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TAX, RETROSPECTIVE LEGISLATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: SOME THOUGHTS ON *NATIONAL AND PROVINCIAL BUILDING SOCIETY v UK*[1]

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Introduction

In its judgment in the above case the Court has rejected a claim by building societies that retrospective tax legislation to close a lacuna in the Finance Act 1985 was contrary to the Human Rights Convention. However it would be wrong to suggest on this case alone that all challenges to retrospective legislation will fail; each case must be decided on its own facts. The Court in Strasbourg was swayed by the fact that in the case of taxation legislation, Contracting States enjoy a wide margin of appreciation which is in most instances to be respected unless it is based on a wholly unreasonable premise.

The facts

In the National Provincial case, a change in the way tax was collected (quarterly instead of annually based on assessment of each building society's financial year) exposed a "gap period" : a period between the end of the building society's accounting period and the start of the first quarter under the new regime. To ensure that interest paid during the gap period was brought into account, regulations were introduced.

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1 [1997] STC 1466 The European Court of Human Rights.

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In proceedings[3] instituted by the Woolwich Building Society to challenge the lawfulness of these regulations, the House of Lords held that the regulations were *ultra vires* the empowering statute and therefore void in their entirety. In a subsequent action for restitution, the Woolwich succeeded in recovering the tax paid.[4] As a result, new legislative provisions were introduced to validate retrospectively the regulations which had been struck down in the Woolwich proceedings. This new legislation was enacted as section 53 of the Finance Act 1991 and had retrospective effect save that by sub-section (4) it had no effect in relation to a building society which commenced proceedings to challenge the validity of the Regulations before 18th July 1986. The Woolwich was the only building society which satisfied this condition.

The National Provincial and other building societies subsequently commenced proceedings for repayment of monies paid pursuant to the regulations, but not before the UK Government had introduced further legislation in the form of section 64 of the Finance (No 2) Act 1992. As the upshot of the legislation was to remove with retrospective effect the causes of action and render fruitless any attempts to secure redress before the courts, the proceedings commenced by National Provincial and the other building societies were abandoned.

The building societies therefore complained to the European Court of Human Rights requesting the Court to find that the facts disclosed breaches of Article 6 of the Convention and Article 1 of Protocol No.1 to the Convention, taken alone and in conjunction with Article 14 of the Convention.

As to the alleged violation of Article 1 of Protocol No.1(unlawful deprivation of their possessions) the applicant societies contended that repeated assurances had been given by the Government that no additional revenue would result from the new measures. But they argued that Parliament had been misled as to the aim of the legislation and the Government had procured the enactment of legislation which had the result of expropriating substantial amounts of money lawfully held by the building societies in their reserves. Subsequently, that expropriation was legalised by means of retrospective legislation which deprived the societies of their legal rights to recover those amounts. However the Court unanimously disagreed and decided that those monies were intended by Parliament to be charged to tax, had not been subjected to double taxation and were therefore not wrongly expropriated.

The Court noted that Article 1 of Protocol No. 1 guaranteed the right to property: the principle of quiet enjoyment of possessions, the deprivation of possessions only subject to certain conditions and the right of Contracting States to control the use of property in accordance with the general interest or to secure the payment of

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3 *R v IRC, ex parte Woolwich Building Society* [1990] 1 WLR 1400.

4 *Woolwich Building Society v IRC* [1993] AC 70.

taxes or other contributions or penalties. Accordingly, an interference including one resulting from a taxation measure, must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In other words, there must be a reasonable relationship of proportionality between the means employed and the aims pursued. In determining whether this requirement has been met, the Court recognised that a Contracting State, particularly in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature's assessment in such matters unless there is no reasonable foundation for it. Therefore, in enacting section 53 of the 1991 Act retrospectively, Parliament was concerned to remedy the technical deficiencies of the regulations, as the decision to do so was taken before the date when the Leeds and National Provincial Societies issued their writs. Although section 53 had the effect of extinguishing the restitution claims of those two applicant societies, having regard to the public interest considerations which underpinned the proposal to legislate with retroactive effect and Parliament's endorsement of that proposal, there was an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall in a changeover to a new tax payment regime and the Exchequer is not denied revenue because of inadvertent defects in the enabling tax legislation.

The Court therefore considered that the actions taken by the respondent State did not upset the balance which must be struck between the protection of the applicant societies' rights to restitution and the public interest in securing the payment of taxes. Accordingly there had been no violation of Article 1 of Protocol No. 1. The Court also rejected, by a majority of eight to one, the applicant societies' argument that there was a breach of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention, which prohibits discrimination. The effect of section 64 of the 1992 Act was such that it applied in equal measure to other financial institutions and did not perpetuate any difference in treatment between the Woolwich and the applicant societies.

As for the complaint that there had been a breach of Article 6(1) of the Convention, giving a right to a fair hearing, the building societies claimed that the enactment of retrospective legislation thwarted their access to a court for a determination of their civil right to restitution of monies to which they were lawfully entitled. Whilst the building societies accepted that limitations on the right of access to a court guaranteed by Article 6(1) may, in certain well defined circumstances, be justified having regard to a Contracting State's margin of appreciation, in considering the scope of the limitation to the right of access to a court, they argued that the retrospective measures in question did not pursue a legitimate aim given that the Government's overriding concern was to legitimise the unlawful expropriation of their assets.

In determining whether there had been a violation of Article 6 (1), the Court noted that the right to institute proceedings before a court in civil matters was only one aspect of the "right to a court". However, this right is not absolute, but may be

subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the state. In this respect, the Contracting States enjoy a certain margin of appreciation[5] although the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

The Court noted that the effect of the retrospective legislation was to thwart the building societies' chances of winning their restitution proceedings against the Inland Revenue and also to recover any of the tax they had paid. But the Court recalled that the legislature did not at any stage prevent or bar the building societies' access to a court to seek a determination on the rights which they wished to assert.

However in ascertaining whether there had been a violation of Article 6(1), the Court decided that the building societies were well aware of the legislature's intention to seek to cure the technical defects of the regulations as not to do so would be to allow a large amount of collected revenue to be lost on account of a technicality. The Court also noted that the building societies only commenced their proceedings after Parliament's approval had been sought for the retrospective validation of the defective regulations, they were therefore attempting to benefit from the vulnerability of the authorities' situation following the outcome of the Woolwich litigation. The Court also recalled that the decision of the authorities to pass retrospective legislation to remedy the defective regulations was taken without regard to pending legal proceedings and with the aim of restoring Parliament's original intention with respect to all building societies whose accounting periods ended in advance of the start of the fiscal year. Therefore taking all the facts into account, the Court unanimously decided that there had been no breach of Article 6(1) of the Convention.

The Court also rejected the claim Article 6(1) of the Convention taken together with Article 14 of the Convention had been violated. The applicant societies' argument that they were in a virtually identical situation to that of the Woolwich and possessed common law rights to restitution of monies expropriated by the respondent State was rejected by the Government as there existed a reasonable and

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5 See the interesting case of *Harvest Sheen Limited & Anor v The Collector of Stamp Revenue*, (1997/98) 1 OFLR 669 which was a decision of the High Court of Hong Kong in which the "margin of appreciation" did not assist the authorities; see p 667g. Although the judge's comments on Article 10 of the Hong Kong Bill of Rights Ordinance were obiter, Art 10 is substantially similar to Art 6 of the Convention and the judge relied on decisions brought under the Convention. See also Timothy Lyons' note on the Harvest Sheen case in this *Journal*.

objective justification for the difference in treatment; the Woolwich alone having borne the costs and incurred the risks of the earlier litigation. The applicant societies could not be said to have been in a relevantly similar situation. Additionally, the Court held that were similar reasons motivating the enactment of section 53 of the 1991 Act and the appropriateness of excluding the Woolwich from the retroactive effects of that measure as that building society had secured a final court judgment in its favour.

Comment

Cases where a Contracting State has passed retrospective legislation to right a wrong are not uncommon. A similar situation arose in the case of *S.A. Pressos Compania Naviera and Others v Belgium*[6] where legislation was passed to correct an "incorrect" judgment of the Court of Cassation which had rendered the State potentially liable for the negligence of pilots, the State being responsible for pilotage services. Proceedings brought by many applicant shipowners against the State were not dealt with at first instance when the legislation was introduced. Although a majority of the Commission decided that the retrospective legislation had deprived the applicants of "the right to obtain a decision on the civil rights and obligations", a minority was of the view that as the judgment of the Court of Cassation had been incorrect, the legislature had been right to rectify it. There had been no harm done to the applicants' interests as their respective liabilities were covered by insurance policies and the possibility of action against the State was a windfall.

In the building societies case, the applicant societies had disputed from the beginning their liability to pay tax on the interest they had paid to their investors in the gap period. The concerns of the societies had been made known to Parliament during the passage of the relevant legislation but by enacting the legislation, Parliament had confirmed its intention to bring the interest paid during the gap period into account for tax purposes. The subsequent litigation was a deliberate strategy to frustrate the original intention of Parliament. The margin of appreciation in relation to tax matters is clearly wide, justifying as in this case, retrospective legislation. But only time will tell whether that margin is limitless.

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6 Case No. 17849/91 Comm. Rep. 4.7.94. The Court considered the case on the basis of Article 1 of Protocol No.1 and found it unnecessary to examine Article 6 separately.