

# THE INDUSTRIAL TRIBUNALS

CASE REF: 14427/18

**APPELLANT:** Surface Solutions NI Limited

**RESPONDENT:** Construction Industry Training Board NI

## DECISION

The unanimous decision of the tribunal is that it is not satisfied that the appellant ought not to have been assessed to the levy or ought to have been assessed in a smaller amount so as to rescind or reduce the assessments under Article 24 (5) of the Industrial Training Order 1984. The appellant's appeal against the assessments to the levy made by the respondent on 17 August 2018 numbered C1S114032 and C1S114033 is accordingly dismissed and the assessments to levy are confirmed.

### Constitution of Tribunal:

**Employment Judge:** Employment Judge Bell

**Members:** Mr I Atcheson  
Mr R McKnight

### Appearances:

The appellant was represented by Mr Tony McGovern.

The respondent appeared and was represented at the hearing by Mr J Coyle, Barrister-at-Law, instructed by Babingtons Solicitors.

### The Appeal

1. The appellant appealed under the Industrial Training (Northern Ireland) Order 1984, Articles 24 and 30, against the assessment to the levy made by the respondent on 17 August 2018 numbered C1S114032 and C1S114033 on grounds that its main business activity did not fall within the scope of the applicable legislation.

### Background

2. The appellant came to the respondent's attention from information appearing in Stubbs Gazette in December 2016 and upon checking the Equifax database which

listed the appellant as having a Standard Industry Classification (SIC) Code of "Other specialised construction".

3. The respondent on 9 January 2017 sent for completion by the appellant a pre-registration letter and questionnaire used by its Levy Department (responsible for the administration of the CITB NI's Register of Employers and Levy collection) to determine whether an employer potentially falls within the scope of the Construction Industry Training Levy and should be placed on the respondent's register of construction employers.
4. Protracted communication thereafter took place between the appellant and respondent.
5. The respondent added the appellant in January 2017 to its register of construction employers.
6. The appellant advised the respondent that its SIC Code listed at Companies House had been changed to "Landscape Service Activities".
7. Mr McGovern primarily on the basis that he did not believe the appellant to fall within scope of the Construction Industry Training levy refused to provide information sought by the respondent to assess whether the appellant was in scope and if so the statutory levy payable.
8. Ultimately the respondent raised an estimated invoice to allow the appellant to formally dispute it and to unlock access to the respondent's internal review process through the Board Review Committee and if required an Industrial Tribunal in circumstances where it suspected that the appellant was in scope, but where information requested had not been provided and a detailed assessment possible.
9. A meeting took place between Mr McGovern and the CITB NI Board members on 17 May 2018 following which parties were left with differing impressions of their agreed way forward. Mr McGovern believed that board members were to conduct a site visit to gain an understanding of the appellant's main business activity, whereas the respondent understood that it would be allowed to attend to review the scope position.
10. Ultimately a scope audit was proposed to take place on 13 August 2018 by the respondent to include a payroll audit and refused by Mr McGovern on the basis that he did not agree with the respondent's registration process and would not be supplying requested information.
11. Consequently the respondent proceeded to issue two estimated invoices, numbered CIS114032 for the levy period 52 (01/09/2016-31/08/2017) and numbered CIS114033 for period 53 (01/09/2017-31/08/2018), both dated 17 August 2018, to the appellant, in respect of which the appellant has raised this

appeal on grounds that its' main business activity did not fall within the scope of the applicable legislation.

12. Mr McGovern in closing arguments at the hearing of this appeal raised whether the respondent's contention that a driveway forms part of a building so as to fall within the scope of Schedule 1 paragraph 1 (a) of the 1964 Order was correct, it being to him, four walls and whatever is in it. Mr Coyle offered to provide short written submissions on authority that a driveway is part of a building if this was a point now being advanced, which Mr McGovern confirmed it was. The respondent was given 7 days to provide written submissions thereon and the appellant 7 days thereafter to reply.

### **The Issues**

13. Whether the appellant ought not to have been assessed to levy and assessments be rescinded under Article 24 (5) of the Industrial Training Order 1984?

That is:-

- a. Whether the appellant's business activities fall within the scope of Schedule 1 of the Construction Board Order 1964? In particular whether or not the *main* activity of the appellant could be construed as a construction activity for the purposes of a training levy?

If so,

- b. From when the assessment to levy should apply? (The amount of the assessment was not otherwise an issue raised for determination on appeal).

### **Sources of Evidence**

14. The tribunal considered written witness statements and oral evidence from Mr Tony McGovern for the appellant and from Barry Neilson (Chief Executive) and Ashleigh McIlmurray (Board Accountant) for the respondent, an agreed bundle of documentation and further photographs presented by the appellant at hearing.

### **Relevant Findings of Fact**

15. The appellant is a company registered in Northern Ireland.
16. The appellant's website sets out that it:

*'offers a comprehensive range of decorative outdoor/indoor paving options. Our primary paving products, Surface Bound Gravel and Resin Bound Gravel offer customers the benefit of hard wearing pavements coupled with aesthetically pleasing natural stone finishes.*

*In addition to our paving range we manufacture innovative landscaping products including: bespoke outdoor furniture, natural stone cladding & walling, ironwork, water features, garden art and a complete driveway and garden design and build service.*

*At Surface solutions we have designed and developed our own range of low maintenance value adding products using locally sourced materials.'*

17. In response to the respondent's notice requiring additional information relating to tax years 2015/16, 2016/17, 2017/18, Mr McGovern apportioned wage and subcontractor payments as spread over all the activities carried out by the company in the following percentages:

- A. Research and precast concrete product development:15%
- B. Precast, specialist concrete and step face/trim product: 20%
- C. Gravel production in yard: 5%
- D. Resin Bound Gravel laying: 60%
- E. Ancillary preparation works: 10%

18. As confirmed by Mr McGovern in his evidence:

- a. The appellant has a Landscape Centre where its products can be seen and where it stores materials which it brings to site.
- b. The appellant's minor business activities include the installation of cobbled decorative borders, this type of work making up approximately 10% of sales; also, the supply and laying of an aggregate concrete surface being approximately 5% of sales; furthermore the appellant has carried out some research and development work into pre-cast concrete flags.
- c. Approximately 80% plus of the appellant's sales are for the supply and laying of resin bound gravel on driveways, pathways and public realm schemes where the surface upon which it is being laid (usually a concrete or tarmac layer) has normally already been constructed by someone other than the appellant. Preparation works may be involved and carried out by the appellant in terms of edging and kerbing. A significant proportion of the appellant's resin bound gravel work involves recreational areas. The appellant prepares the resin bound gravel by mixing dried gravel in bags with polyurethane and then trowels it over the surface and flattens it to an even surface and a degree of skill is required to ensure its successful laying. Where used in driveways the surface has been applied up to and touching buildings.
- d. If properly maintained the resin bound gravel surface may last for many decades and as such is not temporary in nature.
- e. The appellant in or around 2012 carried out minor repair works (at a value of less than £3,000.00) involving the laying of resin bound gravel over a tarmac base laid by another contractor to repair tidal damage which had occurred to Portrush East Strand, a marine surface.

## **Relevant Law**

19. The Construction Industry Training Board (CITB) was formed by the Industrial Training (Construction Board) Order (Northern Ireland) 1964 to provide or secure the provision of courses and other facilities for the training of persons employed or intending to be employed in the construction industry. Provision for the raising and collection of a levy for the purpose of raising money towards meeting the expenses

of industrial training boards is made under the Industrial Training (Northern Ireland) Order 1984 (which replaced the Industrial Training Act (Northern Ireland) 1964).

20. Each year a Levy Order is required giving the Construction Industry Training Board power to collect levy for the new training year. The Industrial Training Levy (Construction Industry) Order (Northern Ireland) 2016 gives effect to proposals submitted by the Construction Industry Training Board to the Department for the Economy for the imposition of a (further) levy upon employers in the construction industry for the fifty-second levy period, commencing 1 September 2016, ending 31 August 2017 at a rate of 0.65% in respect of relevant earnings over £80,000.00.

21. The 2016 Levy Order defines:

*“construction establishment”* as an establishment in Northern Ireland engaged wholly or mainly in the construction industry for twenty-seven or more weeks in the fifty-second base period, or being an establishment that commenced to carry out business in the fifty-second base period, for a total number of weeks exceeding one half of the number of weeks in the part of the said period commencing with the day on which business was commenced and ending on the last day thereof; or where an election is made, in any part of the alternative fifty-second base period;

*“construction industry”* as any one or more of the activities which, subject to the provisions of paragraph 2 of Schedule 1 to the Industrial Training (Construction Board) Order (Northern Ireland) 1964 are specified in paragraph 1 of the Schedule as the activities of the construction industry;

*“fifty-second base period”* as the year that commenced on 6 April 2015 and the *“alternative fifty-second base period”* as the year commencing on 6 April 2016; and *“fifty-second levy period”* as the year commencing on 1 September 2016 under the 2016 Order.

22. Similar provision is made in The Industrial Training Levy (Construction Industry) Order (Northern Ireland) 2017 which gives effect to levy proposals submitted for the fifty-third levy period, commencing 1 September 2017, ending 31 August 2018, at a rate of 0.65% in respect of relevant earnings over £80,000.00 and which defines the *“fifty-third base period”* as the year that commenced on 6 April 2016; and *“alternative fifty-third base period”* as the year commencing on 6 April 2017; and *“fifty-third levy period”* as the year commencing on 1 September 2017.

23. Schedule 1 to the Industrial Training (Construction Board) Order (Northern Ireland) 1964 sets out:-

“1. Subject to the provisions of this Schedule, the activities of the construction industry are the following activities in so far as they are carried out in Northern Ireland:-

(a) *all operations in:-*

(i) *the construction, alteration, repair or demolition of a building;*

(ii) ...

(iii) *the construction, structural alteration, repair or demolition of any ...dock, harbour, pier, quay, wharf, coast protection ...*

(iv) ...

(v) *the construction of ... a playing field or ground for sporting or recreational purposes ...*

...

(g) *when carried out in association with or in conjunction with any of the foregoing activities, any of the following activities, that is to say:-*

(i) *research, development, design or drawing;*

(ii) *operations in connection with sale, packing, warehousing, distribution or transport;*

(iii) *work done at any office ... store, warehouse, or similar place or at a garage;*

(h) *any other activity of industry or commerce carried out at or from an establishment engaged mainly in one or more of the foregoing activities;*

2. *Notwithstanding anything contained in this Schedule there shall not be included in the activities of the construction industry:-*

(a) *the activities of any establishment (not being that of a local authority) engaged mainly in one or more activities not included in paragraph 1 of this Schedule;*

...

3. (1) In this Schedule:-

(a) *“building” includes any structure or erection (other than a tent or caravan) and any part of a building so defined;*

...

(h) *“repair” in relation to a building includes maintenance ,re-pointing, re-decoration and external cleaning;”*

24. On an appeal by a person assessed to levy imposed under a Levy Order, if the appellant satisfies the tribunal that he ought not to have been assessed to the levy or ought to have been assessed in a smaller amount the tribunal under Article 24 (5) of the Industrial Training (Northern Ireland) Order 1984 shall rescind, or as the case may be, reduce the assessment but (save where it appears the appellant ought to have been assessed to the levy in a larger amount and the tribunal may increase the assessment accordingly) in any other case shall confirm it.

25. The question of whether a business or employer falls within the scope of the Schedule and hence is liable for payment of the levy has been considered by tribunals and courts in Northern Ireland on a number of occasions.

26. In **F M Windows Ltd and Discount Window Systems Ltd v Construction Industry Training Board** the Court of Appeal in Northern Ireland considered and found that the tribunal was correct in law in finding that the replacement of existing windows by PVC windows constituted an “alteration” of a building within the meaning of paragraph 1 of Schedule 1 of the 1964 Order, in particular Hutton LCJ noting that paragraph 3 (1) (a) “*building*” is stated to include “*any part of a building*” and question for decision not just whether the installation of PVC double glazed window units in a house constitutes “*the alteration of a building*” but whether it constitutes “*the alteration of any part of a building*” and that the respondent would be entitled to succeed if the installation of a replacement window was an “alteration” of any part of a house; also, that the broadening of the meaning of *building* to include *part of a building* meant that there was no requirement for the alteration to be structural in effect. Pringle J therein considered that “alteration” connotes a change of some description (albeit that it does not have to be particularly extensive) and the definition of “*building*” as including any part of a building and secondly, the definition of “*repair*” in very wide terms to show a legislative intention in sub-paragraph (a) (i) to cover all, or nearly all, work done in relation to a building and hence the work of each appellant in installing double glazed windows to be an operation within the ambit of the sub-paragraph.
27. **In the Matter of an Application by HSS Hire Service Group PLC for Judicial Review** [ref: KERC3476] delivered 6 July 2001, Kerr J (as he was then) concluded that CITB does not enjoy discretion whether to require the levy to be paid but is fixed with a statutory obligation to collect the levy from those who are liable to pay it. Also, that whilst the relevant levy order contains no express provision that CITB may make an estimate of the amount of the levy in the absence of a return, that the power to estimate the amount of the levy must be regarded as incidental to the collection duties imposed therein and could not be the case that the collection of the levy could be frustrated by the refusal of employers to complete return forms and that it would be absurd to confine the power of CITB to collect the levy to those cases where a return had been made.
28. In **Trunk Flooring Limited v Construction Industry Training Board (CRN: 7287/17IT issued 9 January 2019)**, in concluding that the fitting of wooden overlay flooring brings about the alteration of a building and to be within scope of the 1964 Order, the tribunal considered that the drafters of this longstanding legislation had sought to broaden out its scope and application by including use of the phrase “*all operations in ...*” and also the inclusion of “*any part of a building*” within the definition of a building.
29. The meaning given to the word “building” varies in case law from restrictive interpretation to wide depending upon the particular context in which it is used. Interpretations include: an enclosure of brick or stonework covered by a roof; a structure of considerable size intended to endure for a considerable time; it not requiring masonry but some degree of trouble, skill and elaboration in fixing or removing the structure; a relatively permanent and substantial structure; the inclusion of adjuncts necessarily used in connection with the building; the inclusion of appurtenances expressly or impliedly included in the demise of a flat to a tenant by way of gardens and a private road [**Denetower Ltd v Toop [1991] 3 All ER661**]; the exclusion of a forecourt of a service station [**Heron Service Station v Coupe [1974] 1LR 502**]. Ultimately the meaning of a ‘building’ is a question of fact, degree and context including whether it is defined within the legislation in question.

## The Appellant's contentions

30. The appellant disputed the interpretation of its main activity as being within the scope of the Training Order by what it considered to be subjective and ambiguous processes to determine technical questions using wages turn over data and the issue of a backdated levy assessment without disclosure of the respondent's authority to do so.
31. The appellant contended that its *main* business activity is the supply and laying of resin bound gravel upon surfaces *already constructed* by someone other than the appellant, that this is an embellishment rather than "alteration" of a surface not constructed by the appellant and questioned the correctness of the respondent's contention that a driveway forms part of a building so as to fall within the scope of Schedule 1 of the 1964 Order.
32. In relation to a driveway not being "*part of a building*" Mr McGovern's main contentions in summary were:
  - a. A window as an example of a building alteration is not relevant or helpful in determination of this question, it forms part of the building structure whereas resin bound gravel laid on top of an external pavement such as a driveway, is not part of a building.
  - b. There is an absence of reference to external areas forming part of a building in the context of Building Regulations NI 2012 and that Building Control issue building completion certificates when gardens paths and driveways are incomplete.
  - c. Whilst a driveway may touch the external wall of a house it is not connected but adjacent thereto.
  - d. ***Denetower Limited v Toop***, relied upon by the respondent, relates to whether a garden belonged to rather than whether it was a structural part of a building.
  - e. In *Stroud*; words and phrases legally defined, a driveway, path or garden does not fall within the definition of a building; that a driveway is like a forecourt of a service station which (per p.306 *Stroud*) is not a building; Also (per p.309 *Stroud*) "*The word building in S11(1A)(a) of the Landlord and Tenant Act 1985 is not defined and should be given its ordinary dictionary meaning of "structure with a roof and wall" (Edwards v Kumarasamy 2015).*
33. Mr McGovern contended the appellant should not have in accordance with Schedule 1, Paragraph 2 of the 1964 Order been registered.
34. The appellant contended if found to be within scope that the levy assessment should be from the date of the tribunal's decision rather than backdated prior to the notified date of registration.



## The Respondent's Contentions

35. The respondent contended that the laying of resin bound gravel on driveways is a permanent alteration of part of a building under Paragraph 1 (a) (i) and that the appellant also falls within the categories set out in Paragraph 1 (a) (iii), 1 (a) (v), 1 (g) and 1 (h) of Schedule 1 of the 1964 Order and had rightly been assessed as within scope and assessments correctly raised.
36. In relation to a driveway being part of a building Mr Coyle in summary submitted:
- a. The width of the definition could not be wider, including all operations in the construction, alteration, repair or demolition of a building. Focus upon the activity and skill utilized are important; also fact and degree combined with context; and analysis in ***FM Windows v CITB*** helpful.
  - b. The definition of building as including any structure or erection other than a tent or caravan in any part of the building as so defined favours setting aside restrictive definitions for the more expansive ones in considering the context and catchall Parliament aimed to encompass.
  - c. The surface in the example deployed by Mr McGovern at hearing was accepted as touching, connected to the building structure. This permanent alteration forms part resultantly of the building. The gravel resin was not adjacent or delineated but connected to the bricks and mortar of the dwelling house.
  - d. Context is important in relation to definitions of building provided set out in *Stroud; Words and Phrases Legally Defined* and ***Denetower Limited v Toop*** relied upon in which gardens and appurtenances going with the building were said to form part of the building.
  - e. ***Heron Service Station v Coupe*** turned upon the definition of building with the specific exclusion in relevant regulations of a filling or service station forecourt and a very different legislative and specific context to this circumstance which is not so confined.
  - f. To be part of a building it is agreed requires permanent affixation and therefore the temporary parking or placing upon by a caravan or tent is excluded. The surface solution used is in contradistinction to those.

## CONCLUSIONS

37. Taking into consideration the relevant facts, law and submissions the tribunal has reached the following conclusions:
38. The tribunal, mindful of the reasoning in ***FM Windows*** of Hutton LCJ such that the broadening of the meaning of “*building*” to include “*part of a building*” meant that there was no requirement for the alteration to be structural in effect or particularly extensive but connotes a change of some description; and Pringle J that the definition of “*building*” as including any part of a building and secondly, the definition of “*repair*” in very wide terms to show a legislative intention in subparagraph (a) (i) to cover all, or nearly all, work done in relation to a building, find that the laying of resin bound gravel to an already constructed driveway surface is

not temporary in nature but is permanently affixed and brings about a permanent change of that already constructed surface and amounts to an *alteration* thereof.

39. The next question is whether the permanent alteration of an already constructed driveway surface by the appellant's surface solution properly falls to be considered as within the meaning of "a building" in the context of Paragraph 1(a)(i) of the 1964 Order.
40. We note the differing definitions of a building as construed in varying contexts as set out in *Stroud, Words and phrases legally defined* and indeed in relation to Building Control Regulations. The 1964 Order does not however omit to define "a building" but therein provides that a "*building*" includes *any structure or erection* (other than a tent or caravan) *and any part of a building* so defined. We consider that inclusion at the outset of Schedule 1 in the 1964 Order of the words "*all operations in*" and the broadening at paragraph 3[1](a) of a "building" to include *any structure or erection and any part of a building so defined* suggests wide legislative intent in respect of activities meant to be captured thereunder. We are mindful of the purpose of the legislation to encourage adequate training of persons employed or intending to be employed in the construction industry and of the skill involved in the preparation and application of the appellant's surface solution. We are of the opinion that in the context of the 1964 Order an adjoining driveway upon which a surface structure has first been constructed in the form of a tarmac or concrete layer before alteration thereof by the appellant, which is intrinsic to the use of the building, essential for ingress and egress thereto and without which the building otherwise cannot be sold or let, is in this specific context properly to be construed as within the definition of a building for the purpose of the 1964 Order.
41. We accordingly find on balance that the appellant's activity of laying resin bound gravel upon driveways falls within Paragraph 1 (a) (i).
42. We accept also that the appellant's activities clearly fall within categories set out at Paragraph 1 (a) (iii), 1 (g) and 1 (h).
43. We are not persuaded on balance that the application of the appellant's permanent surface solution to a constructed surface first prepared by someone other than the appellant falls outside *all operations* in the *construction* of a ground for recreational purposes so as to fall outside Paragraph 1 (a) (v) of Schedule 1 of the 1984 Order.
44. From when should the assessment to levy apply? The respondent is obliged by law to levy an employer who carries out the activities of the construction industry (as defined) in Northern Ireland as a statutory requirement under Article 23 (1) of the 1984 Order. The respondent has no discretion in that regard as confirmed by Kerr J in the Matter of an Application by **HSS Hire Service Group PLC for Judicial Review** and in which he made clear whilst the relevant levy order contains no express provision that CITB may make an estimate of the amount of the levy in the absence of a return, that the power to estimate the amount of the levy must be regarded as incidental to the collection duties imposed therein. We consider that Invoices numbered CIS114032 raised for the levy period 52 (01/09/2016-31/08/2017) and C1S114033 for period 53 (01/09/2017-31/08/2018) for the appellant who was registered in January 2017 have been raised correctly in accordance with the 2016 and 2017 Levy Orders for the relevant levy periods and base 'reckoning' periods provided therein ("fifty-second base period" as the year that commenced on 6 April 2015; "fifty-second levy period" as the year commencing

on 1 September 2016; “fifty-third base period” as the year that commenced on 6 April 2016; and “fifty-third levy period” as the year commencing on 1 September 2017) and the appellant having carried out activities of the construction industry (as defined) within the relevant base periods that the invoices have not been incorrectly backdated and the tribunal is not persuaded that the levy should properly only apply from the date of this decision.

45. The tribunal is not satisfied on appeal that the appellant ought not to have been assessed to the levy or ought to have been assessed in a smaller amount so as to rescind or reduce the assessment under Article 24 (5) of the Industrial Training Order 1984.

**Employment Judge:**

**Date and place of hearing: 27 March 2019, Belfast.**

**Date decision recorded in register and issued to parties:**