THE VALUATION TRIBUNAL FOR ENGLAND

Appeal Number: 0915M85513/254C

20 March 2013 (c)

Council tax – disability reduction – whether applications may be made in respect of previous years – Council Tax (Reduction for Disabilities) Regulations 1992, reg. 3(1)(b) – limitation period – Limitation Act 1980, s. 9.

Arca **Appellant**

v

Carlisle City Council **Respondent**

Re: (i) 18 Beck Road, Carlisle (to 18 March 2010)

(ii) Hawksdale Park, Dalston, Carlisle (from 19 March 2010)

Before: The President (Professor Graham Zellick QC)

At: Tullie House, Castle Street, Carlisle.

On: 29 January 2013

Appearances:

Mr Paul im Thurn, Senior Solicitor, Cumbria Law Centre, for the appellant.

Mr Alan Kerr, Senior Recovery Officer, Carlisle City Council, for the respondent.

A. The issue

1. The only issue for decision in this appeal is whether a council tax payer can apply for a disability reduction in respect of previous financial years.

B. The legislation

2. The relevant provision is reg. 3(1) of the Council Tax (Reduction for Disabilities) Regulations 1992 (SI 1992, No. 554), which reads:

> "… a person is an eligible person for the purposes of these Regulations if –
>
> …
>
> (b) as regards the financial year in question, an application is made in writing by him or on his behalf to that authority."

3. The answer to the question posed by this appeal turns on the meaning of, or given to, reg. 3(1)(b) above.

C. The facts

4. The appellant, Mrs Arca, applied successfully for a reduction on 3 November 2011, which the Council backdated to the beginning of the financial year but not because they felt obliged by law to do so. She renewed the application, in greater detail, on 2 February 2012. Her entitlement arises by virtue of her 23-year-old daughter's severe disability. It is accepted by the respondent Council that the grounds entitling Mrs Arca to the reduction applied in every year back to the introduction of council tax, and this provision, 20 years ago. But her application in respect of previous years has been rejected and is the subject of this appeal. Mrs Arca did not apply prior to 2011 because she was unaware of her entitlement.

5. As far as I can gather, the council had no policy on this issue, as other councils do, based on their interpretation of the provision, but Carlisle came to a conclusion when presented with Mrs Arca's application.

6. There is evidence of a variety of practices among billing authorities: some refuse to backdate at all and will grant a reduction only from the date of the application; others will backdate to the beginning of the financial year in question (if the circumstances justify it), as Carlisle did in this case; and others are willing to entertain applications in respect of previous years.

7. However, this does no more than illustrate that the provision is being interpreted in different ways. There is considerable support for the backdating interpretation in various publications and websites, but none provides any reasoning for their conclusion. Two of these websites call for specific consideration, which is given later in this decision (see section G below).

D. The arguments

(a) The respondent Council

8. Mr Kerr for the Council acknowledges the lack of clarity or precision in the wording of para. (1)(b), but argues that the better view is that backdating is not permitted. He cited a previous decision of this Tribunal in support: *Smith* v. *Allerdale Borough Council* (2010).

9. His approach initially was that a *Wednesbury* reasonableness test should be applied to the Council's approach to its meaning, but that line of argument was abandoned during argument, as was the further suggestion that the Tribunal should, if it found that backdating was possible, apply such a test to determine how far back Mrs Arca's applications should be allowed to go. Mr Kerr accepted that such an approach to statutory interpretation was misconceived, although some reference to something like reasonableness may prove apposite when considering the intention of the draftsman.

10. In their written submission, the Council paraphrase reg. 3(1)(b) and assert that it "prescribes that any application is made **within the financial year in question"** (their emphasis), but it plainly says no such thing unless one accepts that "as regards" means "within", which is not self-evident.

11. Alternatively, Mr Kerr relies on s. 9 of the Limitation Act 1980, which limits recovery in actions based on statute to six years. I consider this point in section I below.

(b) The appellant

12. Mr im Thurn ably represented Mrs Arca. The essence of his case is captured in the following submission:

> "The appellant says that her desired construction can be derived from the wording of the Regulation as it stands without any alteration or implication of additional meaning; whereas the respondent's desired construction (*viz.* that the Regulation '*prescribes* that an application is made *within* the financial year in question') could be achieved only by altering the words that are there, e.g. substituting 'in' for 'as regards'."

13. Mr im Thurn argues that there is in reality no ambiguity in the provision; that it plainly permits backdating because it contains no language precluding it or

requiring applications to be made in a particular financial year. He points out that the draftsman could easily have excluded backdating by using the simple preposition "in" instead of the words "as regards". He also points out that in other instances where backdating is limited (e.g. council tax benefit), there are explicit statutory provisions regulating the matter. The Secretary of State had the power to make such explicit regulations here, either excluding backdating or qualifying it, but has not chosen to do so.

14. Mr im Thurn invites me not to follow this Tribunal's earlier decision in *Smith* v. *Allerdale Borough Council* (2010), refers me to various websites and publications which support his contention, and maintains that s. 9 of the Limitation Act does not apply. All these points are considered further below.

E. The Tribunal's earlier decisions

15. I am not, of course bound by an earlier decision of the Tribunal and it would be an error of law to follow it for no better reason than to secure consistency. It is certainly true that conflicting decisions of the Tribunal are deeply unsatisfactory and do not conduce to justice. For that reason, I approach an earlier decision with care and respect.

16. However, I am bound to say that, whatever conclusion I reach in this matter, the reasoning of the panel in *Smith v. Allerdale BC* (2010) is of no assistance. I quote the paragraph in which the panel explains why it has concluded that the appellant's argument for backdating is unsustainable:

> "22. The panel was of the opinion that Regulation 3(1)(b) did not allow reductions to be backdated to earlier financial years than the year in which the application was made. If this were the case, it could mean, in theory, that a reduction could be backdated to 1 April 1993, the date from which council tax was introduced. This was currently over 17 years ago and, in the panel's opinion, an unreasonable proposition, particularly considering the billing authority had publicised the reduction scheme with every annual bill."

17. This reasoning is quite unsatisfactory and deficient. It evinces no attempt to confront the actual wording of the regulation; it rejects backdating to 1993 as unreasonable without engaging in a proper exercise of statutory interpretation (in fact, this proposition merely restates the question rather than supplies an answer); and it attaches significance to the publicity given each year to the reduction scheme, when that cannot possibly have relevance in construing the statutory provision.

18. A panel in 2012 (Appeal no. 1230M77030/182C) reached the same conclusion, believing that the wording of the regulation did not provide for backdating; and "there is no implied intention of this in the explanatory notes to the regulations" (para. 12).

They concluded that the respondent council had, in refusing to backdate, correctly interpreted the regulation and accordingly dismissed the appeal.

19. The approach to statutory interpretation here is superficial and appears to be based on a belief that the wording plainly excludes backdating and is incapable of any other interpretation, which is manifestly not so.

20. Since I can derive no assistance from these decisions, I must disregard them.

F. Other statutory provisions

21. Mr im Thurn cites an analogous provision in relation to council tax benefit where backdating is dealt with explicitly in reg. 69(14) of the Council Tax Benefit Regulations 2006 and during argument indicated that he was aware of no comparable situation where backdating, when permitted, was not the subject of explicit provisions.

22. Moreover, that was also the case under the legislation prior to the introduction of council tax. The Rating (Disabled Persons) Act 1978 gave the rating authority a very wide discretion to grant a rebate for any period earlier than the period in which the application was made "in such circumstances and to such extent as the rating authority may determine" (s. 3(3)(b)).

23. What can be inferred from such provisions? The appellant says they show that if backdating is to be regulated, the legislation will regulate it expressly. The contrary view is that what these provisions chiefly do is to permit backdating when it would not otherwise be possible but also to prescribe the circumstances, conditions or limitations.

24. I think no general proposition can be derived from these provisions and one is driven back to the actual wording of the regulation. If the regulation suggests backdating is not available, a subsequent provision then permitting it will make sense and may impose limitations on it. If the wording suggests backdating is permissible, it follows that no further provision will be necessary to authorise it.

G. The official advice

25. The appellant drew my attention to two official websites in support of backdating.

26. The first was under the NHS banner, but headed "Carers Direct" and was entitled "Personal and household finance" and subtitled "Council Tax discounts". This advises unequivocally that council tax discount can be backdated to 1993 when council tax was introduced. It states that no reasons have to be given for the failure to apply previously and mentions that a refusal to backdate can be challenged in the VTE. A sample letter to the local authority insisting that backdating is permissible under the regulations is provided.

27. It is unclear who the author of this advice is. Moreover, the right to backdate is asserted but not in any way justified or explained. Even if authorship could be

attributed to the NHS, which is obviously an official body and an emanation of the State, I cannot ascribe any particular status to this opinion on the meaning of the legislation in question and must therefore disregard it.

28. The second appeared on the Directgov website, dated January 2012, under the heading "Council Tax reduction for disabled people – how to apply" and it states:

> "Normally the reduction is backdated to the date you applied. Councils may backdate a reduction if you can demonstrate you were entitled to it before you applied."

29. This is much less specific than the NHS advice with its specific reference to 1993. It is not clear whether it refers only to backdating to the start of the financial year in which the application is made; and in any case says councils *may* backdate, suggesting they are not obliged to do so but have a discretion.

30. I am satisfied that this text emanates from the government department responsible for the regulations in issue in this appeal – the Department for Communities and Local Government's Council Tax Information Letter 5/2006 in December 2006 referred local authority finance officers to the website - and if the wording were more helpful to the appellant, it might have lent strong support to her contention, as it did in another decision of this Tribunal on council tax in relation to students' overseas spouses or partners: see *Re appeals against Harrow, Hounslow and Waltham Forest LBC* [2012] RA 36, paras. 16 and 21-23 and, on appeal to the Administrative Court, *sub. nom. LB of Harrow* v. *Ayiku* [2012] EWHC 1200 (Admin), paras. 17 and 29-31, *per* Sales J.

31. If the wording on the website were more strongly supportive of the appellant's argument, it would be necessary to consider what weight should be given to the opinion, in the light of the *dicta* in the above cases, but in the circumstances of this case, the government view is of little or no assistance to me. (I understand, incidentally, that Directgov has now been replaced by Gov.UK and the relevant page says nothing about backdating.)

32. Once again, therefore, I am driven back to a textual analysis of reg. 3(1)(b).

H. Reg. 3(1)(b)

33. For convenience, I set out the words again:

> "as regards the financial year in question, an application is made in writing … to that authority".

34. On any test, this is scarcely legislative drafting at its best. Even if there is a presumption against backdating, these words do not succeed in plainly excluding it if that were the draftsman's intention.

35. "As regards" means "in respect of" or "concerning": it does not mean "in". There is a degree of ambiguity in this language, but a close and careful reading cannot, in my

judgment, support the respondent's view that backdating is excluded. The draftsman would have had to say so and he has not. He may have expressed himself clumsily or imprecisely, but the words do not preclude applications in respect of earlier financial years, which could so easily have been done if that had been the intention. What he has written, albeit in a ham-fisted fashion, is that a written application is made to the authority in respect of – not "in" – the financial year in question; and I take "in question" to mean the year in respect of which the applicant is applying for the reduction, irrespective of whether that is the current financial year or not.

36. It is presumably a straightforward analysis of this sort that has led various advice agencies and local authorities to the conclusion that backdating is permitted; and permitted refers to the applicant not the authority, i.e. the applicant *may* apply in respect of previous years, but the billing authority *must* consider such applications on their merits.

37. It may at first sight seem surprising that a statutory provision of this kind should permit applications in respect of previous years, and potentially an ever-increasing number of years, leaving billing authorities in the position of having to return monies collected in previous financial years, but if that is what the statutory language provides, then that is how it is. There is nothing so unreasonable, ludicrous, preposterous or unworkable as to render this conclusion untenable. Furthermore, as neither the sums involved nor the numbers of such applicants are likely to be great, perhaps this was indeed intended by the draftsman, to be fair to taxpayers in difficult circumstances, but even if it were not, it is the inescapable outcome of the drafting. It is, after all, what happens in a successful banding appeal where the BA must alter the band retrospectively back to April 1993; and in a successful non-domestic rating appeal the decision is retrospective to the start of the list. As Henriques J. noted in *Hammersmith and Fulham Billing Authority* v. *Butler* [2001] RVR 197, para. 9: "… backdated recovery of rates is by no means a novel concept. It is a common practice both in domestic and non-domestic rates recovery."

38. Unless there is some basis for limiting applications to a shorter period, it follows that applications may go back to 1993 when this tax and its associated arrangements were introduced. This may seem particularly surprising, but is in fact an illusory fear, as will emerge in the next section.

I. The Limitation Act 1980

39. If, as I have held, applications may be made in respect of earlier years, it follows they may go back to the introduction of the Regulations unless some other statutory provision overrides that result. The respondent says that s. 9 of the Limitation Act 1980 limits the appellant's claim to six years. Section 9 provides:

> "(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

40. No issue arises in connection with the reference to "enactment" in s. 9(1) and the appellant accepts that both the Local Government Finance Act 1992 under which this appeal is brought and the particular statutory regulations on which it turns are "enactments" for this purpose: Interpretation Act 1978, s. 23(2).

41. But the appellant does not accept that these proceedings constitute "an action to recover any sum".

42. The interpretation section of the 1980 Act is notably unhelpful. "Action", according to s. 38(1), "includes any proceedings in a court of law".

43. The first question that arises is whether proceedings in a tribunal such as this are covered by the section. The appellant concedes that the Tribunal is a court of law for these purposes. If s. 38(1) had said "means" instead of "includes", it would have been necessary to consider whether these proceedings could be characterised as "proceedings in a court of law", which would not have been straightforward, but as it says "includes", I cannot discern any reason why tribunal proceedings should be excluded. No reasons or authorities have been advanced in argument and I cannot see any basis for holding that s. 9 cannot or should not apply to proceedings in a tribunal such as this.

44. The second question is whether proceedings of this nature fall within the terms of s. 9. I accept the appellant's contention that not all legal proceedings fall within the Act in general or s. 9 in particular. For example, in *Bray v. Stuart A. West & Co*. [1989] 139 New L.J. 753, Warner J. drew, or rather confirmed, a distinction between proceedings in which " a party seeks to enforce his legal rights, to which the Limitation Acts may apply, and proceedings … where a party invokes the court's supervisory jurisdiction over solicitors". The appellant's claim before me in this case may, it seems to me, aptly be described as enforcement of her legal rights. There is certainly no question of the exercise of a supervisory jurisdiction of the kind that arose in *Bray.*

45. The appellant argues that the proceedings in this case fall outwith s. 9, maintaining that the cause of action here is a statutory entitlement to a discount or to be relieved of an obligation to pay a sum and not an entitlement to receive a payment (or repayment) of money, and the Tribunal itself cannot order a repayment.

46. Council tax appeals to this Tribunal arise under s. 16(1) of the Local Government Finance Act 1992:

> "A person may appeal to a valuation tribunal if he is aggrieved by –
>
> …

(b) any calculation made by such an authority of an amount which he is liable to pay to the authority in respect of council tax."

47. Once an appeal is successful, the Tribunal may make various orders, including one requiring "the decision of a billing authority to be reversed" (The Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009 (SI 2009 No 2269), reg. 38(1)(c)) or "a calculation … of an amount to be quashed and the amount to be recalculated" (reg. 38(1)(d)).

48. The appellant's analysis, as outlined in para. 45 above, while correct on its face, seems somewhat artificial. Once it is held that the appellant's applications for earlier years must be granted, there must be a recalculation and monies already paid will have to be returned, even if the Tribunal does not specify the actual sum which the respondent must return to the appellant. It is therefore difficult to see why this should result in the removal of these proceedings from the ambit of s. 9.

49. Mr im Thurn (prompted by an enquiry from me) says that, as the Tribunal cannot order the respondent to return any money to Mrs Arca, enforcement proceedings would lie in the county court if the council refused to pay, where the Limitation Act provision might apply, or might not if the action were regarded as restitution. I am not convinced that the appropriate remedy would lie in the county court, rather than public law proceedings in the Administrative Court to enforce the Tribunal's order, but I do not think these considerations are of help in determining the issue before me.

50. The appellant also points to s. 38(11) of the Limitation Act which excludes recovery by the authorities of sums overpaid or wrongly paid under social security legislation, but the exclusion arises only where the method of recovery is "other than a proceeding in a court of law". I do not therefore think this is of any relevance here.

51. The case law is also against the appellant. Lord Goddard CJ has said that the courts will take a broad, realistic view of all the circumstances when considering whether proceedings are "to recover any sum recoverable by virtue of any enactment" (*West Riding C.C.* v. *Huddersfield Corporation* [1957] 1 QB 540, 546-547).

52. In the earlier case of *China* v. *Harrow Urban District Council* [1954] 1 QB 178, the Divisional Court (Lord Goddard CJ presiding) considered whether the Limitation Act 1939 (which for present purposes is no different from the 1980 Act which replaces it) applied to proceedings for the recovery of domestic rates.

53. In this case, the local rating authority was seeking to recover unpaid rates going back many years and it was the ratepayer who invoked the Limitation Act. The only procedure open to the authority was an application to the justices for a distress warrant. The Divisional Court held that the Act did apply.

54. Lord Goddard, rejecting the argument that the section had no application because there was no ordinary action to recover the unpaid sums, could "see no good reason for unduly limiting words which can apply to a particular case as courts always lean

against stale claims" (at 185) and concluded that the section "was intended to apply to all money claims made in a court" (at 186). He ended his judgment by saying that "the legislature meant to bring every class of litigation, before whatever tribunal it might come, within the ambit of the statute" (*ibid.).* The other two judges delivered judgments in like vein. (I note that this six-year limitation is now expressly contained in the regulations: Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992 No. 613), reg. 34(3).)

55. I appreciate that there are differences between proceedings in the magistrates' court for a distress warrant in respect of unpaid rates and an application for a disability reduction, but the inferences I draw from this case are that the Limitation Act applies to rates, the precursor of council tax, that a broad, common sense approach should be taken to what falls within the limitation provisions, and that the statutory language should be interpreted accordingly.

56. I have therefore come to the view that these proceedings are governed by s. 9 of the Limitation Act and must now address the third and final question in relation to the Act of "the date on which the cause of action accrued".

57. The appellant submits that, if the Limitation Act does apply, the six-year period begins to run only when the council tax payer makes the application or applications for the discount. Mr im Thurn relies on *Regentford Ltd* v. *Thanet District Council* [2004] EWHC 246 (Admin) and the *China* case (*supra*).

58. In *Regentford*, Lightman J held that council tax was due only when the demand for payment was issued, which seems as obvious as it is correct, and reflects the view taken by Lord Goddard in *China*, but I fail to see how this can support the contention that the appellant's claim must run from her composite letter of application in February 2012.

59. There is manifestly a difference between being liable to pay someone money, whether it is a tax or any other kind of debt, only when that person makes a lawful request or demand for payment, and seeking to recover sums already paid many years previously. The argument that this must be dated from the appellant's letter of February 2012 would make a nonsense of the limitation period and indeed render s. 9 nugatory in this context. In my judgment, a demand to pay council tax is materially different from an application for a disability discount and, *a fortiori*, a late application.

60. Mr im Thurn has further argued that the appellant might be able to use any success in this appeal to reduce or eliminate future council tax bills until the overpaid sum had been recovered, rather than being given a lump sum following my decision, but I cannot see the relevance of this argument. The parties may come to whatever agreement they like once this decision has been issued as to how effect might be given to it, but it cannot have any bearing on the decision to which I must come.

J. Conclusions

61. I conclude that on a proper reading of the legislation the appellant's applications for a disability reduction for financial years prior to 2011-2012 are valid and must be granted – there being no dispute as to eligibility on the facts – but subject to the six-year limitation period by virtue of s. 9 of the Limitation Act 1980.

62. Mrs Arca's two letters of application fell within the financial year 2011-2012. For present purposes, I take the earlier letter as founding the application, which is partly prospective and partly retrospective.

63. The prospective element is straightforward and entitles Mrs Arca to the reduction from the date of her letter – 3 November 2011 – until the end of that financial year in 2012, but the billing authority backdated it to the beginning of the financial year in question, namely, 1 April 2011. There is no dispute about that and it is not the subject of this appeal.

64. Mrs Arca further seeks the reduction to be applied to previous years. I have held that, while backdating is mandatory, it is subject to the six-year limitation in s. 9 of the Act of 1980.

65. The billing authority argue that the correct date should be 12 March 2006 on the basis that the "cause of action accrued" on the date when Mrs Arca instigated her appeal in this Tribunal. I think Mr im Thurn agrees that this is the relevant date from which to make the calculations, although his conclusion appears to differ.

66. I do not accept this approach. In my judgment, the cause of action accrued when Mrs Arca made her application to the council, not when she appealed to the Tribunal. The word "action" in s. 9 is, in my judgment, being used in different senses when it refers at the beginning to "An action" and at the end to "the cause of action". The former relates to the instant proceedings; the latter refers to the original cause or facts giving rise to that action.

67. Accordingly, I conclude that Mrs Arca is entitled to the reduction for the six years up to 2 November 2011 (i.e. the day before her application is dated), which takes it back to 2 November 2005. I note that the reduction has already been applied from 1 April 2011 for the whole of that financial year.

K. Observations

68. This decision produces a situation not dissimilar to that arising after the decision in the student spouses case referred to in para. 30 above. There, different panels and different billing authorities had interpreted the regulations differently, producing a most undesirable situation and one hardly conducive to justice. Happily, that was eventually resolved authoritatively by a decision of the High Court.

69. There may or may not be such an appeal in this case, but until the matter is settled by a higher court, or the regulation is amended, billing authorities would be well advised

not only to regard this decision as representing a correct statement of the law but also as the interpretation almost certainly to be applied by this Tribunal in any future appeal raising the same point unless fresh legal arguments can be made.

ORDER

The respondent billing authority must apply the disability reduction to the appellant from 2 November 2005 to 30 March 2011, recalculate her council tax bills accordingly and return to her such sums as have been overpaid.

President

20 March 2013 (c)