

THE HIGH COURT

THE STATE (CALCUL INTERNATIONAL LIMITED AND SOLATREX
INTERNATIONAL LIMITED)

AND

THE APPEAL COMMISSIONERS AND THE REVENUE COMMISSIONERS

Judgment by Mr. Justice Barron delivered the 18th day of December
1986

In October, 1981 the first named Prosecutors ("Calcul") imported a consignment of calculators into the State. These were returned by the Company to the Revenue Commissioners as electronic calculators and duty was paid on them at the rate of 13.5%. Calcul subsequently claimed a refund of duty on the ground that the correct rate was 5.2%. Correspondence followed between the Company and the Revenue Commissioners and the claim for a refund was withdrawn. The Revenue Commissioners then ascertained that previous consignments of identical items had been entered by Calcul at a duty rate of 5.2%. An inspection of Calcul's records was then undertaken as a result of which it is alleged that many irregularities were discovered. This led to further investigations of the affairs of both Calcul and the second named Prosecutor ("Solatrex") as a result of which the Revenue Commissioners became satisfied that both Companies had been involved in a scheme to defraud the Revenue both in relation to the payment of import duties and in the payment of tax. In the course of these investigations, the Revenue Commissioners also became satisfied that large sums of money were being transferred

illegally by the two Companies to Hong Kong.

On the 5th October, 1983 the Revenue Commissioners instituted proceedings against both Companies and against four of their Directors. The Indorsement of Claim was as follows:

"The Plaintiffs' claim is brought in their capacity as Revenue Commissioners for:

1. As against the first and second named Defendants the sum of £238,381.94 in respect of underpaid corporation tax and income tax together with the sum of £55,000 in respect of underpayment of duty and value added tax making in all the sum of £293,381.94.
2. As against all the Defendants damages in the sum of £293,381.94 for fraud and/or conspiracy.
3. As against all the Defendants an injunction restraining the Defendants and each of them their servants or agent or any person acting in concert with them or any person with notice of the making of such an Order from disposing of, parting with possession of, mortgaging, charging or otherwise dealing in all or any property which they own or in respect of which they have illegal or beneficial interest or disposing power whether situate within or without the jurisdiction and of whatever nature and kind so as to reduce the asset possession of the Defendants to a sum of less than £293,381.94
4. An Order directing each of the Defendants to forthwith make discovery within such time as to the Court may appear proper of all assets which they own or in respect of which they have a legal or beneficial interest or a disposing power whether situate within or without the

jurisdiction.

5. Further other and alternative relief.
6. Costs."

On the same date the Revenue Commissioners applied ex parte for and obtained a mareva injunction restraining the Defendants from disposing of their assets so as to reduce them below the sum of £293,381.94. This injunction was obtained on affidavits of William David Murphy and Denis O'Connell. Paragraph 10 of the former affidavit which deposed to the amount which the Plaintiffs alleged to be owed by the Defendants was as follows:

"I say and believe that the Plaintiffs have a good cause of action against the Defendants in relation to underpayment of both tax and import duties in a total sum of £293,381.94. That sum does not take account of any penalties which may be exigible either against the companies or the personal Defendants. Very substantial penalties would apply in respect of the matters complained of in these proceedings in the event of other proceedings being taken."

The interlocutory application to continue this injunction until the trial of the action was listed before the Court for the 10th October, 1983. On that date an agreement was reached between the parties which disposed of the need to hear the application. The material terms of this agreement provided that the injunction should be lifted immediately and that each of the parties should make discovery of their assets. Each of the Defendants undertook not to remove any of their assets from the jurisdiction nor to deal in or dispose of them so as to defeat or prejudice any creditors pending the hearing of the action. The Company Defendants also consented to the appointment and maintenance by the Plaintiffs of an authorised officer of the

Revenue Commissioners to have full access to their premises, records, stocks and bank accounts for the purpose of satisfying the Plaintiffs that the undertaking not to dispose of their assets would be complied with and undertook to keep such officer fully informed of any transactions or events in the course of trading relevant to the conservation of their assets.

On the 3rd and 4th November, 1983 additional assessments were made against both Prosecutors for tax. The further assessments raised against Calcul related to corporation tax for the years ending 30th June, 1977 to 30th June, 1982 inclusive, related to income tax for the years ended 5th April, 1979 to 5th April, 1983 inclusive and related to V.A.T. for the period July, 1976 to June, 1982. The further assessments raised against Solatrex related to corporation tax for the years ended 30th June 1978 to 30th June, 1982 inclusive and related to income tax for the years ended 5th April, 1981 to 5th April, 1983 inclusive. The total amount claimed on foot of these assessments amounted to £1,926,726.06.

On the 10th November, 1983 the Revenue Commissioners delivered their Statement of Claim. They put their claim as follows:

- "4. Since they commenced trading the first and second named Defendants under the direction and management of the third fourth fifth and sixth named Defendants carried on their business in such a manner as to defraud the Plaintiffs of monies and taxes lawfully due by the first and second named Defendants in respect of customs duty, corporation tax, income tax and valued added tax. Furthermore, the Defendants have together conspired to bring about the exportation from the State contrary to the provisions of the exchange contro

regulations of large sums of Irish currency.

Particulars

The Defendants have brought about the defrauding of the Plaintiffs in the following ways:

- (a) The presentation of fictitious invoices;
- (b) The presentation of importation return which misrepresent and mistake both the nature of the goods being imported and their value;
- (c) The presentation of incorrect and inaccurate and false returns to the Revenue Commissioners;
- (d) The presentation of false and misleading information to the Plaintiffs in response to queries raised by them;
- (e) The suppression of information required by the Plaintiffs from time to time;
- (f) Falsification of returns and documents made to the Plaintiffs.

5. By reason of the said activities of the Defendants, the Plaintiffs have sustained loss and damage under the following heads:

Customs duties underpaid	£55,000.00
Corporation tax underpaid	£1,185,463.40
Income tax underpaid	£367,074.75
Value added tax underpaid	£374,742.16.

6. Furthermore, all of the Defendants have together wrongfully and unlawfully conspired to bring about the defrauding of the Plaintiffs in the manner already referred to, and by so doing, have caused the Plaintiff to suffer loss and damage.

7. Accordingly the Plaintiffs claim;

1. As against the first and second named Defendants,

the sum of £1,552,538.15 in respect of underpaid corporation tax and income tax together with the sum of £429,742.16 in respect of underpayment of customs duty and value added tax making in all the sum of £1,982,280.31.

2. As against all the Defendants, damages in the sum of £1,982,280.31 for fraud and/or conspiracy.
3. Further and other alternative relief.
4. Costs."

It can be seen that no reference is made to the additional assessments which had by then been raised which sought the same amounts. Although there appear to be minor discrepancies between the assessments and the Statement of Claim, it is common case that each seeks exactly the same amount, such discrepancies resulting from arithmetical error.

Particulars were sought by the Defendants of the matters set out in the Statement of Claim by letter dated 10th February, 1984. Particulars were furnished by letter dated 6th December, 1984. By this letter the Plaintiffs indicated that no claim was being made by them in those proceedings in respect of the exportation from the State of currency contrary to the Exchange Control Regulations. Further and better particulars were sought by the Defendants and these were ultimately delivered on 16th August, 1985 pursuant to a Court Order made on the 14th May, 1985.

The Defendants delivered their defence on the 27th November, 1985. This was essentially a denial that any of the sums claimed were owing. They further pleaded by paragraph 8 as follows:

- "8. The Defendants will claim that at the institution of these proceeding, and at all material times, the sums claimed by the Plaintiffs in respect of corporation

tax, income tax, customs duties and value added tax were never due or owing by the Defendants or any of them to the Plaintiffs."

A reply in the form of a joinder of issue was delivered on the 10th December, 1984

The assessments made on the 3rd and 4th November, 1983 were appealed by the Prosecutors and were listed for hearing on 14th September, 1984. On that date the Prosecutors applied to the Appeal Commissioners not to entertain the appeals on the basis that the subject matter of the said appeals had already been placed before the High Court by the Revenue Commissioners and on the basis that the Revenue Commissioners had seized certain documents which they had not made available to the servants or agents or accountants of the Prosecutors to examine. The Appeal Commissioners refused this application but adjourned the matter to 19th December, 1984 to enable the Prosecutors to examine such documents. The Prosecutors sought to restrain the Appeal Commissioners from hearing the said appeal and on 3rd December, 1984 obtained a Conditional Order of Prohibition directed to the Respondents prohibiting them from entering upon the hearing of or disposing of the appeal on the grounds set out in paragraph 14 of the affidavit of Michael Thomas Flynn which granted the application. These grounds are as follows:

- "(a) that in placing the issue as to whether or not any tax was due by the Prosecutors to the Revenue Commissioners before the High Court, the Revenue Commissioners were estopped and debarred from instituting any process which would determine the same issues finally and conclusively for all purposes against the Prosecutors herein if unappealed or determine the same issues finally and conclusively as between the Prosecutors and the Revenue Commissioners herein

if determined by the Appeals Commissioners or by the Circuit Court

- (b) in placing certain issues of fact and law before the High Court, the Revenue Commissioners waived any entitlements they had to have the same issues determined by way of assessment and appeal procedure by any inferior tribunal.
- (c) that it was unlawful for the Revenue Commissioners to invoke the assessment provisions of the income tax, value added tax, and Corporation Tax Acts so as to deprive the High Court of jurisdiction to determine questions which they themselves had placed before the High Court and which the High Court were solely permitted to determine.
- (d) that it would be unlawful and contrary to natural justice for the Appeal Commissioners to enter into a determination of issues before the High Court by the Revenue Commissioners in proceedings which the Revenue Commissioners were maintaining in the High Court so as to finally and conclusively determine the matter for all purposes including the purpose of the High Court proceedings themselves.
- (e) that the Appeal Commissioners erred in law in refusing to quash the assessments on the basis that the same were already before the High Court and in the alternative in refusing to stay the determination of the Prosecutor's appeal pending the determination of the same issues in the High Court proceedings.
- (f) that the Revenue Commissioners acted in breach of natural and constitutional justice by invoking two mutually exclusive procedures to determine the same issue of

fact and by maintaining the High Court proceedings for the purpose of obtaining interim and interlocutory relief and for other purposes while seeking to deprive the High Court of its right to determine the central issue of fact in the said proceedings.

- (g) that the Appeal Commissioners in purporting to determine whether the Prosecutors herein are liable on foot of the additional assessments hereinbefore referred to in an amount of £1,910,101.06 would be exercising a judicial power and function other than a limited power and function in a manner prohibited by Article 34 and Article 37 of the Constitution."

The Respondents have shown cause and the matter now comes before the Court for an Order absolute notwithstanding the cause shown.

Counsel for the Prosecutors made three basic submissions. He submitted first that the Revenue Commissioners by instituting High Court proceedings to recover taxes had elected to pursue their claim by such process and that they were therefore prevented from raising assessments and seeking to have the identical liability to taxes determined by the procedures provided for by the tax codes.

In support of his submission he adopted certain passages from Spencer Bower and Turner, estoppel by representation, third edition. The passages to which he referred commenced at page 309 and are contained in Chapter XIII which is headed Election. The proposition for which he contended was that where two courses of legal action are available to a litigant, which are mutually exclusive, then where the choice of one such course leads the other party to change his position, the first party is estopped from pursuing the second of such courses. He submitted that the Revenue Commissioners by proceeding in the High Court to recover the amount of taxes owing had elected to have such amount

determined by the High Court rather than under the tax codes and that as the Prosecutors had materially altered their legal position by the terms of the consent entered into by them with the Revenue Commissioners by way of compromise of the application by the Revenue Commissioners for a mareva injunction pending the hearing of the action, the Revenue Commissioners were now estopped from raising additional assessments and seeking to have the liability of the Prosecutors to tax determined in accordance with the procedures applicable under the tax codes.

As a general principle, there may well be cases where one party by the course which he has taken and maintained in pursuing a claim against another may be precluded from taking a second and different course to pursue the same claim. Nevertheless, this is not one of those cases. It is a fundamental part of the submission that the two courses of legal actions should be mutually exclusive. In the present instance, it is essential to show that the claim for tax in the Court proceedings is maintainable and is identical to the claim for tax on foot of the assessments raised by the Revenue Commissioners and appealed to the Appeal Commissioners. Undoubtedly, the sums claimed are identical. But the two procedures are separate and distinct. The liability to tax is assessed under the provisions of the tax code. If this sum is not paid by the taxpayer, it may be recovered inter alia through the Courts as a debt due to the State: section 488 of the Income Tax Act 1967. Paragraph 8 of the defence filed by the Prosecutors in the proceedings brought by the Revenue Commissioners recognises this. The Prosecutors cannot insist on the claim as pleaded being pursued to finality. The High Court has a full and original jurisdiction in all matters by virtue of the provisions of Article 34 of the Constitution.

This does not however give a right to a litigant to have his cause decided by the High Court when the legislature has ordained otherwise. In such cases, the High Court nevertheless retains its supervisory jurisdiction: see Tormey .v. Ireland . The plea of estoppel accordingly fails.

The next submission on the part of the Prosecutor was that the raising of assessments was a breach of the doctrine of the separation of powers. If the claim for tax could equally well be brought either before the Courts or in accordance with the tax code then the situation might arise whereby the decision of the Respondents might be alleged to bind the Court. If so this would clearly not be permissible. Since the claim is required to be brought in accordance with the tax code this situation can never arise. Accordingly this submission also fails.

The final submission made on behalf of the Prosecutor was that the procedures adopted by the Revenue Commissioners were unfair. It was submitted that unfairness had resulted because restrictions had been imposed upon the Prosecutors by virtue of the agreement reached on the 10th October 1983 and also because the onus of proof which would have rested on the Respondents as Plaintiffs to establish the amount of tax owing would now rest on the Prosecutors as Respondents before the Appeal Commissioners. Undoubtedly, these consequences exist as a result of what has taken place. Nevertheless, the only permissible procedure for the assessment of the tax payable is that now being taken. This submission also fails.

It seems to me that the real complaint of the Prosecutors is that the Respondents imposed upon them improperly the restrictions agreed to on the 10th October 1983. I do not accept this.

Whether or not a claim for tax not yet assessed can be made through the Courts is a question of law. The Order of the 5th October 1983 was made on foot of such a claim. Further, the Prosecutors themselves were fully aware of the status of such claim as appears from their defence. It was open to them on the 10th October 1983 to contest the grant of a mareva injunction. They did not do so. Presumably, because they accepted that on the facts being alleged by the Respondents such relief would have been granted. Admittedly the proceedings brought by the Revenue Commissioners will be further varied by the abandonment by them of the claim that the Prosecutors have exported currency from the State contrary to exchange control regulations. Adverse comment on the behaviour of the Revenue Commissioners may well be justified, but is not a basis for granting the relief sought.

The Prosecutors finally rely upon the constitutional argument that the Appeal Commissioners in hearing the appeal before them would be exercising a judicial power and function other than the limited power and function in a manner prohibited by Article 34.1 and Article 37 of the Constitution. By reason of this submission the Attorney General has been joined as a party to the proceedings and pleadings have been directed and have been delivered dealing with this issue.

The extent and nature of the powers conferred on the Appeal Commissioners by the tax code are set out in paragraph 4 of the Statement of Claim delivered by the Prosecutors on the Constitutional issue. Paragraph 4 is as follows:

"4. The provisions of Part XXVI of the Income Tax Act of 1967 purport to confer on the first named Respondent powers to:-

- (a) hear and determine any appeal by a person assess for income tax in respect of any assessment;
- (b) give judgment in respect of any such appeal;
- (c) to make determinations of liability to pay income tax which are final and conclusive and which will be enforced, if necessary, with the authority of this State.
- (d) to hear pleadings by any barrister or solicitor or to hear any accountant or other person whom they shall deem fit;
- (e) to alter or vary any assessment to income tax made on any person;
- (f) to issue precepts requiring any Appellant to furnish particulars for the information of the first named Respondents in relation to his property or to his trade profession or employment or the amount of his profits and gains;
- (g) to require persons to whom precepts have been delivered to tender to themselves for oral examination and to reduce such oral examination to writing and to require its verification upon oath;
- (h) to summons witnesses and to examine them upon oath;
- (i) to state cases on questions of law for determination by the High Court;
- (j) to entertain and to receive evidence and arguments;
- (k) to determine any claim for exemption or for any

allowance or deduction under the Income Tax Acts;

- (l) to determine all claims for repayment of tax under the Act;
- (m) to determine all claims to relief under the Act and all matters and questions relating to any relief, on appeal for the Revenue Commissioners, the second named Respondents;
- (n) to hear and determine questions of fact and liability to tax in any amount without limit;
- (o) the said powers are extended in relation to corporation tax by Section 146 of the Corporation Tax Act of 1976;
- (p) the said powers are extended to determination of the liability for value added tax by Section 25 of the Value Added Tax Act 1972 as amended."

The Prosecutors further plead that the exercise of such powers constitutes the administration of justice for the purposes of Article 34.1 of the Constitution; that the determination of a tax appeal amounts to the determination of a justiciable controversy; and that in exercising such powers the first named Respondents are exercising a power and function of a judicial nature other than a limited power or function as permitted by Article 37 of the Constitution. In relation to the latter plea, particulars are furnished in the Statement of Claim as follows:

"Particulars

The powers conferred by the said provisions on the first named Respondents are unlimited in that they:-

- (a) purport to authorise the first named Respondents

to determine a justiciable controversy between the State and another person in an unlimited amount.

- (b) purport to enable the first named Respondents to fix and determine liability on the part of a person to pay taxes and other moneys to the State in an unlimited amount.
- (c) purport to empower the first named Respondents to decide any issue of fact of whatever kind for the purposes of making any such determination.
- (d) purport to empower the first named Respondents to exercise a judicial power and function in a manner calculated ordinarily to affect in the most profound and far reaching way the fortunes and reputations of the Appellants appearing before them."

The Respondents in their defence admit that the powers enumerated are conferred upon them. They deny that the exercise of such powers constitutes the administration of justice; and that the exercise of such powers is a determination of a justiciable controversy; and plead that, if so, such powers are limited functions or powers as envisaged by Article 37 of the Constitution.

The nature of judicial power was fully considered by the Supreme Court in In Re. Solicitors Act, 1954, 1960 I.R. 239. The judgment of the Court was delivered by Kingsmill Moore J. in the course of which are laid down the criteria for determining whether a power is a judicial power and, when it is, whether such power is of a limited nature.

Dealing with the matters to be looked for to decide these questions he said at page 264:

"Eventually the question whether any particular tribunal is unconstitutional must depend on whether the congeries of the powers and functions conferred on the tribunal or any particular power or function is such as to involve the pronouncement of decisions, the making of orders, and the doing of acts, which on the true intendment of the Constitution are reserved to judges as being properly regarded as part of the administration of justice, and not of the limited character validated by Article 37."

This is what the Court has to look for, but using what guidelines? Kingsmill Moore J. provided these. At page 274, he indicated that it was the nature of the order which the tribunal was empowered to make which governed the nature of its power. He said:

"The decisive test in the opinion of the Court lies in the orders which by s. 18 the Committee is empowered to make. The Committee may remove or strike off the roll the name of a solicitor, award to either party costs (which by s. 20, sub-s 3, and the rules made thereunder may be taxed by the Taxing Master under the scale of costs applicable to High Court proceedings and are to be recoverable as if taxed under an order of the High Court) and may order the making by the solicitor of such restitution or satisfaction to any aggrieved party as the Committee may think fit.

Presumably restitution or satisfaction could only be made where there had been something in the nature of misconduct, but misconduct would include fraud and negligence. Damages awarded by a Court for fraud or negligence are primarily an attempt to produce

"restitutio in integrum" and the Court is unable to distinguish the power given to the Committee from the power given to a Court, unless indeed it be that the power given to the Committee is wider than any that a Court can exercise. The questions which can arise before the Committee are as contentious, as difficult, and as important as the questions which would arise before a Court trying a common law action for negligence or fraud. In the opinion of the Court a tribunal which may make such an order is properly described as administering justice and such a tribunal unless composed of judges is unconstitutional."

Likewise at page 263, he indicated the meaning to be given to the word "limited" in Article 34, 3, 4° of the Constitution.

He said:

"What is the meaning to be given to the word "limited"? It is not a question of "limited jurisdiction" whether the limitation be in regard to persons or subject matter. Limited jurisdictions are specially dealt with in Article 34, 3, 4°. It is the "powers and functions" which must be "limited", not the ambit of their exercise. Nor is the test of limitation to be sought in the number of powers and functions which are exercised. The Constitution does not say "powers and functions limited in number." Again it must be emphasised that it is the powers and functions which are in their own nature to be limited. A tribunal having but a few powers and functions but those of far-reaching effect and importance could not properly be regarded as exercising "limited" powers and functions. The judicial power of the State

is by Article 34 of the Constitution lodged in the Courts, and the provisions of Article 37 do not admit of that power being trenched upon, or of its being withdrawn piecemeal from the Courts. The test as to whether a power is or is not "limited" in the opinion of the Court, lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as "limited."

The nature of the judicial function was considered again by the Supreme Court in McDonald .v. Bord na gCon 1965 I.R. 217. The Board in that case was empowered in certain circumstances to make exclusion orders whereby a person might be banned from attending at greyhound race meetings or coursing meetings or public sales of greyhounds. It was contended that the exercise of such a power amounted to the administration of justice. It was held not to be such since such an order was not directly enforceable by the Board. Accordingly those to whom the power of making the expulsion order was granted did not themselves by virtue of any provisions impugned "affect any right or impose any penalty or liability on anybody." See the judgment of Walsh J. at p. 244.

Turning to the powers of the Appeal Commissioners it seems to me that their essential function is to decide whether the assessment raised by the Tax Inspector should be reduced or increased. They do not have power to enforce their decision nor to impose liabilities. Essentially, their decisions are enforced by the institution of legal proceedings to recover the amount of

tax determined by them as being payable. Equally in those cases where penalties may become payable proceedings must be instituted before they can be recovered. Nor do the Appeal Commissioners determine the amount of or impose such penalties. It is the statute which does so.

The essence of a tax assessment is the determination of the amount of tax to be paid by the taxpayer. It is the particular proportion of his taxable income which is required by the tax code to be paid by way of tax. Undoubtedly, questions of fact and law require to be decided to determine taxable income. I am sure that a spectator at a hearing before the Appeal Commissioners will see no material difference between the conduct of the hearing and the conduct of many hearings in the Courts. In each case, there will be an adversarial procedure with each side seeking to establish the law and the facts to suit its own case.

This however is not the test. This lies in the orders which the Appeal Commissioners are empowered to make. Such orders obviously impose liabilities upon the taxpayer concerned, but they do not deprive him of anything nor impose penalties nor limit his freedom of action. They declare his liability for tax upon the basis of the facts as found by them. Having declared this liability, they have no power to enforce their decision. Applying the test of the judicial power as expressed by Kingsmill Moore J. at page 274 in the Solicitors Act Case, it does not seem to me that an order having such characteristics and effect can be said to be an order which on the true intendment of the Constitution was one reserved to Judges as being properly regarded as part of the administration of justice.

If I am wrong in this view, nevertheless it seems to me that

such powers and functions as they possess are limited within the meaning of Article 37. On this aspect of the case, the Prosecutors rely first upon the submission that the Appeal Commissioners may exercise a jurisdiction unlimited in amount. But this is not a correct test. "It is the powers and functions which must be limited, not the ambit of their exercise:" per Kingsmill Morre J. in the Solicitors Act Case at page 263.

The Prosecutors next rely upon the power of the Appeal Commissioners to decide any issue of fact of whatever kind. Again, this is substantially a submission that their powers are unlimited. This is not the test. This lies in the effect of the assigned power when exercised. So the nature of a power as opposed to its effect when exercised is immaterial.

The Prosecutors rely finally upon the general ground that the Appeal Commissioners are empowered to exercise powers in a manner calculated ordinarily to affect in the most profound and far-reaching way the fortunes and reputations of the taxpayers appearing before them. Where the Revenue Commissioners allege that the taxpayer has failed to make proper returns, an adverse decision may well brand the taxpayer to a greater or lesser extent as a person who is dishonest, but that is an inference to be drawn from their decision, it is no part of it. It is not in my view a matter which would make the powers of the Appeal Commissioners unlimited in the sense for which the Prosecutors contend.

The decision of the Appeal Commissioners undoubtedly affects the fortune of the taxpayer concerned. Any taxpayer appearing before the Appeal Commissioners either seeks to establish that he has no tax liability or a tax liability less than that for which the Tax Inspector contends. In reality, the decision