1958
Sept. 25, 26, 27
Oct. 9

BEAVER LAMB AND SHEARLING COMPANY LIMITED ..... } SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Revenue—Excise Tax—Taxpayer under mistake of law paid excise on sheepskin processed into "Mouton"—Recovery of money paid—Application for refund barred by prescription—Payments made under duress recoverable—The Excise Tax Act, R.S.C. 1927, c. 179 as amended, s. 80A(1) as re-enacted by 1952, c. 27(1), s. 105(1)(a)(b), (6).

Section 80A(1) of the *Excise Tax Act*, R.S.C. 1927, c. 179, as amended, provides for payment of excise tax on all furs dressed in Canada; s-s. (1) of s. 105 for a refund in case of overpayment or payment in error; s-s. (6) that where, by mistake of law or fact, monies have been paid or overpaid as taxes imposed by the Act, they shall not be refunded unless an application has been made in writing within two years after the monies were paid or overpaid.

The suppliant paid the Department of National Revenue (Customs and Excise) $24,605.37 prior to June 1, 1953 and $30,000 on February 1, 1954 as excise taxes on deliveries of processed sheepskins known as "mouton". By Petition of Right it sought to recover on the grounds that the payments were made in error and overpayment; that an application for refund was made prior to June 1, 1953 and that, as the Supreme Court of Canada on June 11, 1956 had held in *Universal Fur Dressers & Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, that s. 80A(1) did not apply to "mouton", the excise taxes in suit were imposed and collected by the agents of the Crown unlawfully. At the trial it was allowed to amend and pleaded alternatively that the $30,000 was paid involuntarily and under duress, consisting of the threat of criminal proceedings and the imposition of penalties and fines against the suppliant and its president, or that the sums were paid in protest.

Held: That in respect of its product "mouton" the suppliant was never liable for the payment of the excise tax provided by s. 80A.

2. That the suppliant failed to establish that the application for a refund referred to in s. 105(6) of the Act was ever made.

3. That even had it been made and received, it would not be entitled to recover the $30,000 as a refund, since no application, as required by s. 105(6) of the *Excise Tax Act*, was made within two years after such refund became payable.

4. That there was no evidence to support the contention that any of the payments were made "under protest".

5. That there was uncontradicted evidence that the $30,000 payment was made under duress or compulsion, and as it was not a voluntary payment, the suppliant was entitled to recover that sum from the respondent. *Brocklebank Ltd. v. The King*, [1925] 1 K.B. 52; *Maskell v. Horner*, [1915] 3 K.B. 106.

PETITION OF RIGHT to recover excise tax.

Hugh Plaxton, Q.C. and *Robert McKercher* for suppliant.

D. S. Maxwell and *G. T. Gregory* for respondent.

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

CAMERON J.:—In this Petition of Right, the suppliant seeks to recover from the respondent substantial sums paid to the Department of National Revenue (Customs and Excise)—hereinafter to be called the Department—on or after June 15, 1951. The suppliant is a company incorporated under the laws of Ontario, having its head office at Uxbridge, its business, until its plant was destroyed by fire in July 1953, having been that of processors of sheepskins, a substantial part of its product having been converted into "mouton". The Department for many years had considered "mouton" to be within the category of "furs" and accordingly it had required the suppliant and other firms engaged in the production of "mouton" to pay excise tax "on all dressed furs, dyed furs, and dressed and dyed furs, dressed, dyed, or dressed and dyed in Canada" in accordance with the provisions of s. 80A(1)(ii) of *The Excise Tax Act*, R.S.C. 1927, c. 179, as amended.

Universal Fur Dressers and Dyers, Ltd., a company also producing "mouton", contested the validity of the assessment to excise tax on "mouton" on the ground that it was not a fur within the meaning of s. 80A, and by a decision of the Supreme Court of Canada[1] its contention was upheld. It is clear, therefore, that in respect of its product "mouton", the suppliant was never liable for payment of the excise tax provided for in s. 80A. It does not follow as a matter of course that the suppliant by reason of that fact alone is entitled to a refund of the amounts so paid. Parliament has made provision for the circumstances under and the manner in which refunds may be made. The relevant section of *The Excise Tax Act* under the heading "Deductions, Refunds and Drawbacks", is as follows:

105. (1) A deduction from, or refund of, any of the taxes imposed by this Act may be granted

(*a*) where an overpayment has been made by the taxpayer;

(*b*) where the tax was paid in error;

* * *

(6) If any person, whether by mistake of law or fact, has paid or overpaid to Her Majesty, any monies which had been taken to account, as taxes imposed by this Act, such monies shall not be refunded unless application has been made in writing within two years after such monies were paid or overpaid.

[1] [1956] S.C.R. 632.

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

Section 105 consists of seven subsections, but those parts which I have omitted are, in my view, irrelevant to this issue. Some reference was made to s-s. 5 which reads:

(5) No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act, or under any regulation made thereunder.

That subsection, it seems to me, is restricted to such refunds as are specifically provided for in the Act or under any regulation made thereunder, examples of which are found in s-ss. 2 and 3 of s. 105 relating to goods sold to Her Majesty in right of any province of Canada, or where goods are sold as ship's stores, after payment of the tax. I was not referred to the regulations and I have not found anything in the Act which states when the refunds such as those herein claimed "first became payable under the Act".

The claim as originally advanced was based entirely on the allegation that the sums paid were so paid in error and in overpayment. These allegations were as follows:

3. Your Suppliant paid to the agents of Her Majesty the Queen, the Deputy Minister of National Revenue, Customs and Excise Division, the sum of $24,605.27 as and on account of excise taxes on the delivery of processed sheepskins known as mouton during and prior to June 1, 1953.

4. Your Suppliant paid to the agents of Her Majesty the Queen, the Deputy Minister of National Revenue, Customs and Excise Division, a further sum of $30,000 on February 11, 1954, as and on account of excise taxes relative to delivery of like products prior to June 1, 1953.

5. Your Suppliant paid the sums referred to in paragraphs 3 and 4 hereof in error and in overpayment and made application to the Deputy Minister of National Revenue, Customs and Excise Division, on or about June 1, 1953 for refund of the said amounts in accordance with the Excise Tax Act, Stat. of Can., 1947, Chapter 60, and with the Departmental practice in existence at that time.

At the trial and on the application of the suppliant, I allowed certain amendments to be made to the Petition of Right by the addition of two paragraphs in which it was alleged in the alternative that as to the payment of $30,000, such payment was made involuntarily and under duress, and that both amounts were paid under protest. For the moment I shall pass over these alternative claims and consider only the original allegations.

Exhibit 8 is an agreed summary of the excise taxes actually paid by the suppliant under s. 80A in the period June 1, 1951, to June 30, 1953. The Act requires that every person liable to pay taxes under that section shall file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of such furs and pay the tax returns. Then s. 106 provides for monthly returns and payments of any deficiencies and for penalties. Exhibit 8 sets out the details of the daily and monthly returns for the period mentioned, the total amount paid being $24,605.26—just one cent less than the amount stated in para. 3 of the Petition of Right. As will be noted later, a great many of these returns were admittedly false. Exhibit 6 comprises the daily returns for the months of May, June and July, 1953.

Following a routine audit of the suppliant's books and records in March 1953 by Mr. Belch (an experienced auditor in the Department) and an associate, it was found that the returns were fraudulent in a great many cases. Mr. Herbert Berg, president of the suppliant company and its main shareholder, admitted to Mr. Belch, as he did at the trial, that such was the case. The scheme of operations was as follows. The suppliant sold two main products, namely, shearlings and "mouton", the former of which was clearly not subject to the tax imposed by s. 80A. In shipping goods to purchasers who were aware of the fraudulent plan, the invoices in many cases showed "shearlings" to have been shipped where, in fact, "mouton" was supplied. In other cases where the purchaser was not a party to the scheme, the invoice sent to him correctly showed the proper proportion of shearlings and "mouton" actually shipped; the office copy of the invoice, however, was made out in different form and in many cases showed shipments of shearlings where "mouton" had been actually supplied. It was from these two types of false invoices that the excise tax returns were made out on many occasions.

Following the audit and the discovery of the fraud, various assessments were made upon the suppliant, based in part, I take it, on the admissions of Mr. Berg as to the details of the fraudulent invoices. Finally, the suppliant was notified on April 17, 1953 (Exhibit 3) that its total

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

indebtedness for excise taxes and/or other charges amounted to $61,722.36. Thereafter, Mr. Berg interviewed various officials of the Department and about May 28, 1953, a well-known Montreal solicitor made representations on behalf of the suppliant. As I have noted, the factory of the suppliant was destroyed by fire on July 19, 1953, and no operations have been carried on since that time.

After that date, a distinguished Toronto counsel was engaged by the suppliant and after interviews and correspondence, something in the nature of a settlement was arrived at as appears from the letter of Mr. Sim, Deputy Minister of National Revenue, Customs and Excise, dated September 15, 1953, to that counsel (Exhibit 5). The arrangement was that the suppliant would pay $30,000 in cash on account of the excise tax arrears, would plead guilty to a charge of making false or deceptive statements in its monthly sales and excise tax returns required to be filed by the Act, and covering the months of August and September 1952, involving additional taxes of $5,000. In November 1953, the suppliant pleaded guilty to the charges, incurred penalties of $10,000 (double the amount of the tax evasion specified), and was fined $200, all of which was paid. Cheques aggregating $30,000 on account of arrears of taxes were in the hands of the Department on September 15, 1953, but apparently were not taken into account until February 11, 1954 (Exhibit 4). In the meantime, by Order in Council dated January 21, 1954, authority was granted for remission of taxes and interest penalties in the sum of $17,859.04 principal and $7,587.34 interest (Exhibit B). The item of $30,000 so paid is the second amount now claimed as a refund. No claim is made in respect of the $10,000 penalty.

Whether the provisions of s. 105(1), which I have quoted above, confer a statutory right upon a taxpayer to a refund of taxes in the case of overpayment or error, or whether the expression "may be granted" is permissible, I need not stop to consider. It is abundantly clear from the provisions of s-s. 6 that a refund in case of payment or overpayment due to a mistake of law or fact shall not be made "unless application has been made in writing within two years after such monies were paid or overpaid". Here the error was clearly one of law, the Department construing the product

"mouton" as falling within the term "furs" in s. 80A and the suppliant making its payments as to both the sums claimed, on the same basis.

It will be recalled that in the pleadings the suppliant alleges that it made an application for refund of the said amounts on or about June 1, 1953. There is no allegation in the pleadings that the application was in writing, but at the trial evidence was led which, if believed, would indicate that on or about June 15, 1953, an application in writing was prepared and posted, the letter being addressed to Mr. David Sim, the Deputy Minister. The burden of proof lies on the suppliant to establish that an application in writing such as is required by the subsection was made.

Mr. Joseph Abrams, of the Canadian Abattoir, Ltd., is a minor shareholder in the suppliant company and the father-in-law of Mr. Berg. He says that he received a letter from Donnell and Mudge dated June 12, 1953 (Exhibit 1) that firm also being engaged in the production of shearlings and "mouton". It intimated that steps were being taken in the industry to test the validity of the assessment to excise tax on "mouton" and recommended him to join with the others in so doing and to make application for a refund of taxes paid within the previous two years. Abrams says he read over that letter on the telephone to Berg, intimating that he should do likewise. Attached to the letter are samples of the application for refunds said to have been sent in by Donnell and Mudge, and another, presumably by Universal Fur Dressers and Dyers.

Berg says he received Exhibit 1 and the sample letters accompanying it and on or about June 15, 1953, he dictated a letter addressed to Mr. David Sim, the Deputy Minister, to his bookkeeper and secretary, Mrs. Marie Forsythe; that when the letter was typed, he read and signed it and gave it to Mrs. Forsythe, saw her stamp it and gave instructions to post it. He says it asserted a claim that "mouton" was not properly subject to tax, claimed a refund for the last two years and also for a refund of any payments subsequently made. He did not see the letter posted. He admits that no reply to that letter was ever received and that neither before nor after that date did he make any other claim to any refund, either orally or in writing, or during the course of the negotiations for settlement. He admits, also, while

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

knowing that no reply had been received, that he made no inquiries as to why the Department had not replied. He also swore that he had Mrs. Forsythe prepare a statement of the amount of tax paid on "mouton" from January 1, 1951, to May 1953, similar to Exhibit 2, and that this was enclosed in his letter to Mr. Sim. Exhibit 2 itself is said to have been forwarded to the company's auditors and consequently to have escaped destruction in the fire. It concludes an item of $3,720.38 for tax paid in June 1953, this item having been added by Mr. Berg.

Mrs. Forsythe stated in evidence that she had prepared such a letter on the instructions of Berg, had submitted it to him for approval and signature, had stamped the envelope, and as usual had deposited it with other letters in the post office at Uxbridge. She stated, also, that she had prepared the statement similar to Exhibit 2 on Mr. Berg's instructions and that it had been enclosed in a letter to Mr. Sim.

If this evidence regarding the sending of the letter and statement stood alone and if I believed these witnesses, there would seem little doubt that an informal application for refund had, in fact, been posted. The respondent denies that any such letter or statement was ever received and evidence was led to establish that such was the case. I was informed as to the practice followed in the Department as to the indexing and filing of incoming and outgoing mail. Such a letter applying for the refund of tax would in the normal course be referred to the refund section where it would receive almost immediate attention. A reply would be sent at once and the necessary forms supplied to the applicant. Records would be kept of the application and any correspondence connected therewith. The evidence clearly establishes that after the most careful and repeated searches, no trace could be found of any such application or statement or of any reply thereto. The Department of National Revenue, Customs and Excise has hundreds of employees and while the possibility of human error or omission may be present, it is clearly shown that such errors in matters of this sort practically never occur. In the

ordinary course of things, the applicant would receive a reply in the course of two or three days, but both Mr. Berg and Mrs. Forsythe admitted that no such reply had been received.

There are also substantial grounds for doubting the veracity of both Mr. Berg and Mrs. Forsythe. It will be noted that the item of $30,000 now claimed, while less than the total amount originally claimed by the Department, relates entirely to taxes which the suppliant by its fraudulent records and returns had endeavoured to escape paying. Berg was the author of the plan as he admitted to the Department's auditor and at the trial. In his evidence he endeavoured to protect Mrs. Forsythe by stating that "he could not remember" whether she knew of or participated in the falsification of records and returns. I do not believe that statement. As manager and operator of this small business, Berg would undoubtedly be aware of everything that went on in the office and what knowledge Mrs. Forsythe had of the frauds. Exhibit A—a statement given by Mrs. Forsythe to an inspector in the fire marshal's department and to which I will refer later—provides the clearest proof that Berg did in fact know that Mrs. Forsythe had full knowledge of and was a party to the carrying out of the frauds, on his instructions.

In direct examination, Mrs. Forsythe stated expressly and vehemently that she had no knowledge of and had not participated in any way in the falsification of records and returns; that she had merely done what she was told to do and that Berg had never disclosed the fraudulent plan to her. Again there is the most cogent evidence to the contrary.

Mr. Belch, the departmental auditor, states that as an auditor his opinion was that it was impossible for the bookkeeper, Mrs. Forsythe, to have made the false returns without knowledge that they were fraudulent. He stated, also, that Mrs. Forsythe had voluntarily told him that in making

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

out the duplicate invoices she had taken steps in some cases to ensure that the duplicate or office copy of the invoice did not correspond with the original which was sent to the customer.

But the most important evidence relating to the credibility of Mrs. Forsythe is Exhibit A—a three-page statement signed by Mrs. Forsythe on each page. It was produced from the custody of the witness R. J. Simmons, an inspector in the office of the fire marshal of Ontario who was sent to Uxbridge to ascertain the cause of the fire. For reasons stated at the trial, I ruled that this document was both relevant and admissible notwithstanding the vigorous objection of counsel for the suppliant.

While Mrs. Forsythe admitted that she had signed the document which had been read over, she expressly denied having given the answers to the questions, stating that she was confused at the time and was frightened and perhaps threatened by the inspector who was accompanied by a local police constable of the Ontario Provincial Police. The evidence of Simmons, to which I give full credit, is that the statement was completely voluntary, was fully understood by Mrs. Forsythe, and that no threats whatever were used at any time. The questions and answers are in his handwriting and both he and the accompanying constable signed each page. I need say no more about this document than that it clearly admits full knowledge on the part of Mrs. Forsythe of the frauds planned by Berg and the steps taken by her over a period of years in falsifying the records and returns at the direction of Berg.

The conduct of Berg would also tend to indicate that an application for a refund was never made. He was unable to produce a copy of his application, alleging that it was destroyed at the time of the fire. It is highly probable, I think, that such an important piece of evidence in which a claim was allegedly made for refunds of $25,000 or more and for later payments to be made, would have been kept in a safe place. The company's safe, holding a number of

the important books and cash, was salvaged. The letter itself is said to have been sent by ordinary mail and not registered. Surely to such a request an answer in due course would have been expected and if not forthcoming, enquiries would have been made promptly. Nothing was said by Berg to Belch at any time about such a letter; nor did Berg or either of his solicitors mention the matter at any time when interviewing or corresponding with the Department officials. Why was it not mentioned during the course of negotiations for settlement which resulted in the suppliant making further payments of over $40,000? Surely the departmental officials, if aware of the outstanding request for a refund, would not have made any settlement whatever without taking into account and finally disposing of the alleged application. There is no evidence to suggest that Berg ever advised the suppliant's solicitors that while he would consent to paying the arrears of taxes, he would later advance a claim to recover the whole amount so paid on the basis of a prior letter written by him.

The settlement was not one made "without prejudice". At that time there was no contention that a claim for a refund had been made or would be made or that the suppliant was not liable for payment of the taxes, the only matter in question being the quantum of the unpaid taxes.

I have no hesitation whatever in accepting the evidence of Belch and Simmons as completely truthful and where it is in any way in conflict with that of Berg or Mrs. Forsythe, I must reject the latter. In view of the admitted falsification of the records and returns of Berg and the other matters to which I have referred as indicating that no application for refund was ever made, and the fact that his evidence relating to the application is entirely self-serving, I do not accept his evidence as proof that such an application was ever made. Moreover, I must also reject the evidence of Mrs. Forsythe relating to the alleged application. Her denial at the trial of any knowledge of the falsifications or any complicity therein is so much at variance with her

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

statements found in Exhibit A that I am unable to believe her or to attach any weight whatever to her evidence. There is, therefore, no credible evidence before me that any application for a refund was made. It follows, therefore, that the suppliant has failed entirely to establish that the application referred to in s. 105(6) was ever made.

That finding is sufficient to debar the suppliant from recovering a "refund" under the provisions of s. 105. It is clear, however, that even had I found that such an application in writing as is required by s. 105(6) had been made in June 1953 and had been received, the suppliant would not in any event be entitled to recover the item of $30,000 *as a refund* under that section since no application therefor was made within two years *after* that amount was paid or overpaid. As I have said, the cheques in payment of the $30,000 were in the hands of the Department not later than September 15, 1953, and were taken into account not later than February 11, 1954. Admittedly, no application of any sort was made thereafter until these proceedings were instituted on November 1, 1957.

In view of my finding that no application for a refund was ever made, it becomes unnecessary to consider the further submission on behalf of the respondent that as no application was received by the Department, there never was in fact an "application".

I turn now to the alternative claims as stated in the amendments to the Petition of Right allowed at the opening of the trial. They are as follows:

8*a*. In the alternative to paragraph 4 your Suppliant alleges and the fact is that the said sum of $30,000 was paid to Her Majesty through the agency of the Department of National Revenue, Customs and Excise Division involuntarily and under duress. Such duress consisted of the threat of criminal proceedings and the imposition of large penalties and fines against the Suppliant and the President thereof.

8*b*. In the further alternative to the allegations set out in paragraphs 3 to 5 inclusive herein, your Suppliant alleges and the fact is that the said sums referred to in the said paragraphs were paid to Her Majesty as aforesaid under protest.

It will be convenient to first consider the allegation in para. 8*b* that both amounts claimed were "paid under protest". As regards the first claim—that of $24,605.26—it

relates entirely to amounts paid prior to the date of the alleged letter of application about June 15, 1953, and there is not a tittle of evidence to support the contention that any of the payments aggregating this amount were "paid under protest". Berg stated expressly that all payments up to the end of June 1953 were paid voluntarily. In the interviews and correspondence that followed after that date, the only disputed point was one of quantum and when the final settlement was worked out, nothing is shown to have occurred which would indicate that the other item, namely, $30,000, was paid under protest. I must, therefore, entirely reject this plea.

There remains only the alternative claim that the $30,000 payment was made involuntarily and under duress.

On this point, counsel for the suppliant referred to a number of exhibits which in my view have no bearing on this matter. Exhibit 12 is a letter from the Collector to the suppliant dated September 3, 1953, intimating that it had failed to file returns for June and July as required by the Act and stating that by such failure it had rendered itself liable to payment of the penalty provided. The suppliant was in default in making such returns and penalties were provided in the Act. This letter, therefore, merely drew attention to the existing law and could not be considered as amounting to duress. The same may be said also about Exhibits 3, 9 and 10, in which there are "demands" for payment of the assessments made. Exhibit 11 is a letter dated July 13, 1953, by the Deputy Minister to Mr. Eudes of Montreal, then solicitor for the suppliant. It relates to an interview of May 28 when Mr. Eudes had suggested that the suppliant's auditors be given an opportunity to further examine the assessment with a view to establishing whether or not the suppliant would wish to challenge the Department's figures. Mr. Nauman, of the Department, had then intimated that he would have no objection to such an examination, but as the amount involved was very large, he laid down the condition that 50 per cent. of the amount of the assessment be paid and that the suppliant would have until June 10 to decide whether it would take advantage

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

of the arrangement. The suppliant did nothing in the matter and the letter merely indicates that the proposal would be withdrawn unless accepted by July 20; if 50 per cent. of the assessment were not then paid on account, it was intimated that the Department would proceed without delay to place the matter before the Court. I am unable to find anything in this letter which amounts to duress. In the opinion of both parties, substantial amounts were long past due and the only possible uncertainty was the precise amount of the arrears. In intimating that Court action would be taken if the offer were not accepted, the Department was merely carrying out its duties as required by the Act, or at least as the Department then construed its duties to be.

On this point, the suppliant relies mainly on statements made to Berg by Mr. Nauman, a senior executive in the Department, and on other matters which followed. After the issue of the increased assessments, Berg came to Ottawa in April 1953 to interview Mr. Labarge, another official of the Department, and was taken by the latter to see Mr. Nauman. Berg states that he was told by Mr. Nauman that if the full amount of the assessments were not paid, prosecution would follow and that he (Berg) would be sent to jail; that the falsification of records had been going on for a long time and that the Department proposed to make an example of him. Further unsuccessful efforts were then made by Mr. Eudes on behalf of the suppliant. After the fire in July, the Department followed the procedure laid down in s. 108 of the Act and in order to ensure collection of the amount claimed, prohibited the fire insurance companies from paying the fire loss to the suppliant and the suppliant's bankers from paying out the amounts held on deposit. Finally, with the assistance of its Toronto counsel, the settlement above mentioned was agreed upon, the $30,000 was paid, and the bank account and the fire insurance monies released to the suppliant. Later, the charge was laid, the suppliant pleaded guilty, and the penalties and fines were paid.

Neither Nauman nor Labarge gave evidence at the trial and consequently Berg's evidence as to the above threats is uncontradicted.

It is well settled that a payment made under duress is deemed to be involuntary and may be recovered in an action for money had and received to the use of the payor.

In Halsbury's *Laws of England*, 3rd Ed., Vol. 8, p. 240, the proposition is stated thus:

417. A person who voluntarily pays a sum of money on another person's demand cannot claim a return of it from a payee as money had and received to his use, for, since he might have resisted the demand, the payment must be taken to have been voluntary; but if the payment is made under duress or some form of compulsion other than legal compulsion, it is deemed to be involuntary, and the sum paid is recoverable in this form of action.

* * *

A payment is not considered voluntary when made under threat of a penal action, or of an execution, even though no execution could lawfully issue; or when illegally demanded and paid under colour of an Act of Parliament or of an office, or under an arbitrator's award which is *ultra vires;* or when one party is in a position to dictate terms to the other; nor is a payment considered voluntary merely because the person making it has not waited to be sued or has been allowed time for payment. There may be "practical" as well as "actual legal" compulsion.

The case of *Brocklebank, Ltd. v. The King*[1] is cited as authority for the statement that a payment is not considered voluntary when illegally demanded and paid under colour of an Act of Parliament. There the headnote in part is as follows:

The Shipping Controller, purporting to act under the authority of the Defence of the Realm Regulations, required as a condition of a licence to the suppliants to sell one of their ships to a foreign firm that they should pay a percentage of the purchase money to the Ministry of Shipping, and the suppliants paid the said percentage. On a petition of right to recover back the money so paid:—

Held, (1.) That the imposition of the condition was illegal, and that the payment was not a voluntary payment.

Bankes, L.J. stated at p. 61-2:

The sum paid was £34,920, and it is for recovery of this amount that the petition of right is brought. The whole of the facts relating to the demand of this sum of money are contained in a few letters and in what

[1] [1925] 1 K.B. 52.

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

passed at the above-mentioned interview. The learned judge came to the conclusion, after considering the evidence, and the authorities which were cited to him and to us, that the payment was not a voluntary one. I entirely agree with this view. The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless. I do not propose to go through the evidence or to discuss the authorities, as upon the materials before the Court it seems to me impossible to disturb the judge's conclusion on this point.

In *Hooper v. Mayor & Corp. of Exeter*[1], the facts were that the Corporation of Exeter exacted harbour dues from the plaintiff in respect of exempted articles. The plaintiff paid in ignorance of the exemption. It was held that the plaintiff was entitled to recover back the money so paid. Lord Coleridge, C.J. said at p. 458:

From the case cited in the course of the argument it is shewn that the principle has been laid down that, where one exacts money from another and it turns out that although acquiesced in for years such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery.

I am of opinion that that principle should be adopted here, and that accordingly the plaintiff is entitled to recover his money on the ground that he has paid it involuntarily.

Smith J. was of the same opinion and added:

The question is if the money has or has not been paid by erroneous payment. Here the plaintiff brings his limestone to the quay, and the defendants demand and receive a toll they are not entitled to. I agree that, upon the authority of *Morgan v. Palmer*, 2 B & C. 729, and of another case—*Steele v. Williams*, 8 Exch. Rep. 652—the plaintiff should be entitled to recover these amounts so erroneously paid by him for dues and which cannot be considered as voluntary payments.

The leading authority on cases of this kind is *Maskell v. Horner*[2]. The headnote to that case is as follows:

From September, 1900, to June, 1912, the plaintiff carried on business as a dealer in produce in the vicinity of Spitalfields Market. As soon as he commenced business the defendant, who was the owner of the market, demanded tolls from him under threat of seizure of his goods if he refused to pay, and on the first occasion the plaintiff objected to pay and actual seizure took place. The plaintiff then consulted a solicitor, and upon

[1] (1887) 56 L.J.Q.B. 457. [2] [1915] 3 K.B. 106.

learning that other dealers outside the market paid tolls he, acting upon the solicitor's advice, paid the tolls under protest, and, thereafter, he, or his agents acting upon his instructions, always paid the tolls under protest. Subsequently, whenever the plaintiff challenged the defendant's right, or disputed the amount of tolls, in particular cases there was a seizure or threat of seizure followed by payment under protest.

From the decision in *Attorney-General v. Horner* (No. 2) [1913] 2 Ch. 140, it appeared that the tolls had been unlawfully demanded, and, in consequence, the plaintiff brought this action for money had and received to recover the tolls so paid, claiming that he paid them (1.) under a mistake of fact and (2) not voluntarily but under the pressure of seizure of his goods:—

Held by the Court of Appeal, confirming the decision of Rowlatt J. on this point, that the plaintiff did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls and he did not wish to be involved in litigation with the defendant, and that the plaintiff could not recover under this head of claim; but

Held, further (Pickford L.J. doubting), reversing the decision of Rowlatt J. on this point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years showed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations,

At p. 118 Lord Reading C.J. said:

Upon the second head of claim the plaintiff asserts that he paid the money not voluntarily but under the pressure of actual or threatened seizure of his goods, and that he is therefore entitled to recover it as money had and received. If the facts proved support this assertion the plaintiff would, in my opinion, be entitled to succeed in this action.

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee v. Backhouse,* 3 M & W. 633, 646, 650). The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity

1958

BEAVER LAMB AND SHEARLING CO. LTD. v. THE QUEEN

Cameron J.

and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy v. Manley,* 1 C.B. 594, 602, 603). There are numerous instances in the books of successful claims in this form of action to recover money paid to relieve goods from seizure.

Counsel for the respondent cited a number of cases, including that of *William Whiteley Ltd. v. The King*[1]. The facts are summarized in the headnote as follows:

The suppliants carried on a large business in which they employed a large number of assistants who had all their meals on the premises, and for the service of these meals the suppliants employed a number of men as cooks and waiters. The Inland Revenue authorities said that these waiters were "male servants" in respect of whom duties were payable, and in an interview in the year 1900 the supervisor of taxes told the secretary of the suppliant company that in his opinion the waiters were "male servants" and that the duties were payable, and that if they were not paid the suppliants would incur penalties, and upon that the duties were then paid by the suppliants in each year in the belief that they had no option except to do so. From 1903 onwards the duties were paid with a protest that the waiters were not "male servants" within the meaning of the Act and that the duties were not payable, but the Commissioners of Inland Revenue gave their opinion that the waiters were "male servants" and the duties were payable. In 1906 the suppliants refused to pay, and upon proceedings being taken for penalties, the Divisional Court held that the waiters were not "male servants" and that the duties were not payable. On a petition of right to recover back the moneys so paid:

Held, that the moneys having been paid under a mistake, not of fact, but of law, could not be recovered back, either on the ground that they were paid under duress or compulsion, or on the ground that they were paid in discharge of a demand illegally made under colour of an office.

Walton J. came to the conclusion that there was nothing in the case which amounted to compulsion. At p. 745 he stated in part:

The question which I have to decide here is whether the payments made during the years which I have mentioned—from 1900 to 1905—were or were not voluntary payments. Was there any duress here? I cannot find any evidence of duress or compulsion beyond this, that the supervisor, the officer of Inland Revenue, told Messrs. Whiteley Limited that in the opinion of the Commissioners of Inland Revenue these duties were payable, and that if they were not paid proceedings would be taken for penalties. That is the only evidence of anything which could be called duress or compulsion. The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question as to whether upon such servants as those in question duty was payable.

[1] (1909) 101 L.T. 741.

They themselves raised that question and they paid the duties. They could have resisted payment. . . . I think the most that took place was this, that the officer of Inland Revenue told the suppliants that in his opinion and in the opinion of the Commissioners of Inland Revenue the duties were payable. The suppliants knew that that was only an expression of opinion. They knew that the Commissioners of Inland Revenue could not determine whether the duties were payable or not. . . . In these circumstances I have come to the conclusion that there was nothing in this case which amounted to compulsion.

In the instant case, I have no hesitation in finding on the uncontradicted evidence of Berg that the payment of $30,000 was made under duress or compulsion. It will be recalled that legal proceedings were threatened against the suppliant, that Berg was threatened with imprisonment, that the main assets of the company—namely, its bank account and its right to receive payment from the fire insurance company—were under seizure by the Department. There is no evidence to indicate that up to the time of the settlement, the officials of the Department had withdrawn their threats of criminal proceedings against Berg. The seizure of the bank account and of the insurance monies remained in effect until after the payment of $30,000 was made; and the Department insisted as a term of the settlement that the suppliant should be charged and would plead guilty to making fraudulent returns.

As has been stated above, the demand for payment of the taxes was illegal. For the reasons stated, I am of the opinion that the payment of $30,000 was not a voluntary payment but was made under duress or compulsion and that the suppliant is therefore entitled to recover that sum from the respondent.

There will therefore be judgment declaring that the suppliant is entitled to recover from the respondent the sum of $30,000, a part of the relief claimed in the Petition of Right, which will otherwise be dismissed. The suppliant is also entitled to be paid its costs after taxation thereof.

Judgment accordingly.