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Kempton v. Special Commissioners and Commissioners of Inland Revenue⁽¹⁾

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Income tax—Penalty—Failure to comply with a notice to deliver documents and to furnish particulars—Whether notice valid—Whether Inspector reasonably held opinion that documents requested might contain information relevant to tax liability of person concerned—Whether requirements of notice unreasonably wide—Whether evidence of tax consultant admissible expert evidence—Taxes Management Act 1970, s 20.

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On 28 June 1990 an Inspector of Taxes issued a notice under s 20(1) Taxes Management Act 1970 to Mrs. K in her capacity as executrix of her late husband to deliver not later than 31 August 1990 documents summarising transactions in any bank or building society account operated by her or her husband for the period 6 April 1985 to 5 April 1989 and to furnish particulars of assets, liabilities and income, relating to the same period. Mrs. K did not comply. The Inspector commenced penalty proceedings in April 1991.

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At the hearing of those proceedings before the Special Commissioners the Inspector gave evidence as to the information on which he had formed his opinion that the documents and particulars contained or might contain information relevant to K's tax liabilities, and as to the information which he had placed before the Commissioner when he sought consent under s 20(7) for the notice to be issued. The evidence related to a jewellery company of which K and S were each 50 per cent. shareholders and their wives were employees, and from which S and K and their wives received equal salary and benefits, to the purchase by Mr. and Mrs. K of a house in Spain in the name of a company in which they owned the shares and to which they provided the necessary capital, and to considerable sums of money received by S from the United States of America which he had not disclosed in his tax returns or satisfactorily explained. Correspondence also referred to the Inspector's concern about benefits in kind in respect of the company concerned in the purchase of the Spanish house. In a letter in August 1988 the Inspector had, however, accepted that he had no specific evidence of irregularities in the affairs of either the jewellery company or K.

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The Special Commissioners held that the notice under s 20(1) was valid because, on the facts known to the Inspector at the time the notice was issued, he could have formed a reasonable opinion that the documents specified contained, or might contain, information relevant to the tax liability of Mrs. K. as executrix and that he might reasonably require the specified particulars as being relevant to any such liability. The Special Commissioners refused to admit a proof of evidence of a tax consultant to the effect that, in his opinion, no reasonable inspector of taxes could have formed a suspicion of tax evasion by K without having carried out a calculation which demonstrated that full disclosure had not been made by K. Mrs. K appealed.

(¹) Reported [1992] STC 823.

Held, in the Chancery Division, dismissing Mrs. K's appeal:—

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(i) while the Special Commissioners had cited a passage from the speech of Lord Lowry in *Regina v. Commissioners of Inland Revenue ex parte T. C. Coombs & Co.*⁽¹⁾ which was couched in language more appropriate to the facts of that case, it was clear from the decision as a whole that the Special Commissioners had looked at all the evidence of what the Inspector knew at the time of the notice and correctly asked whether or not it was reasonable for the Inspector to form the opinion that K might have been receiving income which had not been disclosed to the Revenue and that the particulars and documents sought would or might contain information relevant to K's tax liability: there was sufficient material before the Special Commissioners to entitle them to decide that the Inspector held the reasonable opinion which the statute required him to have and that the Inspector's requirement for the furnishing of particulars was reasonable;

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(ii) the taxpayer had not discharged the burden of proving absence of reasonable opinion or the unreasonableness of the requirement; in particular, there was no evidence that the requirement for documents and particulars was in wider terms than was reasonable in the circumstances of the case, or that the Inspector had failed to take account of the expense of compliance with the notice;

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(iii) the question whether a reasonable Inspector could have formed the opinion which he did was a matter for the decision of the Special Commissioner having regard to the proper construction of s 20, as applied to all the available facts, and on that issue a tax consultant was not qualified to give evidence as an expert; in any event, the Special Commissioners were entitled to exercise their discretion under s 5(3)(a) Civil Evidence Act 1972, to exclude the tax consultant's proof of evidence, even if it was admissible, on grounds of lack of weight.

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NOTES OF FINDINGS AND REASONS

Lodged by the Special Commissioners under the Rules of the Supreme Court, Order 91, Rule 5(5).

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1. By an information dated 12 April 1991, proceedings for a penalty were commenced by Keith Rodney Marshall, one of Her Majesty's Inspectors of Taxes, against Mrs. Eleanor Violet Kempton (as the executrix of J. Kempton deceased).

The information stated that Mrs. Kempton was required by a notice dated 28 June 1990, issued under s 20(1) Taxes Management Act 1970, to deliver to him, the said Keith Rodney Marshall, not later than 31 August 1990, the documents and particulars specified therein. The information further stated that Mrs. Kempton had failed to comply with the notice within the time-limit mentioned or at all and had thereby rendered herself liable to a penalty not exceeding £300 under s 98(1)(a) Taxes Management Act 1970.

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2. The proceedings came before me on 21 June and continued on 1 August and 25 September 1991, Mr. C. J. C. Baron of the Office of the Solicitor of Inland Revenue represented the informant in support of the

⁽¹⁾ 64 TC 124.

A application for a penalty and Mr. Koenigsberger appeared on behalf of Mrs. Kempton.

3. A copy of the notice under s 20(1) referred to above is annexed to this note as exhibit 1⁽¹⁾;

B 4. It was admitted by Mr. Koenigsberger that the notice had been received by Mrs. Kempton and that she had not delivered to Mr. Marshall the documents or the particulars referred to in the notice by 31 August 1990, or, indeed, by the time of the hearing. It was further accepted by Mr. Koenigsberger that Mr. Marshall was duly authorised by the Board of Inland Revenue to act for the purposes of s 20 Taxes Management Act 1970.

C 5. I heard evidence from the following witnesses:

Mr. Boulton, an Inspector of Taxes at the Enquiry Branch of the Inland Revenue in Leeds;

Mr. Habib, a partner in the firm of Messrs. Hazlems Fenton, accountants.

D In addition, a sworn declaration made before a notary in Torremolinos in Spain by Doria Suzana Gomercic, was, with the consent of Mr. Baron, read.

E 6. At the conclusion of the hearing I reserved my decision which I gave in writing on 5 November 1991. In my decision, which is annexed to this note as exhibit 2, I set out my findings of fact, the contentions of the parties and my decision together with my reasons for the decision.

F His Honour Judge Medd, } Commissioner for the Special
OBE., Q.C. } Purposes of the Income Tax
Acts

15-19 Bedford Avenue
London
WC1B 3AS

G 17 February 1992

DECISION

H I had before me on 21 June, 1 August and 25 September 1991, a summons issued to Mrs. Eleanor Violet Kempton (as the executrix of J. Kempton deceased) on the information laid by an inspector of taxes which alleged that by a notice dated 28 June 1990, issued under s 20(1) Taxes Management Act, 1970, she had been required to deliver to the Inspector, not later than 31 August 1990, the documents and particulars that were specified in the notice.
I The information further alleged that Mrs. Kempton had failed to comply with the notice within the time specified and had, therefore, rendered herself liable to a penalty not exceeding £300 under s 98(1) Taxes Management Act 1970.

(1) Not included in the present print.

Mr. Koenigsberger of counsel appeared on behalf of Mrs. Kempton and Mr. Baron of the Office of the Solicitor of Inland Revenue appeared on behalf of the Commissioners of Inland Revenue. A

It was accepted by Mr. Koenigsberger that the notice, under s 20(1) Taxes Management Act 1970, had been issued to Mrs. Kempton as alleged in the summons, and that Mrs. Kempton had not complied with the notice within the period specified in the notice. B

Mr. Koenigsberger indicated, however, that it was his contention that the notice issued by the Inspector was invalid and that, therefore, Mrs. Kempton had a good defence and was not liable to a penalty. In answer to this submission, Mr. Baron asserted that it was not open to Mrs. Kempton to take this point in these penalty proceedings and that the point could only be raised in an application for judicial review. C

In the light of these contentions, the issues that arise are first, is Mrs. Kempton precluded from raising as a defence to these proceedings the fact that, as she alleges, the issue by the Inspector of the notice under s 20(1) was invalid? Or is the only remedy open to her, by which she may challenge the Inspector's action, an application for judicial review? D

If she is not precluded from putting forward that defence, then the question is: is the defence made out? If the defence is not made out, the final question is: what amount of penalty should be imposed?

In order that the opposing arguments may be properly understood, it is necessary that I should first set out the relevant provisions of s 20(1) Taxes Management Act 1970, under which the Inspector purported to be authorised to serve the notice, and various other similar provisions of the Act which have been considered in some of the authorities which bear upon the question I have to decide. E

Those provisions are in these terms: F

“20(1) Subject to this section, an inspector may by notice in writing require a person—

(a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to— G

(i) any tax liability to which the person is or may be subject, or

(ii) to the amount of any such liability, or H

(b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability.

...

(3) Subject to this section, an inspector may, for the purpose of enquiring into the tax liability of any person ('the taxpayer'), by notice in writing require any [other person] to deliver to the inspector ... such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is, or may be, or may have been, subject, or to the amount of any such liability ... I

A (7) Notices under [subs (1) or (3) above] are not to be given by an inspector unless he is authorised by the Board for its purpose and—

(a) a notice is not to be given by him except with the consent of a General or Special Commissioner; and

B (b) the Commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section.

...

C 20(B)(1) Before a notice is given to a person by an inspector under [section 20(1), (3) ... the person must have been given a reasonable opportunity to deliver (or, in the case of section 20(3), to deliver or make available) the documents in question; or to furnish the particulars in question; and the inspector must not apply for consent under [section 20(7) ... until the person has been given that opportunity.]”

D From these provisions it can be seen that the taxpayer or other person, upon whom a notice under s 20(1) or 20(3) is served, is given no right to appear before the Inspector when he decides to issue the notice, or before the Commissioner to whom the Inspector applies for permission to issue the notice. At these two stages in the process, therefore, the person served with the notice has no opportunity to put his case and argue e.g. that the Inspector had, or could have had, no reasonable belief that the documents or particulars requested could have been relevant to the taxpayers’ tax affairs.

E Secondly, it is clear from the provisions that the need for the Inspector to obtain leave from a Commissioner before he may issue a notice is intended to provide a safeguard to the taxpayer or other person on whom a notice is served. As Lord Lowry put it in *Regina v. Inland Revenue Commissioners ex parte T. C. Coombs & Co.* [1991] STC 97, at page 110(1):

F “I agree with Bingham L.J. on the principle. Parliament designated the inspector as the decision-maker and also designated the commissioner as the monitor of the decision.”

G So one has a position in which Parliament has clothed one person, the Inspector, with the authority to take an administrative step, i.e. to issue a notice, and another person, the Commissioner, with the authority to take another administrative step, i.e. to allow or disallow the issue of the notice.

H It is clear from the *Coombs* case that the Inspector’s decision to issue a notice under s 20(3) can be challenged by way of judicial review, and I have no doubt that the same must apply if the notice is issued under s 20(1). The question is, therefore, whether, in addition to being able to challenge the Inspector’s decision by way of judicial review, the taxpayer is entitled alternatively to challenge it by way of a defence to penalty proceedings.

I The answer to this question was not given by the House of Lords in the *Coombs* case but Bingham L.J., in the Court of Appeal in the case of *Regina v. Inland Revenue Commissioners ex parte Taylor (No. 2)*(²) 1990 STC 379 which was a case where a notice was issued to a solicitor under s 20(2) (which gives similar powers to the Board of Inland Revenue as are given to an inspector by s 20(1)), said, at page 384j(³)

(¹) 64 TC 124, at page 169F.

(²) 62 TC 578.

(³) *Ibid*, at page 594D.

“Strictly, however, the taxpayers’ remedy is, in the event of non compliance followed by penalty proceedings, to resist the penalty proceedings and then attack the giving of the notice.”

A similar view was expressed by Brightman L.J. in *Essex and Others v. Commissioners of Inland Revenue and Gougan*⁽¹⁾ 53 TC 720, which was an action for a declaration that certain notices were invalid, when he said, at page 743:⁽²⁾

“I should mention at this stage that ss 98 and 100 of the Taxes Management Act 1970 impose penalties on a person who fails to comply with the requirements of a notice served under s 490 of the other Act. It would therefore have been open to the Plaintiffs to challenge the validity of the notices in any proceedings which might have been brought under ss 98 and 100 of the Taxes Management Act instead of claiming a declaratory judgment, as had been done in the present action.”

Those two *dicta* in the Court of Appeal which were both directed to the situation where notices of a similar nature to the one with which I am concerned were served are, of course, strong persuasive authority for the proposition that a person on whom a notice under s 20(1) is served may raise the question of the validity of the notice as a defence in penalty proceedings brought against him for failure to comply with the notice. However, the question seems to me to have been answered even more authoritatively by the reasoning in the decision of the House of Lords in the case of *Wandsworth London Borough Council v. Winder* [1984] 3 All ER 976. This was a case in a very different field of law, but the question raised by the appeal and answered by the House was of general application and, as it seems to me, applies equally to the facts of this case. In *Winder’s* case a tenant of a council flat under a secure weekly tenancy refused to pay the full rent demanded of him when the council put his contractual rent up purporting to act under statutory powers which entitled them to “... make such reasonable charges for the tenancy ... as they may determine”.

On a claim for possession of the flat on grounds of non-payment of rent the tenant sought to challenge the validity of the council’s action in increasing the rent on the ground that the increase was unreasonable. The council relied on the decision of the House of Lords in *O’Reilly v. Mackman and Others* [1982] 3 All ER 1124 in which Lord Diplock had indicated that, as a general rule, it would be contrary to public policy and an abuse of the process of the Court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities. Basing itself on that decision, the council applied to strike out the tenant’s defence on the ground that it was an abuse of the process of the Court. The correct procedure, it was argued, was to apply for judicial review. It was held that, where a defendant claimed that his existing private law rights had been infringed by a decision of a public authority, Order 53 did not prevent the defendant from challenging the validity of the authority’s decision by way of defence to an action brought against him by the authority.

In the present case Mrs. Kempton seeks to establish that her existing private law rights, i.e. her right to privacy for her documents, have been infringed by the decision of the Inspector to issue the notice, and it seems to

(1) [1980] STC 378.

(2) *Ibid.*, at pages 381/382.

A me that the reasoning in the speech of Lord Fraser in *Winder's* case, with which all the other Law Lords agreed, applies with as much force to it as it did to the facts in Mr. Winder's case. I, therefore, hold that it is open to Mrs. Kempton to challenge the validity of the Inspector's decision to serve a notice on her under s 20(1) by way of defence in these proceedings for a penalty.

B So I turn to the next question I must determine, namely, has she established that the notice served on her was invalid and so made out her defence?

I should first observe that the notice, dated 28 June 1990, requested Mrs. Kempton to furnish particulars and deliver documents to him as set out in a schedule containing 7 items.

C Some of these items required her to furnish particulars and some required her to deliver certain documents, so that the notice was issued under both s 20(1)(a) and (b). I do not need to set out in full the terms of the notice which is lengthy.

D Before I give my reasons for reaching the conclusion to which I have come, I must set out the facts as I find them to be in the light of the evidence that was called by the parties and of the facts that were not in dispute between them.

E Mrs. Kempton is the widow and executrix of Mr. J. Kempton, deceased, who died on 7 May 1989, leaving an estate that was valued at £2.2m.

F During his life he had been a director and a holder of 50 per cent. of the share capital of a company, Slade & Kempton (Jewellery) Ltd. The other director, who also held 50 per cent. of the share capital, was a Mr. Slade. Mr. Kempton and Mr. Slade were each paid the same salary by the company and each received the same benefits from the company. The wives of both Mr. Kempton and Mr. Slade were employed by the company and were paid the same salary. Each of the directors and each of the director's wives had the use of a company car.

G Mr. Boulton, an Inspector at the Enquiry Branch in Leeds learned, some time before 23 June 1988, that Mr. Slade had received sums of money from the USA and that considerable sums of money were going into his account which could not be explained and he formed the view that it might be coming from the company. He also learned that two houses, one of which was worth approximately £120,000 and the other was similar, were bought in Spain by two companies. One of these companies was Ivyester Ltd., all the shares of which were held by Mr. & Mrs. Kempton. Ivyester was enabled to buy the house in Spain with the aid of a loan from Slade & Kempton (Jewellery) Ltd.

H The directors of Ivyester provided money as capital which enabled Ivyester to pay off the loan from Slade & Kempton (Jewellery) Ltd. Ivyester's only asset was the house in Spain.

I Mr. Boulton formed the view that if, as seemed likely, Mr. Slade had received money from the company which had not been disclosed and as it appeared that the remuneration of both directors and their wives were identical, it was also not improbable that Mr. Kempton had received money likewise. He, therefore, decided to investigate the tax affairs of Mr. Slade, Mr. Kempton and the company. On 15 August 1988 he wrote to Mr. Kempton with a view to arranging a meeting with him. In reply to a letter from Mr.

Kempton's accountants asking why he wished to investigate his taxation affairs, Mr. Boulton wrote again on 26 August 1988, a letter in which he said:

"As you know it has been established that there have been substantial omissions from Mr. Slade's tax returns forms. I have a duty to satisfy myself that the disclosure he has now made is complete in every respect. This duty extends not only to Mr Slade's personal taxation affairs but also to the affairs of any company in whose financial or business matters he is actively involved.

I will therefore be examining the taxation affairs of Slade & Kempton (Jewellery) Ltd. and before doing so would like to see both the directors of that company to explain the position to them and to explain the policy of the Board of Inland Revenue as stated in my letter of 15 August, 1988.

I can say that at the moment I have no specific evidence of irregularities in the affairs of either Slade & Kempton (Jewellery) Ltd. or, indeed, Mr. J. Kempton, but for the reasons I have explained above I will be looking closely at the company's affairs and it is important therefore that I see Mr. Kempton as well as Mr. Slade."

Thereafter, until Mr. Kempton died in May 1989, Mr. Boulton made, as the agreed correspondence shows, several efforts to interview Mr. Kempton without success. Attempts to interview Mrs. Kempton had the same result and, on 1 March 1990, he wrote to her asking her for the information in respect of which he was in due course to issue the notice under s (20)(1). Having not received the documents or the particulars for which he asked, he repeated his request in a letter dated 30 March 1990, making clear in that letter that, if he got no response, he would take action under s 20(1) and that, as he was bound by s 20(B)(1) to give her a reasonable opportunity to deliver the documents referred to in the notice, he asked her once again to comply with his request. As she did not do so, he applied to a General Commissioner for permission to issue a notice under s 20(1) and after a hearing lasting some 40 minutes, the General Commissioner gave him leave and the notice was issued on 28 June 1990.

A study of the returns made by Mr. & Mrs. Kempton and of the accounts of the company showed that, during the 5 year period from 1 July 1982 to 30 June 1987, the Kemptons received between them as remuneration or dividends a total of some £506,000 and this fact, it was accepted by Mr. Baron, was known to Mr. Boulton when he decided to issue the notice under s 20(1). The facts which I have set out above I find from the evidence given by Mr. Boulton and from the agreed correspondence. In addition Mr. Habib, a partner in the firm of Hazlems Fenton, gave evidence which I accept. It was to the following effect. His firm had acted for Mr. Kempton for more than 10 years. Mr. Kempton had always submitted details of his income to the firm who then prepared his tax returns. He seemed to Mr. Habib to be a very meticulous man who kept clear records. He, it was, who oversaw the administration of the company's books. Mr. Habib also said that he had made an approximate calculation of the cost that would be incurred by Mrs. Kempton in complying with the notice. He assessed it as in the order of £20,000.

I should mention one other piece of evidence that was given in the form of a sworn declaration before a notary in Torremolinos in Spain by Doria Suzana Gomercic who is employed in the estate agency business. Put shortly, she swore that, until April 1988, the house owned by Ivyester was not marketable and no one would have paid any kind of rent to live in it. This decla-

A ration was sworn on 4 June 1990, and it was not suggested that Mr. Boulton was aware of this fact at the time that he issued the notice.

B Mr. Koenigsberger submitted that I should hold that the notice issued by Mr. Boulton under s 20(1) was invalid on the grounds that the evidence showed that Mr. Boulton could not, when he issued the notice, have reasonably been of the opinion that the documents and particulars for which he asked did, or might contain information relevant to any tax liability to which Mrs. Kempton, as her husband's executrix, might be subject or to the amount of that liability.

C Mr. Koenigsberger put his case in this way. It was accepted, he said, in the letter to the Kemptons' accountants dated 26 August 1988, that, at that stage he had no specific evidence of irregularities in the tax affairs of either Mr. Kempton or the company. Furthermore, it was clear from the company's accounts and from the returns by Mr. Kempton that, over the years during which the house in Spain was bought, the Kemptons received some £500,000 income from the company and would have apparently had ample funds with which to pay for the house and there was, therefore, no ground for suspecting that the house in Spain had been bought with funds from income which had not been disclosed to the Inland Revenue. Nor could Mr. Kempton have received any income from the house during the relevant period from the house in Spain on account of its unlettable condition. Alternatively, he asserted that, in accordance with the Taxpayer's Charter, Mr. Boulton should have taken into consideration the likely cost of compliance with the order to which Mrs. Kempton would be subjected if she complied with it, and in the circumstances of this case no reasonable inspector could have taken the decision to issue the notice.

F In the case of *Coombs* it was suggested by counsel for the Crown that the recipient of a notice had the same task whether he was seeking judicial review or challenging on the same grounds the validity of the notice by way of defence to penalty proceedings, but their lordships expressly left open the decision on whether that suggestion was correct (see Lord MacKay of Clashfern L.C. at [1991] STC 97(1), page 99c/d and Lord Lowry, page 111h).

G However, Mr. Koenigsberger put forward only the two points that I have set out above and I propose to deal with them in the light of the guidance that can be obtained from the decision of the House of Lords in *Coombs* as to how such contentions may be approached.

H Lord Lowry, at page 109f/g, shed light on Mr. Koenigsberger's first submission that the Inspector could not reasonably have held the opinion that the statute requires him to hold. Of the parties in that case who were attacking the Inspector's decision, he said⁽²⁾:

I "What they need to do is prove facts which are inconsistent (or irreconcilable) with the inspector's having had a reasonable (not necessarily a correct) opinion when he gave the second notice that the applicants had documents relating to the six companies which contained or *might contain* information relevant to any tax liability to which the taxpayer was or *might be* or *might have been* subject."

I ask myself first, therefore, are the facts which have been relied upon by Mr. Koenigsberger, namely, the fact that in August 1988 Mr. Boulton had no

(1) 64 TC 124.

(2) *Ibid*, at page 168F/G.

specific evidence of irregularity in Mr. Kempton's tax affairs and the fact that, at the relevant times, Mr. & Mrs. Kempton were receiving substantial sums by way of remuneration and dividends and that the house in Spain was not in a state in which it could produce any income (which was not shown to have been in the Inspector's knowledge) are irreconcilable with, or inconsistent with, the Inspector reasonably holding the opinion that the documents requested might contain information relevant to any tax liability to which the late Mr. Kempton was or might have been subject, or to the amount thereof, or that the particulars requested would or might be relevant to any such liability, or to the amount of it?

It seems to me that those facts known to the Inspector at the time that he issued the notice are not irreconcilable with him holding, reasonably, the opinion that he is required by the statute to hold.

What the Inspector knew was that the two directors of the company were treated in exactly the same way by the company. They had the same salaries, the same benefits in kind, their wives were both employed by the company at the same salary and both had company cars. The director, Mr. Slade, was known to have received income that had not been explained satisfactorily and that Mr. Kempton had acquired a home in Spain which was, so far as he was aware, capable of producing income and no such income had been disclosed. It does not seem to me unreasonable for him, in those circumstances, to have formed the opinion that Mr. Kempton might have been receiving income that had not been disclosed to the Revenue and that, if he received the particulars and the documents he asked for, they would be relevant to, or contain, or might contain, information relevant to Mr. Kempton's tax liability. They might establish that Mr. Boulton's suspicions were unfounded, or they might confirm them. In either event, they would be relevant to Mr. Kempton's tax liabilities.

In reaching this conclusion I have not mentioned the hearing before the single Commissioner who gave permission to the Inspector to issue the notice. As was made clear in the case of *Coombs* and as I have said above, the Commissioner to whom the Inspector must apply under s 20(7) for permission to issue the notice is the person who Parliament had decreed should monitor the issue of notices. He is required by s 20(7)(b) to give consent only on being satisfied that, in all the circumstances, the Inspector is justified in proceeding under the section. The Court also pointed out that the presumption of regularity is strong in relation to the function of the independent Commissioners (see *per* Lord Lowry [1991] STC 97, at page 108 e/h). I do not need to rely upon this presumption in reaching my decision, but I do take comfort from the fact that another Commissioner has, albeit at a hearing *ex parte*, reached the same conclusion.

Mr. Koenigsberger made, as I have said, one further submission. He reminded me that, in the Taxpayer's Charter, the Commissioners of Inland Revenue undertook that they would bear in mind the costs of compliance with any action they required a taxpayer to take. He then submitted that, in the light of Mr. Habib's evidence that the likely cost to Mrs. Kempton of complying with the notice would be in the order of £20,000, it was quite unreasonable of the Inspector to have made such a request in the circumstances of this case. It would be known to the Inspector, who had considerable experience in the Enquiry Branch, that to require a taxpayer to produce capital statements of the sort required as a result of the requests for particulars would inevitably involve the taxpayer in great expense, and, in the circumstances of this case, no reasonable inspector who had in mind the

A Taxpayer's Charter would have issued the notice. It does not seem to me that such an argument can hope to succeed in the absence of evidence of the means of the taxpayer in question. There was no evidence before me that Mrs. Kempton was in straitened circumstances or that the costs of complying with the order would have caused her serious hardship.

B I, therefore, hold that Mrs. Kempton's defence to these penalty proceedings fails and that the penalty must stand.

C That leaves the question of how much the penalty should be. It is clear from the correspondence put before me that Mrs. Kempton had been in bad health and I do not regard this case as an example of the worst type of refusal to comply with a notice and I think that a penalty of £150 is appropriate and I declare that Mrs. Kempton has failed to comply with the notice dated 28 June 1990.

D His Honour Judge Medd, } Commissioner for the Special
O.B.E., Q.C. } Purposes of the Income Tax
Acts

15-19 Bedford Avenue
London
WC1B 3AS

E 5 November 1991

F The case was heard in the Chancery Division before Mummery J. on 9 October 1992 when judgment was reserved. On 16 October 1992 judgment was given in favour of the Crown, with costs.

Leolin Price Q.C. and *C. W. Koenigsberger* for the taxpayer.

G *Launcelot Henderson* for the Crown.

The following case was cited in argument in addition to the case referred to in the judgment :—*Khan v. Edwards* 53 TC 597.

H **Mummery J.**:—Under s 20(1) of the Taxes Management Act 1970, as amended, wide powers are conferred on an inspector of taxes to require by notice in writing the delivery of documents which, in the Inspector's reasonable opinion, contain, or may contain, information relevant to tax liability to which the person on whom the notice is served is or may be subject. The powers extend to requiring that person to furnish to the Inspector such particulars as the Inspector may reasonably require as being relevant to, or to the amount of, any such liability. (See s 20(1)(b).) If the person fails to comply with a notice requiring the delivery of documents or the furnishing of particulars, a penalty not exceeding £300 may be imposed, with daily penalties of £60 for each day on which the failure continues after the penalty is imposed. (See s 98(1).)

I

This is an appeal against a penalty of £150 imposed by the Special Commissioner, His Honour Judge Medd, O.B.E., Q.C., on Mrs. Eleanor Kempton in her capacity as executrix of her late husband, Mr. John Kempton, who died on 7 May 1989 leaving an estate valued at about £2.2 m. The penalty was awarded on 5 November 1991 for failure to comply with a notice dated 28 June 1990 by which the Inspector required Mrs. Kempton as executrix to deliver, not later than 31 August 1990, specified documents summarising transactions in any bank or building society account operated by her or her husband in whatever names for the period 6 April 1985 to 5 April 1989. The notice also required the furnishing of particulars of assets, liabilities and income, showing the amounts from each source individually, and of bank and building society accounts operated by them over the same period.

Mrs. Kempton did not comply with any of the requirements of the notice. The Inspector, therefore, commenced proceedings for a penalty on 12 April 1991. At the hearing of the proceedings which spread over three days (21 June, 1 August and 25 September 1991) the Special Commissioner heard evidence from the Inspector, Mr. Boulton, of the Enquiry Branch of the Inland Revenue in Leeds, and Mr. Habib, a partner in a firm of accountants, Messrs. Hazlems Fenton, who had acted for Mr. Kempton and who now acts for Mrs. Kempton. There were various documents before the Special Commissioner, including bundles of correspondence and a sworn declaration made before a notary in Torremolinos.

The Special Commissioner identified the issues before him as follows: first, whether Mrs. Kempton was precluded from raising, in defence of penalty proceedings, the contention that the issue of the notice by the Inspector under s 20(1) was invalid. The Inspector contended that the only remedy open to her by which she might challenge the Inspector's action was an application for judicial review. After a full review of the authorities and arguments, the Special Commissioner concluded that Mrs. Kempton was entitled by way of defence to challenge the validity of the Inspector's decision to serve the notice. That point was not pursued on this appeal.

The second issue was whether the notice served was valid. The Special Commissioner, after reviewing all the evidence, stated his findings of fact and applied the provisions of s 20, as interpreted by the House of Lords in *Regina v. Inland Revenue Commissioners ex parte T. C. Coombs & Co.*⁽¹⁾[1991] STC 97. He came to the conclusion that, on the facts known to the Inspector at the time the notice was issued, he could have formed a reasonable opinion that the documents specified contained, or might contain, information relevant to the tax liability of Mrs. Kempton as executrix and that he might reasonably require the specified particulars as being relevant to any such liability. Mrs. Kempton appeals against that ruling on validity.

The third matter related to the amount of the penalty fixed by the Special Commissioner at £150. There is no appeal against the amount of the penalty if this Court upholds the decision of the Special Commissioner on validity.

Before I deal separately with each of the three grounds of appeal raised in the originating motion of 2 December 1991, I should make the following

(1) 64 TC 124.

A observations relevant to the legal background of the challenge to the validity of the notice.

(1) An appeal against the determination of a penalty can be brought against the decision of a Special Commissioner only on a question of law. (See s 100C(4)(a) of the Taxes Management Act 1970.) If it appears that no penalty has been incurred, the Court may set aside the determination of the Special Commissioner.

(2) There is a strong presumption of regularity regarding the notice which the Inspector was authorised to issue by the Board for its purposes and which was issued also with the consent of a General Commissioner on being satisfied that, in all the circumstances, the Inspector was justified in proceeding under this section. The Board's authorisation and the consent of a General or Special Commissioner to the giving of a notice under s 20(1) are required by, and were granted under, s 20(7).

I should refer to part of the speech of Lord Lowry in *Regina v. Inland Revenue Commissioners ex parte T. C. Coombs & Co*(¹), in which there was an unsuccessful challenge by way of judicial review to a similar form of notice served under s 20(3) on a person other than a taxpayer. At page 108F-H, Lord Lowry said(²):

“The commissioner must be taken to be satisfied that the inspector was justified in proceeding under s 20 and hence that the inspector held, and reasonably held, the opinion required by s 20(3). The presumption that that opinion was reasonable and that the commissioner was right to be satisfied can be displaced only by evidence showing that at the time of giving the second notice the inspector could not reasonably have held that opinion. In order to decide whether the applicants succeed in this task, the court must consider all the evidence on both sides and all the available facts, one of which is that the commissioner, having heard the application, consented to the giving of the notice.”

(3) For reasons also set out by Lord Lowry in his speech in *ex parte Coombs*, at page 109H-J, a taxpayer challenging the validity of such a notice is in a difficult position, even though the power exercised is regarded as “intrusive and potentially oppressive, but presumably necessary”. The exercise of the power is subject to the independent and effective supervision of the Commissioner to whom the Inspector owes a duty to make full disclosure of all facts within his knowledge which could properly influence the Commissioner against the giving of consent to the issue of the notice. The person mounting a challenge to the validity of the notice has to prove a negative, namely, the absence of a reasonable opinion held on behalf of the Inspector and formed on the basis of evidence as to which, on account of taxpayer confidentiality and the protection of sources, an inspector may legitimately maintain silence. Further, the opinion of the Inspector that documents contain, or may contain, relevant information and a requirement to furnish particulars relevant to a liability to which the person is or may be subject, may be reasonable in all the circumstances, even if it is an incorrect opinion. The issue is whether the Inspector's opinion and the requirements made by him were reasonable in the circumstances.

(¹) 64 TC 124.

(²) *Ibid*, at page 167D/E.

On the hearing of the penalty proceedings the Special Commissioner had the advantage, which the Court did not have in the *Coombs* case, of evidence from the Inspector as to the information on which he formed his opinion and as to the information which he placed before the Commissioner when he sought consent under s 20(7) for the notice to be issued.

The Special Commissioner concluded that the Inspector had reasonably formed the opinion which he was required by the statute to hold. Mrs. Kempton appeals from that decision on three grounds, each of which I shall deal with in turn.

The first ground of appeal is that the Special Commissioner misdirected himself by asking himself whether the facts relied on by Mrs. Kempton were irreconcilable or inconsistent with the Inspector reasonably holding the opinion that the documents requested might contain information relevant to any tax liability to which Mr. Kempton was or might have been subject. In his decision at page 10, the Special Commissioner referred to the first submission on behalf of Mrs. Kempton that the Inspector could not reasonably have held the opinion that the statute required him to hold. He cited a passage from the speech of Lord Lowry in *ex parte Coombs*, at page 109F-G, where he said of the parties who were attacking the Inspector's decision⁽¹⁾:

“What they need to do is prove facts which are inconsistent (or irreconcilable) with the inspector's having had a reasonable (not necessarily a correct) opinion when he gave the second notice that the applicants had documents relating to the six companies which contained *or might contain* information relevant to any tax liability to which the taxpayer was *or might be* or *might have been* subject.”

The Special Commissioner referred to facts relied on by Mrs. Kempton. He referred to facts known to the Inspector at the time he issued the notice. He concluded that these facts were not inconsistent or irreconcilable with his reasonably holding the opinion that he was required by the statute to hold. (See page 11D of his decision⁽²⁾.) He stated, at page 11F, that it did not seem unreasonable for the Inspector, in the circumstances, to have formed the opinion that, if he received the particulars and documents he asked for, they would or might contain information relevant to Mr. Kempton's tax liability.

It was submitted on behalf of Mrs. Kempton that the Special Commissioner had misdirected himself in relying on the *dictum* of Lord Lowry in *ex parte Coombs*. In that case there had been no disclosure of the grounds of the decision to issue the notice. By way of contrast, in this case the Inspector had given evidence to the Special Commissioner of his reasons for issuing the notice. It was argued that the Special Commissioner should, therefore, have asked himself a different question, namely, whether the disclosed reasons were sufficient to justify the opinion required to be held by the Inspector under s 20(1). It was submitted that, on that approach, the Special Commissioner ought to have decided that the notice was invalid as having been issued when there was no reasonable suspicion of tax evasion by Mr. Kempton and there were no grounds for forming the opinion that the information and particulars sought by the notice might be relevant to a tax liability to which Mr. Kempton was or might be subject.

⁽¹⁾ 64 TC 124, at page 168F.

⁽²⁾ Page 258C *ante*.

A In support of those submissions Mr. Price emphasised the fact that it had been expressly accepted by Mr. Boulton in a letter to Mr. Kempton's accountants dated 26 August 1988 that he had "no specific evidence of irregularities in the affairs of either Slade & Kempton (Jewellery) Ltd"—a company in which Mr. Kempton was equal shareholder and director with a Mr. Slade—"or, indeed, Mr. J. Kempton. . .". The only grounds put forward for serving a notice on Mrs. Kempton related to acts or omissions by Mr. Slade. B It was argued that it was Mr. Slade who was the true target of the Revenue's investigations. To rely on such grounds for suggesting that Mr. Kempton was involved in the same irregularities as Mr. Slade was "guilt by association". Mr. Price suggested that the Revenue had acted on fanciful, eccentric and unreasonable suspicion. He criticised the Revenue for adopting an impermissible scatter-gun approach to the use of an intrusive and oppressive power. C He said that the power had been exercised without being based on any reasonable opinion and that the request made could not constitute a reasonable requirement for particulars to be furnished by Mrs. Kempton. He submitted that, for those reasons, the decision of the Special Commissioner was not correct in law.

D In my judgment, Mr. Price's criticisms of the Special Commissioner's decision are not justified. First, on the alleged misdirection in law, it is true that the Special Commissioner cited a passage from the speech of Lord Lowry which was couched in language perhaps more appropriate to the facts of that case, where the Revenue had remained silent, than to the facts of this case where the Inspector had volunteered evidence about the grounds for his opinion and his decision to issue the notice. However, it is clear from reading the Special Commissioner's decision as a whole that he looked at all the evidence of what the Inspector knew at the time of the notice and correctly asked himself whether or not it was reasonable for the Inspector to form the opinion that Mr. Kempton might have been receiving income which had not been disclosed to the Revenue and that, if he received the particulars and documents that he asked for, they would or might contain information relevant to Mr. Kempton's tax liability. The Special Commissioner commented, at page 11G, that⁽¹⁾

G "They might establish that Mr. Boulton's suspicions were unfounded, or they might confirm them. In either event, they would be relevant to Mr. Kempton's tax liabilities."

H In my judgment, the Special Commissioner's conclusion that it was reasonable of the Inspector to form the opinion he did is a conclusion which the Special Commissioner was entitled to reach on the facts found by him about the Inspector's state of knowledge at the time of the issue of the notice and in the light of all the evidence about the circumstances in which the notice was issued. The facts known to the Inspector at the relevant time were that Mr. Slade and Mr. Kempton were close business associates and were both directors of the company, Slade & Kempton (Jewellery) Ltd. Each had a 50 per cent. shareholding in that company and received the same salary and benefits from their interest in the company. Both Mrs. Slade and Mrs. Kempton were employed by the company and each was paid the same salary. Each of the directors and each of their wives had use of a company car. Both the Slades and Kemptons were involved in the purchase of house properties in Spain

(1) Page 258E *ante*.

using the vehicles of limited companies. In the case of the Kemptons, the purchase was in the name of a company called Ivyester Ltd. All the shares in that company were owned by Mr. and Mrs. Kempton. The property purchased by the company was the only asset of that company. The company purchased the property, estimated to be worth about £120,000, with the help of a loan from Slade & Kempton (Jewellery) Ltd. That loan was repaid in due course by Mr. and Mrs. Kempton as directors of Ivyester Ltd. They provided money as capital to enable Ivyester to pay off the loan. A B

It appears from the company's accounts and Mr. Kempton's tax returns that, over the years during which the house in Spain was purchased, Mr. and Mrs. Kempton had received income totalling over £500,000 from the jewellery company. It was argued that they had ample income resources, which had been declared for tax, to enable them to provide money for the purchase of the property. I should add it was agreed that the Special Commissioner was mistaken in thinking that the Inspector was of the view, at the time of the serving of the notice, that the house in Spain was capable of producing income which had not been disclosed by Mr. and Mrs. Kempton. C D

It was found by the Special Commissioner that it had come to the Inspector's knowledge that Mr. Slade had received into his account considerable sums of money from the United States of America which he had not disclosed in his tax returns or satisfactorily explained. E

The Inspector entered into correspondence with Mr. Kempton and his accountants. A bundle of correspondence dating from August 1988 to April 1991 was before the Special Commissioner. It has been shown to me. It appears from that correspondence that *inter alia* the Inspector was concerned about benefits in kind in respect of Ivyester Ltd., as part of the examination of Mr. Kempton's tax affairs. Further, it appears from the correspondence that the Inspector was unsuccessful in his attempts, both by telephone and correspondence, to set up a meeting with the two directors at the accountants' offices to discuss the taxation affairs of the jewellery company and also Mr. Kempton's personal taxation affairs. The Inspector's letters refer to the fact that there were substantial omissions from Mr. Slade's tax returns. F G

The Inspector was informed in a letter dated 15 March 1989 that, as the Inspector had stated he had no specific evidence of irregularities in the affairs of either the company or Mr. Kempton, Mr. Kempton, as an individual and as a director of Slade & Kempton (Jewellery) Ltd., was not agreeable to either the company or himself being subject to the Revenue's enquiry. Attempts to arrange a meeting with Mrs. Kempton after her husband's death were unsuccessful for similar reasons. H

On 11 January 1990 the Inspector sent to Mrs. Kempton a list of questions addressed to Mrs. Kempton personally and to her as executrix of Mr. Kempton. No reply was given to any of those questions. In those circumstances, it was not disputed that, prior to the issue of the notice, the requirements of s 20B(1) had been satisfied. Section 20B(1) provides that, before a notice is given to a person by an inspector under s 20(1), that person must be given a reasonable opportunity to deliver the documents or furnish the particulars in question and the Inspector must not apply for consent under s 20(7) until the person has been given that opportunity. I

A I should mention the further exchange of letters which took place in August 1991 after the Inspector had given his evidence. I understand that those letters were before the Special Commissioner at the resumed hearing of the penalty proceedings. By agreement those letters were shown to me. It appears from them that the Inspector accepted he had not made any calculation of figures to arrive at the opinion he had formed that the acquisition of the flat in Spain could not be explained by the information in Mr. Kempton's tax returns and that he was not satisfied that full disclosure had been made by Mr. Kempton of his income. There is no mention in the Special Commissioner's decision of the fact that no such calculation had been made by the Inspector.

B
C I have come to the conclusion that, taking into consideration all the facts set out above, there was sufficient material before the Special Commissioner to entitle him to decide that the Inspector held the reasonable opinion which the statute required him to have and that the Inspector's requirement for the furnishing of particulars was reasonable as the statute required it to be.

D
E I now turn to the second ground which is that the requirements of the notice were unreasonably wide and compliance with the notice would cost Mrs. Kempton in the region of £20,000. The Special Commissioner accepted the evidence of Mrs. Kempton's accountant, Mr. Habib, that the likely cost to Mrs. Kempton of complying with the notice would be of the order of £20,000. The Special Commissioner rejected the submission that the Inspector had sent the request for particulars in the knowledge that it would inevitably involve the taxpayer in great expense and that, in those circumstances, no reasonable inspector, who had in mind the provisions of the Taxpayer's Charter, would have issued a notice in those terms.

F
G The Special Commissioner said that such an argument could not hope to succeed in the absence of evidence of the means of the taxpayer in question. There was no evidence that Mrs. Kempton was in straitened circumstances or that the costs of compliance with the notice would have caused her serious hardship. I would not go as far as the Special Commissioner in saying that such an argument could not succeed in the absence of evidence of the means of the taxpayer. According to the Taxpayer's Charter, the Inland Revenue will have regard to the compliance costs of different taxpayers, including the particular circumstances of small businesses. In applying their procedures they will recognise the need to keep to the minimum necessary the costs incurred in complying with the Revenue's requirements, subject to the Revenue's duty to collect tax due from the taxpayer efficiently and economically.

H
I The power to require the furnishing of specified particulars may put the taxpayer to substantially greater trouble and expense than the power to require the taxpayer to deliver specified documents in the taxpayer's possession or power. In some cases, having regard to all the circumstances, including the amounts involved and the likely cost of compliance, it may not be reasonable for an inspector to require at one sweep extensive particulars going back over a number of years. It may be more reasonable for him to adopt a gradual, step-by-step approach seeking documents first and then considering in the light of those whether it is appropriate to require the furnishing of particulars. In this case Mr. Price emphasised the fact that no evidence

had been given by the Inspector to the Special Commissioner that he had taken into account the likely cost of compliance. Mr. Price submitted that he should have taken into account considerations of the costs of compliance. The costs in this case were onerous and, in the absence of evidence that the Inspector had taken those costs into account, the decision to issue the notice was invalid. Mr. Price emphasised rightly that cost considerations lie at the heart of reasonable administration.

In my judgment, that submission fails to take account of the presumption of regularity which applies to the decision to issue the notice and the consent given by the General Commissioner to the issue of the notice. The burden is on the taxpayer to prove the absence of a reasonable opinion and the unreasonableness of the requirement. There was no evidence from the taxpayer that the requirement for documents and particulars was in wider terms than was reasonable in the circumstances of the case. There was no evidence before the Special Commissioner that the Inspector had failed to take any account of the expense of compliance with the notice. There was no evidence to support an inference that the Inspector failed to take into account the likely costs of compliance with the notice.

I turn finally to the third ground. At the adjourned hearing of the penalty proceedings by the Special Commissioner on 25 September 1991, counsel for Mrs. Kempton sought to introduce expert evidence from a Mr. Ian Drummond. I am told that he is a tax consultant for Price Waterhouse and that he used to be deputy head of the Revenue's Enquiry Branch. A copy of his proof of evidence was sent to the Solicitor of Inland Revenue a few days before the hearing (on 23 September). I have not been shown a proof of that evidence, but I have been told by counsel that the effect of the proposed evidence was that, in the opinion of Mr. Drummond, no reasonable inspector of taxes could have formed a suspicion of tax evasion by Mr. Kempton without having carried out a calculation which demonstrated that full disclosure had not been made by him and no such calculation had been carried out. The proof went on to show that, on the basis of Mr. Drummond's own examination and a calculation in the matter, no reasonable inspector of taxes could have formed such a suspicion about Mr. Kempton.

The Special Commissioner read the proof of evidence and refused to admit it. He gave no formal judgment containing his reasons for rejecting it. Mr. Price submitted that it was wrong for the Special Commissioner to exclude the evidence. He said the evidence was admissible under s 3 of the Civil Evidence Act 1972. The Special Commissioner should have allowed it to be given so that he could decide what, if any, weight he should attach to it.

Section 3 of the 1972 Act provides:

"(1) Subject to any rules of court made in pursuance of Part I of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence."

Subsection (3) provides that, in that section, "relevant matter" includes an issue in the proceedings in question.

It was argued that it was an issue in the proceedings before the Special Commissioner whether a reasonable inspector could have formed a suspicion

A of tax evasion by Mr. Kempton and it was a relevant matter on which the opinion of Mr. Drummond was admissible as an expert. It was submitted that the Special Commissioner had wrongly excluded admissible evidence.

B In my judgment, the Special Commissioner was right. The evidence was not admissible. The question whether a reasonable inspector could have formed the opinion which he did was a matter for the decision of the Special Commissioner having regard to the proper construction of s 20, as applied to all the available facts. On that issue—an issue of mixed fact and law and, therefore, an issue for the Special Commissioner—Mr. Drummond was not qualified to give evidence as an expert. In any event, I would add that the Special Commissioner was entitled to exercise his discretion to exclude that evidence, even if it was admissible, on grounds of lack of weight. Section C 5(3)(a) of the Civil Evidence Act 1972 gives the Special Commissioner that power.

D It follows from the reasons which I have set out above that I do not accept any of the three grounds of appeal. I, therefore, dismiss the appeal.

Appeal dismissed, with costs.

[Solicitors—Messrs. Chethams; Solicitor of Inland Revenue.]
