC's view that it was as irrational. Nor is it reasonably arguable that the decision to frame "outstanding" by reference to the technical decision to definition in the 2017 Act was irrational. It may be said that if that definition had not been incorporated the Scheme would fail to allow for repayment in some cases

where the Loan Charge applies because loans are outstanding only on the technical definition in the Act. That seems to me a rational basis for adopting the 2017 Act definition.

31 In any event, however, in an area as complex as this, even if a bright line rule leads to some distinctions capable of being regarded as anomalies, it is for HMRC, exercising the legislative discretion conferred on it by Parliament, to balance the need to eliminate such anomalies against the virtues of simplicity and administrative workability.

The (new) third ground of challenge

32 I turn, now, to the third ground which I mentioned at the outset. This ground was not pleaded in the Statement of Facts and Grounds and was not among the bases on which the claim under the Scheme was made. It was not contained in the document filed by the claimant indicating the grounds on which the renewed application for permission to apply for judicial review was to be made and it was not in the skeleton argument prepared for the purposes of this hearing. It was raised for the first time in oral argument by Mr Mullan. The point is this: Mr Mullan says that a sum will be outstanding if a person takes a relevant step in relation to it (see para. 4.1(b) of Schedule 11 to the 2017 Act); a relevant step includes earmarking a sum of money, which is defined by s. 554B of the Income Tax, Earnings and Pensions Act 2003.

33 On 28 March 2019, the trustees indicated to the claimant that they would take instruction from him to pay the tax due under the Settlement Agreement and that, Mr Mullan submits, would amount to an earmarking under the relevant definitions. Since the earmarking took place before 5 April 2019, the sum of money was outstanding for the purposes of the Scheme and therefore, to the extent that the sum was outstanding in that way, the claimant should have qualified under the Scheme.

34 It is clear that ground 3 raises a point quite different from grounds 1 and 2. The effect of this ground, if it were to succeed, would be not that the Scheme itself is unlawful, but that even under the Scheme as it currently is the claimant should have qualified.

35 During the course of the hearing, I drew Mr Mullan's attention to §7.11 of the Administrative Court Judicial Review Guide. That provides guidance on cases where the claimant seeks to amend the claim to add grounds of challenge before the court has considered permission. It makes clear, by reference *inter alia* to CPR 54A PD, paras 11.1 to 11.4, that a formal application is generally required. I would not, in the exercise of my discretion, grant permission for the amendment of the claim to include such a point at this stage. My reasons are these: if such a point were to be made it would be essential for the defendant, HMRC, to have the opportunity to respond to it at the time when the challenge decision was being made. That is particularly so because the argument, as outlined by Mr Mullan orally today, is one which could depend on evidence. That means that if HMRC were to respond to the argument, they would be entitled to call for evidence which may not be before the court.

36 In any event, even if all the evidence were present, there is no good reason why this argument could not have been made earlier and for those reasons I would refuse permission to amend the grounds set in the Statement of Facts and Grounds to include ground 3.

37 For completeness, I should indicate that Mr Elliott responded on his feet to this new ground, having taken instructions. He indicated that HMRC do not accept that the ground has merit in any event. The reason, in brief, is that the sums which Mr Mullan submitted had already been earmarked when they were paid by the main trust into a sub-trust in the name of the particular employee and that a sum could not be earmarked twice. I say nothing about the

merits of the argument, but I mention this only to indicate that the point is one to which Mr Elliott had an answer.

38 For these reasons, I will refuse permission to appeal on both grounds pleaded and refuse permission to amend to plead an additional ground 3.

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