



**THE COURT OF APPEAL**

Neutral Citation Number: [2016] IECA 396

**[2016 No. 68]**

**[2015 No. 152 J.R.]**

**The President  
Hedigan J.  
Hanna J.**

**BETWEEN**

**SARLINGFORD LIMITED**

**APPELLANT/APPLICANT**

**AND**

**APPEAL COMMISSIONER KELLY**

**AND**

**FRANK GALLAGHER (NOMINATED OFFICER)**

**AND**

**THE REVENUE COMMISSIONERS**

**RESPONDENTS**

**JUDGMENT of the President delivered on 21st December 2016**

**Introduction**

1. This is an appeal brought by Sarlingford Ltd. against the judgment and order of McGovern J. of 28th January 2016 on a motion for discovery of documents in the possession or procurement of the Revenue Commissioners. The issue as to documents arose in judicial review proceedings brought by the company against the Appeal Commissioner, the Revenue official who made the original decision in the matter and the Revenue Commissioners in respect of Sarlingford's claim that it had a legitimate expectation to be entitled to tax relief under s. 141(5)(d) of the Taxes Consolidation Act 1997 on certain patent income distributions. The contending parties in this appeal are Sarlingford and the Revenue parties, being the deciding official and the Commissioners as a body; the Appeal Commissioner is not concerned with the issue of discovery. The High Court refused the application for discovery on the basis of principle and authority, holding that the issue in the case was one of statutory interpretation and discovery was neither necessary nor appropriate. I respectfully agree with the trial judge that it is a matter of law not of policy whether the tax relief is properly claimable. Moreover, the matters raised by the appellant do not establish an entitlement to an order for discovery based on legitimate expectation but even if they were capable of doing so, the relevant factual basis is available to the company without discovery. I would dismiss the appeal accordingly.

**Background**

2. Section 141 of the Taxes Consolidation Act 1997 (TCA 1997) provides, broadly, for an exemption from income tax or corporation tax in respect of income paid by a company by way of distributions from income earned in connection with a qualifying patent. Section 141(5)(d)(i) provides, *inter alia*, as follows:-

"If in an accounting period the beneficial recipient of the specified income shows in writing to the satisfaction of the Revenue Commissioners that the specified income is income from a qualifying patent in respect of an invention which

I. Involved radical innovation and

II. Was patented for bona fide commercial reasons and not primarily for avoiding a liability to taxation

the Revenue Commissioners shall after consideration of any evidence in relation to the matter which the recipient submits to them and after such consultations (if any) as may seem to them to be necessary with such persons as in their opinion may be of assistance to them, determine whether all distributions made out of specified income accruing to the recipient for that accounting period shall be treated as distributions made out of disregarded income and the recipient shall be notified in writing of the determination..."

3. Sarlingford is part of a group of companies engaged in the manufacture and sale of windows and doors for commercial and residential properties. The company holds a patent in respect of an apparatus designed to achieve the efficient manufacture of windows and doors. On 11th December 1996, the appellant sought a determination pursuant to s. 141(5)(d)(i) that the invention of the apparatus involved radical innovation. By letter dated 10th February 1997, the Revenue requested further information. The appellant did not reply at that time and the matter was left dormant for several years. Notwithstanding the absence of a determination as to radical innovation, the appellant proceeded to make tax free distributions in substantial sums to shareholders. The company reactivated its claim for a determination as to radical innovation, in or about 2009, when Revenue inquired as to the basis upon which tax free distributions were being made.

4. Following rejection of its claim by the Nominated Officer, the second respondent, Sarlingford appealed to the Appeal Commissioner, the first respondent. Prior to the hearing of the appeal, Revenue raised a preliminary issue that the appeal was moot because the relief comprised in s. 141(5)(d) Taxes Consolidation Act 1997 ("TCA 1997") ceased with effect from 24th November 2010, and was no longer available to the appellant. The Appeal Commissioner held in favour of the Revenue on this issue, holding that the wording of s. 151(5)(d)(i) meant that even if the appellant succeeded in overturning the determination of the Nominated Official, it would not avail the appellant in respect of the relevant accounting periods.

### **The High Court Proceedings**

5. In the High Court proceedings, the appellant has challenged, by way of judicial review, the determination of the Appeal Commissioner contending, inter alia, that the preliminary issue raised by Revenue did not form part of the appeal heard by the Appeal Commissioner. Further, and of relevance for the purposes of this appeal, the appellant has claimed the following reliefs:-

"8. A declaration that the second and third named Respondents' construction of section 141(5)(d) of the Taxes Consolidation Act 1997 is wrong and misconceived insofar as it contends that the Appellant is not entitled to the tax relief thereunder from the date of its first application to the said Respondents for the said relief provided that the second named Respondent makes a positive determination in its favour under the said section 141(5)(d).

9. A declaration that the proper construction of section 141(5)(d) of the Taxes Consolidation Act 1997 is that the Applicant is entitled to the tax relief thereunder from the date of its first application for same provided that a positive determination is made in its favour under the said section 141(5)(d) by the second or third named Respondents...

12. A declaration that the Appellant had a legitimate expectation that it would be entitled to tax relief under section 141(5)(d) of the Taxes Consolidation Act 1997 from the accounting period in which it first applied for same if the second named Respondent made a positive determination under the said section 141(5)(d)."

6. The discovery sought by the appellant was directed towards the claim of legitimate expectation made in the judicial review proceedings. The discovery sought, which forms the subject of this appeal, is as follows:-

"(i) All documents whether stored in paper or electronic form in the power, possession or procurement of the Respondents in respect of an application made and considered in or about 2004 for determinations pursuant to section 141(5)(d)(i) of the Taxes Consolidation Act, 1997 in respect of Machine & Graphic Consultants Ltd for qualifying expenditure back to 1998 subject (in the case of all documents) to any necessary redaction to protect the identities of the taxpayer or its directors involved.

(ii) All documents created since on or about the 26th day of March, 1996 whether stored in paper or electronic form in the power, possession or procurement of the Respondents or either of them in respect of a policy or practice of the Respondents or either of them concerning the retrospective application of the exemption which flows from determinations made pursuant to section 141(5)(d)(i) of the Act of 1997.

(iii) All documents created since on or about the 1st day of January, 2004 whether stored in paper or electronic form in the power, possession or procurement of the Respondents or either of them in respect of any inspection or audit of the Applicant's tax affairs involving in particular a site visit to the Applicant's premises in 2004 or 2005 carried out by officials of the third named Respondent's large cases division and/or other local officials of the third named Respondent acting either for and on behalf of the said divisions or directly under the authority of the third named Respondent."

7. The basis for the appellant's claim that it had a legitimate expectation to retrospective relief is:

i. The treatment by Revenue of another taxpayer, Machine & Graphic Consultants Ltd., in what Sarlingford says is a similar situation;

ii. A 2005 inspection of the Gardini group of companies (of which Sarlingford is a member) as well as a subsequent VAT audit later that year during both of which no objection or query was raised as to the fact that the relevant relief was being claimed; iii. Statements made by counsel for Revenue in the tax appeal before the Appeal Commissioner;

iv. Subsequent correspondence from Revenue dated 13th April, 2011, which is claimed to indicate that relief under s. 141(5)(d) TCA 1997 was still available to the appellant.

8. In his judgment in *Sarlingford v. Appeal Commissioner Kelly & Ors.* [2016] IEHC 52, McGovern J. refused the application, holding that the relevant issue for determining the proceedings was one of statutory interpretation, and accordingly that discovery was not necessary:-

"8. In due course, the challenge to the Revenue Commissioner's decision by the applicant will be determined by means of statutory interpretation. If the applicant persuades the court that the correct construction of s. 141(5)(d) of the Taxes Consolidation Act 1997, as amended, permits the relief on a retrospective basis, then it will succeed. But if the court concludes that the relevant section does not permit the relief on a retrospective basis, the applicant is not permitted to maintain an entitlement to such relief based on legitimate expectation since that would involve the court requiring the respondents to give a concession to the applicant when it was not entitled in law to such a concession and would be contrary to the principles enunciated by the Supreme Court in *Wiley v. Revenue Commissioners*.

9. Since all three categories of discovery sought in this application relate to the issue of legitimate expectation, they cannot be regarded as necessary for disposing fairly of the issues that arise in the judicial review which, as I have already stated, involve a question of statutory interpretation."

9. Hence, the appellant instituted the present proceedings before this Court.

### **The Appellant's Submissions**

10. Mr. Gallagher S.C. for the appellant submits that the High Court judge erred in law and in fact in determining the application for discovery in holding that the only issue to be determined was one of statutory interpretation when not all of the reliefs sought related to that issue. In particular, Counsel highlights that the High Court judge had previously rejected that the only issue to be determined in the proceedings was one of statutory interpretation when he refused Revenue's application for a preliminary trial on that basis.

11. In relation to the issue of discovery itself, Counsel submits that the principles governing discovery in plenary and judicial review proceedings are not fundamentally different, but that necessity and particularity might be more difficult to prove in the latter. Nevertheless, Counsel submits that this case was set out with sufficient particularity. It is submitted that there is a factual dispute as to the existence of a policy or practice of Revenue which amounts to an express/implied promise to a defined group of persons to grant relief retrospectively under the scheme in circumstances such as those present. Thus, Counsel submits that if such a policy does exist, it would be contained in internal Revenue guidelines and accordingly discovery is necessary. More specifically, in relation to the first category of discovery sought, a legitimate expectation can arise by reference to another taxpayer in circumstances where Revenue must formulate its policy so as to treat similar taxpayers the same. Counsel submits that this approach is supported by policies and consistent practice in other tax areas, and that Revenue's suggestion to the effect that a mistake had been made in respect of the other taxpayer should not exclude discovery.

12. Similarly, in respect of the third category of discovery sought, it is submitted that the dispute as to whether or not the 2005 investigation occurred is an issue of fact and that Revenue either has or does not have records of such. The appellant claims it has extended discovery to other divisions on the basis that it may be mistaken as to the exact division which carried out the investigation. Further, it is submitted that given the detail in the affidavit of Mr. Tobin, the financial director of the appellant, in particular his naming of two officials involved, his testimony of participating in this event is not a mere assertion and discovery is thus required to establish that the appellant's account is correct.

13. Finally, Counsel submits that the appellant is not claiming a legitimate expectation in respect of relief to which he is not entitled as the case arises from a general policy of Revenue. The Revenue's arguments to the effect that such a policy or practice could not override a statutory provision are circular because they are based on the respondents' interpretation of the statute. Counsel submits that the appellant satisfies the substantive statutory requirements and that having applied for such relief, Revenue cannot refuse where it had a policy and/or practice of granting it in similar circumstances to those of the appellant.

14. Accordingly, Counsel for the appellant concludes that discovery is necessary and relevant to establish the existence of the policy, and that the principles of legitimate expectation arising are a matter for argument at trial.

### **Responding Submissions**

15. Mr. McDonald S.C counsel for the Revenue respondents, submits that the central issue is one of statutory interpretation, namely whether s. 141(5)(d) TCA 1997 has retrospective application or not, and that any policy adopted by the Revenue could not affect the outcome to this question. Accordingly, it is submitted that there could be no legitimate expectation on behalf of the appellant which would require Revenue to carry out any activity which they are not empowered to. Further, counsel submits that no proper basis for discovery has been made out.

16. In relation to the first category of discovery sought, while it is denied that it was a policy of Revenue to grant retrospective relief, it is not denied that relief was granted to the taxpayer in question, Machine & Graphic Consultants Ltd. However, since this category of the discovery sought was not mentioned in the grounds of appeal, it did not form part of the appeal. Separately and independently of that point, Counsel submits that a representation to another taxpayer cannot constitute a representation to the appellant. Moreover, the appellant has adduced evidence that the relief was granted retrospectively to a third party (see, for example, the affidavit of Mr. Dermot Byrne, Taxation Consultant) so nothing further by way of evidence is required. Without prejudice to that, it is also submitted that it is inappropriate to seek discovery of the tax affairs of third parties and that there is no factual dispute in relation to that taxpayer such as would justify discovery.

17. With regard to the second category of discovery sought, it is submitted that there is no factual dispute. The appellant's belief as to the existence of a policy is speculative and unsupported by evidence. Discovery cannot be used merely to challenge the accuracy of affidavits or confirm evidence that has already been adduced.

18. In relation to the third category of discovery sought, Revenue denies that any such inspection or audit took place. Hence, it is submitted that there was no determination under s.141(5)(d) TCA 1997 prior to 2012 and that no representation was ever made to the effect that s. 141(5)(d) would or could be applied retrospectively. Furthermore, counsel submits that if a representation had been made, the appellant would be in a position to adduce evidence of same, but that this category of discovery was nevertheless irrelevant given that the central issue in the case is one of statutory interpretation.

### **Discussion**

19. The claim arising out of the other, previous decision made by the Revenue in the case of Machine & Graphics Consultants is not a good ground for this application. In the first place, the documents in that other case fall under Category 1 of the documents sought in discovery. However, the notice of appeal does not apply to Category 1 and so there is nothing to be decided about that case. I do so for completeness and because it is mentioned in the submissions. The fact is that the notice of appeal is expressly confined to Categories 2 and 3.

20. In my judgment, the respondents are correct in submitting that a representation made to one taxpayer is not made to another. The fact that the relief was granted to this other company is not in dispute. Sarlingford has filed affidavit evidence in relation to that other case. Any facts required in endeavouring to establish the alleged legitimate expectation are available. There is no factual dispute in relation to this matter and it is not appropriate for the court to order discovery of a third party's tax affairs without a basis in legitimacy and necessity.

21. The second matter that is cited as being a basis for legitimate expectation is a tax inspection visit to the group of companies of which Sarlingford is one and which allegedly happened in 2005. Sarlingford maintains that company personnel made clear to the Revenue inspectors on this visit that they were claiming the s. 141(5)(d) tax relief in respect of the patent income. The case is that the inspectors did not immediately reject the application and nor did they write later to refer to it or call in question the entitlement of the company to this relief. The matter arose at a later stage in correspondence. However, it is not suggested that the visit was for the purpose of examining or evaluating the claim for tax relief on patent income. It was for other purposes or general tax issues. It seems to me to be simply incorrect to claim that the Revenue Commissioners are bound in some way, or have adopted a position, in regard to something that they were not investigating and made no decision about. The mere fact that the company officers mentioned this relief or that the company was claiming it furnishes no basis for a legitimate expectation in the circumstances. This matter goes nowhere near establishing any kind of legitimate expectation. It is also again the case that any evidence relating to this visit on which the claim is based is available to Sarlingford.

22. The next claimed basis for legitimate expectation is that there is a generally accepted view that was confirmed by counsel at the hearing before the Appeal Commissioners to the effect that if an application was made in one accounting period, but the decision was not made until the following one, the relief would be applied to the previous period when the application was actually made or made

for the first time. It is worth noting that the claimed concession by counsel for the Revenue relates to an application being made and then the decision following in the next accounting period. This is a reference to the terms of s. 141(5)(d) which, on one view, envisages that an application will be made in an accounting period, that the decision will be made by the Revenue Commissioners, and that the relief will be available in that accounting period and all subsequent ones. It is extremely doubtful whether there could be a legitimate expectation based on a submission made by counsel in the course of a hearing in the instant case as to the meaning and effect of a section of legislation, whether relating to tax or otherwise. Counsel was addressing a particular point in specific circumstances and it is wholly unreasonable to fix counsel with responsibility for making express concessions or assertions or declarations on behalf of his or her client in a general way so as to give rise to liabilities outside the terms of the specific dispute or debate that is proceeding and in which counsel is appearing. Above and beyond those considerations, the point again is that this is a specific circumstance on which the company relies to establish its claim to a legitimate expectation. It does not require or refer to any documents. The matter stands or falls on the basis pleaded.

23. The final circumstance in which legitimate expectation is grounded is a letter from the Revenue Commissioners of 13th April 2011 as follows:-

"Dear Sirs,

I refer to your letter of 8th April 2011 in connection with the above named.

I have contacted our Direct Taxes Branch with responsibility for approving Radical Innovation Applications. Please see the enclosed letter, which they sent to you on 10/2/1997. No reply was received to that letter. In light of this information it would appear that no approval has been granted for your Radical Innovation and therefore the exemption is not allowable.

However, if you are in a position to submit the required information in respect of the Innovation, by 20th May 2011, the Direct Taxes Branch may consider the application for exemption.

If no application is received by that date then the income exemption will have to be withdrawn.

Your cooperation on this matter is appreciated.

Yours faithfully"

The letter referenced in this response is from the company's accountants of 8th April, 2011, which has the following relevant paragraph:-

"In December 1996, the Company applied to the Revenue Commissioners for approval in relation to the pre-consolidation equivalent of section 141 and 234 TCA 1997. We cannot trace any response to this application."

There was in fact a response to which Revenue received no reply.

24. This letter does not rule out of consideration an application under section 141 for the tax relief claimed on the basis that that relief section has now been repealed (by virtue of s. 26 of the Finance Act 2011) and that it would be too late to make the application or to have it decided. The basis of the submission that was subsequently made at the Appeal Commissioners is not mentioned in this letter. It may be that the appellant can argue that such is the inconsistency of the subsequent contention that this letter constitutes something of an estoppel or a legitimate expectation. The company may argue that the Commissioners in effect invited the company to make a submission on the basis that the relief was still available for a relevant period. If the relief has been abolished since November 2010, as appears to be the case, this letter cannot refer to anything except a retrospective claim. But it is the letter that gives rise to the claim of legitimate expectation, whether it is soundly based or not. There is nothing to be discovered in order to make the case. It does not require any other documents to support the claim. The existence or non-existence of other materials relating to the background to the letter is irrelevant in my view. The claim as pleaded in the statement of grounds is that this letter created a legitimate expectation and/or estoppel, and it either did or did not. Discovery of other documents has no materiality under this head. It seems to me accordingly that there is no basis in the assertions made by the company that would give rise to an entitlement or a need for discovery. The case is laid out in clear terms in respect of four particular points.

25. More fundamentally, it seems to me that the High Court was correct in identifying the issue in this case as being a legal question as to the interpretation of s. 141(5)(d). Does it apply to the date when a claim is made or how is that section to be interpreted and applied? My view is that whatever the answer to the questions raised by the application of the section to the circumstances of this case, one of them is not that it depends on the policy adopted by the Revenue as to how they will deal with the relief. The decision in a particular case is correct or it is not correct. If it follows a policy adopted by the Revenue Commissioners – in some sense of the word 'policy' – then that will not save the decision of the Revenue in the particular case if the court is not satisfied that it is correct in law. Similarly, if it does not follow a policy adopted by the Revenue but is considered to be correct in law, it will stand.

### **Conclusion**

26. It is a matter of law as to whether the relief is properly claimable or not. It is not a matter of policy. Therefore, I do not think that any question of discovery of an alleged or possible policy can arise in the case. Even if the Court were to entertain such a question, all of the facts and circumstances that are advanced in support of the claimed legitimate expectation are available and known. The appellant has failed to show that it would be necessary and reasonable to provide them with any such documents as are sought.

27. In the circumstances, therefore, I would dismiss the appeal and uphold the decision of the High Court.