SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2022] SC EDIN 20

B1444/19

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

in the cause

ROBERT CRAWFORD

Pursuer

against

DR RICHARD DENNIS, the Accountant in Bankruptcy as the DAS Administrator

Defender

Pursuer: Farrell; Burness Paull
Defender: Lloyd; Harper MacLeod

Edinburgh, 6 May 2022

The sheriff, having resumed consideration of the cause sustains the pursuer's plea in law; repels the defender's pleas in law; quashes the determination of the respondent dated 3 December 2019 to reject the appellant's application for review of the respondent's decision to revoke the appellant's debt payment programme; ordains the respondent to consider the appellant's application for review of the foregoing decision of new; finds the defender liable to the pursuer in the expenses of the action as the same may be taxed; remits an account of expenses thereof to the auditor of court to tax and report.

NOTE

[1] This is an appeal brought pursuant to regulation 47C of the Debt Arrangement Scheme (Scotland) Regulations 2011 (SSI 2011/141), ("the 2011 regulations"). Put shortly, the appellant's application for a debt payment programme (DPP) was approved by the respondent in 2018. By request dated 10 June 2019, one of the appellant's creditors (HMRC) sought revocation of the DPP. By letter dated 15 October 2019 the respondent approved the revocation. The appellant sought review of the decision of the respondent. By letter dated 3 December 2019 the respondent adhered to the decision. Against that decision an appeal by way of summary application has been brought before this court. The action was sisted for some time during the Covid emergency. The respondent lodged answers and the matter proceeded to a hearing before me.

[2] There is no material dispute between the parties as to the relevant facts which are largely a matter of admission. In order to determine the matter it is necessary to expand the summary in paragraph [1] above.

The relevant facts

[3] (i) HMRC submitted a request for the revocation of the appellant's DPP on 10 June 2019 (5/1/1). The principal basis for seeking revocation was "the debtor has yet again failed to pay continuing liability (sic) on time". It was stated that the appellant currently had a VAT debt of £38,703.43 outstanding from his April 2019 VAT return. It was also said that he had a partnership late filing penalty of £100 outstanding on his self-assessment account. It was also alleged that there was a missing DPP instalment for May 2019. The document records that HMRC had made a number of requests for revocation of the DPP (a total of four). In each case, the application for revocation was rejected by the respondent. In short,

the document alleged that there was a consistent pattern of failure by the appellant to comply with regulation 27(2)(c) of the 2011 regulations which requires that a debtor pays his continuing liabilities when due for payment during the DPP.

(ii) By letter dated 11 July 2019 (5/1/2), the appellant replied to the application to revoke the DPP. He stated that the VAT debt of £38,703.43 had been paid in full on 10 June 2019. It was late but only by one day. He also denied that there was any obligation to pay the £100 partnership late filing penalty. The appellant went on to record that there were a number of first tier tax tribunal cases brought by him against the HMRC's calculation of tax, interest and penalties. He also stated that he had lodged two formal complaints against the actions of HMRC. He disputed that he had failed to comply with the obligations imposed upon him by the DPP.

(iii) 5/1/3 is a copy of a letter dated 11 October 2019 sent by the respondent which purports to reject the application for revocation. It is a matter of agreement between parties that that letter was sent in error and falls to be disregarded. 5/1/4 is a subsequent letter sent by and on behalf of the respondent dated 15 October 2019 stating that the application to revoke the DPP was approved on 11 October 2019. Annexed to the letter was a two page document headed "Annex A - Decision" setting out the reasons for the decision. The relevant passages are as follows:

> "The information provided by the debtor throughout the DPP shows that he is in dispute with the creditor who has requested the revocations and rejected the variation proposal, and that this dispute covers a number of matters.
>
> However, the information provided by the debtor also shows he has indeed failed to pay the continuing liabilities when due for payment. This holds true notwithstanding the fact that the debtor may have subsequently paid the outstanding liability, or successfully appealed against the various sums and charges.

> The debtor has been given the opportunity to comply with the condition of his DPP on several occasions but has failed to do so, despite his awareness of the potential consequences for his DPP.
>
> The continued breaches of the Regulations tend to indicate that the Programme will not be successful (regulation 43(1)(c) refers).
>
> The DPP is therefore revoked".

(iv) The appellant's Continuing Money Advisor ("CMA") submitted an application for review of this decision. 5/1/5 is a copy of the application which is undated and unsigned. In other documents, the respondent acknowledges having received the application for review on 5 November 2019. In essence, it was submitted on behalf of the appellant that, although the VAT payment was paid late, it was only one day late. It was incorrect to say that there was a VAT debt of £38,703.43. The late filing penalty liability of £100 was also disputed. It was also submitted that the debtor had made every one of his agreed payments to the payment programme.

(v) 6/1/5 is a copy of an email sent by HMRC to the respondent dated 21 November 2019 ("the HMRC email"). The HMRC email was not copied to the appellant or to his CMA. In addition to commenting upon the matters which have already been the subject to correspondence, the author went on to say:

> "In addition, I would like to bring to your attention, based on returns submitted by the debtor, a further outstanding debt amounting to £76,704.89 for ongoing liabilities that the debtor has failed to pay by the statutory due dates since the revocation submitted on the 10 June 2019 as follows:
>
> - £39,679.49 – VAT period 07/19 £39,679.49 – due on 6 September 2019
> - £37,061.40 – 2019/20 PAYE/NIC for the three outstanding (4-6) due to be paid by the 22 August 2019, 22 September 2019 and 22 October 2019 respectively.
> -
>
> Also, based on the return submitted by the debtor a further amount of £9,305.50 for the 2019/20 PAYE/NIC month 7 is due to be paid by the 22 November 2019.
>
> Making a potential outstanding debt of £86,046.39 since 10 June 2019".

This was material which was not before the original decision maker.

(vi) The document goes on to comment that it is the debtor's responsibility to ensure that all continuing liabilities were paid by the statutory due dates in accordance with the terms and conditions of the DPP.

(vii) 5/1/6 is a copy of a letter dated 3 December 2019 by which the respondent confirmed the original decision and refused the application for review. The principal basis for revoking the DPP was the appellant's failure to comply with regulation 27(2)(c) by not paying a continuing liability when it became due for payment. The letter went on to say:

> "I acknowledge that Mr Crawford has paid his DPP payments and this shows willingness to pay back his total DPP debts, however, this cannot be considered in isolation given he continually fails to pay his continuing tax liability on time, contrary to Regulation 27(2)(c) of the DAS Regs.
>
> You have indicated on (sic) your review that Mr Crawford is concerned that HMRC intend to petition for his bankruptcy. However, this review is to consider if the DPP is fair and reasonable to all parties moving forward. I cannot consider the potential implications if the DPP is revoked, nor can I consider HMRC's process for determining the tax amounts due, and the amount of any penalties they may impose for late payment of taxes.
>
> HMRC confirmed within their representations there has been a consistent failure to make payments on time since the DPP became live. They have stated in their representations that Mr Crawford currently owes:
>
> - £39,679.49 for a VAT period of 07/19. This amount was due on 7/9/2019
> - £37,061.40 for 2019/2020 PAYE/NIC due on 22/8/19, 22/9/19 and 22/10/19
>
> HMRC state that these payments have not been received by their due dates.
>
> **Conclusion**
>
> Taking all information into consideration, I am satisfied that the decision of the DAS Administrator was correct. The debtor has been given the opportunity to comply with the condition of the DPP on several occasions but has failed to do so, despite his awareness of the potential consequences for his DPP. The continued breaches of the regulations tend to indicate that the programme will not be successful (regulation 43(1)(c) refers).
>
> The DPP is therefore revoked".

[4] The author clearly took into account the material as to outstanding liabilities to tax referred to in the HMRC email. In the course of his submissions, Mr Farrell stated that the first time that the appellant was aware of further representations by HMRC to the respondent was when the letter of 3 December 2019 was despatched. The first time he was aware of the email and its contents was when it was referred to in the respondent's pleadings. There is no dispute between the parties that, as a matter of fact, the appellant was not aware of the HMRC email and had no opportunity to comment upon it.

Legislation

[5] The relevant parts of the 2011 regulations are as follows:

> "**41 Application for revocation**
> (1) Subject to paragraph (3), an application to the DAS Administrator for revocation of a debt payment programme, may only be made by –
> (a) debtor or a money advisor on behalf of the debtor;
> (b) a creditor taking part in the programme.
>
> **42 Grounds for revocation**
> (1) A debt payment programme may be revoked by the DAS administrator… where–
> (a) a debtor fails without reasonable cause to satisfy a condition under regulation 27 or 28;
> ...
> (2) If the DAS administrator proposes to revoke a debt payment programme it must give notice of that proposal to –
> (a) the debtor;
> (b) any creditor who is taking part in the programme;
> …
> and it is not to implement the proposal until the expiry of a period of at least four weeks after the date on which notice is given.
>
> **43 Determination of a revocation**
>
> (1) The DAS administrator in determining whether to revoke a debt payment programme is to have regard to –
> (a) any statement by or on behalf of a debtor
> …

(c) any factor that tends to indicate whether or not the programme will be successful;

(d) where notice of proposed revocation is given under regulation 42(2), any representations made by the debtor or by the creditors, as regards the proposal, during the period mentioned in that paragraph.

44 Notification of revocation

(1) The DAS administrator must intimate in writing revocation of the programme and reasons to -

(a) The debtor

…

44A – Effect of revocation

(1) The revocation of a debt payment programme is to have no effect –

(a) in the case of revocation where regulation 40A applies for six weeks; and

(b) in any other case, for 14 days,

immediately following the date on which the programme is revoked.

47 – Application for review

…

(3) A debtor or a money advisor acting on behalf of a debtor, a creditor participating in a debt payment programme or a creditor who has applied for variation of a programme on the grounds in regulation 37(1)(e) or (f) may, on any ground which may be raised in an appeal, apply for review of a determination of the DAS administrator to-

…

(c) revoke a programme [(or not to revoke the programme in the circumstances in regulation 39A(7))]

…

(5) where an application has been made under this regulation, the DAS administrator must intimate the application in writing to –

(a) the debtor;

(b) any creditor named in the application for a debt payment programme.

…

47A Procedure at review

Where an application is made under regulation 47, the DAS administrator must review the determination, which is the subject of the application –

(a) within 28 days of the application for review;

(b) on the basis of –

(i) the information provided in the application; and

(ii) any written representations received from the debtor, creditor or money advisor".

47C – Appeals
(1) A debtor or a creditor may appeal to the sheriff on a point of law against a decision of the DAS administrator under regulation 47B".

Submissions for the appellant

[6] The substance of the appellant's submission can be reduced to two simple propositions: (a) whether the DAS administrator (in this case the AIB) in a review of an application to revoke the DPP can take into account evidence or submissions which were not available at the date of the original decision which is being reviewed; (b) whether the DAS administrator can take into account such evidence of which the debtor was not aware and had no opportunity to respond to. Chronologically, the HMRC email was submitted after the submission which was the subject of review was made. The appellant was unaware that representations had been made by HMRC and was not aware of the HMRC email itself until after the action was raised. The HMRC email raised matters which either had occurred or were to occur after the date of the original decision. From the reasons for decision, the DAS administrator took the material into account. The review was not a decision of new. The review related to the decision and material relative to that decision. Looking at the statutory provisions as a whole there was no mechanism at the review stage to allow for additional material. Reference was made to the following authorities: *Barr* v *British Wool Marketing Board* 1957 SC 72; *R* v *Deputy Industrial Injuries Commissioner* [1965] 1QB 456; *Lloyd and Others* v *McMahon* [1987] AC 625; *Neil* v *Neil* 2021 Fam Law Reports 2. Put shortly, these authorities require procedures such as the present to be fair. Justice must not only be done but be seen to be done. There is no necessity for there to be a causal link between the procedural unfairness and the decision. Reference was also made to a publication of the Scottish Government entitled "Right First Time" and in particular, pages 32-34 thereof.

Although not authoritative, it contained a useful summary of procedural fairness.

Mr Farrell submitted that the review should only take into account information and submissions available at the time of the decision complained of was made; information to be taken into account should be only that which was relevant at the material time i.e. when the debts fell due; the statutory procedure did not envisage further representations at the review stage and any reference to "representations" in the legislation is a reference to material provided at an earlier point. By taking into account information not available to the debtor, and without giving him an opportunity to respond, there was procedural unfairness which was contrary to natural justice.

Submission for the respondent

[7] When a DPP is approved one of the standard conditions (regulation 27(2)(c)) is that the debtor "pay a continuing liability when due for payment". In the present case, there had been four previous applications for revocation, all because the appellant had failed to make a payment timeously. In each of the four cases, the AIB had declined to revoke the DPP but warned the debtor of his responsibility to make timeous payment of continuing liabilities. It is in that context that the decision complained of should be considered. Copies of the respondent's decision letters (24 August 2018, 23 October 2018, 7 November 2018 and 17 April 2019 – 6/1/1 - 4) were produced. These highlighted warnings given to the appellant to ensure payment of existing liabilities. In short, the appellant's construction of regulation 47A is too narrow. The provisions of regulation 47(2) does not restrict the material available to the decision maker. The review is an assessment of new. The AIB's practice is to look at the application for revocation, the representations and the material and make a decision of new. In terms of regulation 47(5), the AIB has an obligation to intimate an application for

review. The practice of the AIB is to invite representations to be made which are then taken into account. In terms of regulation 47A the AIB can then have regard to any information which has been submitted. Regulation 47A(b)(i) calls for information. It refers to "information in the application" which may go further than what was before the original decision maker.

[8] Mr Lloyd did not dispute that the AIB has a duty to act fairly. Reference was made to *Stair Memorial Encyclopaedia – Administrative Law (Reissue)* paragraphs 67 and 77. Mr Lloyd also referred to *R* v *Security of State for the Home Department Ex parte Doody* [1994] 1 AC 531 at 560 and *Spitfire Bespoke Homes Ltd* v *Secretary of State for Housing Communities and Local Government 2020* EWHC 958 (Admin) at paragraph 49. It was submitted that these authorities suggested a more nuanced approach than some of the authorities referred to by the appellant. Accordingly, even if some of the material had not been disclosed it did not mean that the appeal must succeed. One would need to look at the entire background of what was complained about. Review is a *quasi*-judicial function. Looking at the original decision letter and the review letter the common thread was the failure on the part of the appellant to comply with standard conditions despite having been warned about the consequences of so doing. Mr Lloyd submitted that although there was reference to information contained in the HMRC email in the review letter it did not form part of the decision to revoke. It was just part of the background. There was no obligation on the part of the AIB to exhibit the HMRC email. The appellant had had a fair hearing. He was aware of the relevant factors. The decision was based upon the breach of the standard conditions, a breach which was not new. There were no averments as to what difference it would have made if the information had been disclosed.

Reply by the appellant

[9] There was no major difference between the parties on the general principles of law to be applied. There were dicta in the *Spitfire* case, which supported the appellant. (See paragraphs 49 and 64). It is not correct for the AIB to say that material contained in the HMRC email was not taken into account. The decision letter suggested it was. Again, there is no need for a causal link between the unfairness and the result (see *Barr*).

Decision

[10] It is common ground between the parties that a condition of a DPP is that the debtor pays a continuing liability when due for payment. In the present case that involved continuing liabilities for payment of tax. Although not spelt out, it is a reasonable inference from the limited material that the appellant and HMRC were involved in continuing disputes over liability for payment of taxes. The AIB quite properly did not seek to become involved in resolving those disputes.

[11] So far as the statutory framework is concerned HMRC had the right to apply for revocation of the DPP (regulation 41(1)(b)). The failure to pay a continuing liability is a ground for revocation (regulation 42(1)(a)). In terms of regulation 41(1)(a) and (b) only the debtor, and that includes the debtor's money advisor, or a creditor taking part in the programme may make application for revocation of a DPP. However, regulation 42 provides that the AIB can revoke the DPP (whether or not there is an application by the debtor or the creditor) on certain grounds which include, the failure without reasonable cause to pay continuing liabilities, and where the debtor has made a statement in an application which the debtor knows to be untrue. Regulation 42(2) provides that if the AIB proposes to revoke the DPP it must give notice in writing of the proposal to the debtor, the

creditor taking part in the programme and certain others. For four weeks, the AIB may not implement the proposal. This procedure does not appear to distinguish between whether the proposal arises out of an application or at the instance of the AIB itself. Regulation 43 specifies particular matters to which the AIB must have regard when determining whether to revoke the DPP. That includes a "statement" made by or on behalf of a debtor and also "any other factor that the [AIB] considers appropriate in all the circumstances". I read "statement" in the regulation as meaning something different from "representation".

[12] If the AIB decides to revoke the DPP, he must notify the debtor and relevant creditors in writing (regulation 44). In terms of regulation 44A the revocation has no effect for 14 days and where an application for review is made the revocation is of no effect for 28 days after the date on which the application is made.

[13] The right to seek a review of a decision to revoke a programme is contained in regulation 47(3)(c). I raised with both agents the meaning of the expression "on any ground which may be raised in an appeal". Neither agent was able to offer an explanation as to the meaning of this phrase. Mr Lloyd wondered whether there may be have been a drafting error. The only provision within the regulations relating to appeals is contained in regulation 47C. That allows an appeal to the sheriff on a point of law against the decision of the AIB under regulation 47B which relates to the power of the AIB following review of a determination. Neither agent suggested that regulation 47 was intended to limit the review procedure to a point of law. Reference was made to the policy memorandum referring to the relevant part of the regulations introducing this measure (SSI 2013/225) at paragraph 41. However, that was not considered to be of much assistance.

[14] Returning to the procedure, an application for review requires to be made within 14 days of the date of intimation of the determination (regulation 47(4)). The AIB then requires

to intimate the application to a variety of other parties (regulation 47(5). There is nothing in the regulations which expressly confers upon a party to whom intimation is given the right to make representations.

[15] In terms of regulation 47A the AIB requires to review the determination within 28 days of the application for review and on the basis of information provided in the application and any written representations received from the debtor, or creditor or money advisor. As I read it, the reference to "information provided in the application" is a reference to the application for review.

[16] Turning to the authorities, there is no material difference between the parties as to the applicable law. I have considered the relevant authorities which are, in many ways, conveniently summarised in the relevant passages from *Stair, Administrative Law (Reissue)* particularly at paragraph 67. The principal rule is that of fairness which is in many ways a modern formulation of the concept of natural justice. The rules are not fixed. As Lord Bridge commented in *Lloyd* v *McMahon* at 702-3:

> "… The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make under statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness".

[17] There are three issues which require to be resolved in this matter:

(a) the nature of the review;

(b) what information falls to be taken into account?;

(c) whether representations made by parties require to be intimated to other parties?

[18] As a matter of generality a review may take one of two forms: (a) an assessment of the correctness of the decision at first instance based on the material before the decision maker; or (b) consideration *de novo* by the reviewer of the whole matter.

[19] In the present case the right to seek review is set out in regulation 47(3)(c). The key words are "may, on any ground which may be raised in an appeal, apply for a review of the determination of [the AIB] to revoke a programme".

[20] As far as I can see the only provision in the regulations relating to appeal is that contained in regulation 47 which concerns an appeal to the sheriff. Therefore, on a plain reading of regulation 47(3), if it is confined to the regulations, the only ground upon which an application for review may proceed is the point of law. That is to take a narrow construction of the regulation. The only other construction apparent to me is that "raised in an appeal" means in any appeal, not an appeal confined to the regulations. It seems unlikely that Parliament intended that the review procedure is limited to a point of law only. That would mean that in the proceedings before the reviewer and before the sheriff the only ground of appeal is a point of law. I can see why there is such a limitation on appeals to the sheriff, there having been a review of the original decision. As I have said neither agent supported a narrow construction of the provision. I am of the opinion that a wider construction of regulation 47(3) is possible and indeed appropriate although I accept it is not immediately apparent. In my opinion, the task of the reviewer is to consider the matter *de novo* and to reach a conclusion on the basis of all the material then available. However, there are certain implications of such a construction.

[21] It seems to me that, reading regulation 47(5) and 47A(b)(ii) together, it is anticipated that persons to whom intimation of a review are made may make representations to the AIB. That helps confirm my view that the process of review is wider than an assessment of the original decision. There would seem to be little purpose in the provision for intimation if that were not the case. Furthermore, the AIB is entitled, if not obliged, to have regard to such material. There is a lacuna in the regulations in not dealing with the receipt and management of such incoming material. In accordance with the authorities to which I was referred that is where the common law steps in. Both agents accept, correctly in my view, that the procedure to be adopted must be fair. However, I do not think that fairness is the same thing as saying that the process is quasi judicial. I would be hesitant to describe the function of the AIB on review as quasi judicial. I refer to paragraph 67 of the *Stair Memorial Encyclopaedia* and particularly *Re HK* [1967] 2 QB 617 at page 630 per Parker LCJ referred to therein. In my opinion, in the present case, fairness requires that if a party lodges material in a review, particularly where that refers to events which have or are to take place after the original decision, then it is only fair that other parties should see that material and have an opportunity to comment upon it before any decision is made. I see no reason why the AIB could not at the time intimation is made in terms of regulation 47(5) direct a party that, if they wish to make representations for the reviewer to consider, to do so within a fixed time, and at the same time sending a copy thereof to other relevant parties. If it is not possible for the persons sending in the information to effect such intimation then it should be done by the AIB. I realise that there are time limits prescribed in which a decision requires to be made (regulation 47A(a)).

[22] Returning to the facts of this case, it is clear that the HMRC email was received by the AIB who took its contents into account in making a determination. There is a reference

to a number of the matters raised in the HMRC email which post-dated the original decision. The question of liability to tax was a contentious issue between the parties. In earlier correspondence it is shown that there were disputes involving various appeals and complaints. The appellant ought to have had the opportunity to see the HMRC email and to comment upon it before a determination was made. That would have been a fair procedure. That the same conclusion might have been reached is speculative and, in accordance with the ratio of *Barr,* irrelevant. It follows that, although I do not agree with the appellant that the review procedure was limited to an assessment as to whether the original decision should stand, in my opinion, the procedure adopted in this case was flawed and amounts an error of law. Accordingly, the appellant succeeds.

[23] In relation to disposal, regulation 47C is silent as to the power of the sheriff on appeal. The pursuer craves the quashing if the decision with a direction to reconsider the matter of new. I did not understand the respondent to take issue with such a disposal. I shall therefore sustain the pursuer's first plea in law, repel the defender's pleas in law and grant decree as craved. Parties were agreed that expenses follow success. The pursuer is therefore entitled to his expenses as the same may be taxed.