THE HIGH COURT

REVENUE

[2015 No. 269R]

BETWEEN/

KENNY LEE

APPELLANT

AND

THE REVENUE COMMISIONERS

RESPONDENT

JUDGMENT of Mr Justice Keane delivered on the 31st January 2018

Introduction

1. His Honour Judge David Riordan, a judge of the Circuit Court, has stated a case for the opinion of the High Court pursuant to ss. 943(1) and 941 of the Taxes Consolidation Act 1997, as amended ('the TCA') at the request of Mr Kenny Lee ('the appellant'). The Office of the Revenue Commissioners is the respondent.

2. While the case stated poses three questions, it really turns on a single issue concerning the scope of the jurisdiction of the Appeal Commissioners and Circuit Court on an appeal under s. 933 or s. 942 of the TCA, respectively. The issue is whether the obligation on both the Appeal Commissioners and the Circuit Court under s. 934 of the TCA - to abate; reduce; permit to stand; or increase any assessment that is the subject of an appeal – requires where relevant, or precludes in all circumstances, consideration of whether a prior settlement has been reached between the taxpayer concerned and the Revenue Commissioners in respect of the relevant liability.

Background

3. In May 2008, the respondent announced a voluntary disclosure initiative for persons holding untaxed funds in domestic deposit accounts, as a preliminary to an inquiry that it was proposing to conduct into that issue.

4. To avail of the 'qualifying disclosure' provisions of s. 1077(E) of the TCA in that regard, an eligible person had to submit a 'notice of intention to make a qualifying disclosure' on or before 15 September 2008, followed by full payment and disclosure on or before 15 January 2009.

5. The appellant signed a *Notice of Intention to make a Qualifying Disclosure of a Tax Default relating to Undisclosed Funds Invested with Financial Institutions*, dated 11 September 2008. The evidence before the Circuit Court was that it was submitted to the respondent by the appellant's then accountants on 12 September 2008. It recites that it is a formal notification of the appellant's intention to make a qualifying disclosure of outstanding tax liabilities in accordance with the *Code of Practice for Revenue Auditors 2002*. It includes a formal undertaking by the appellant to submit computations and pay the tax, interest and penalty due by 15 January 2009. It identifies the particular financial institution in which the appellant's untaxed funds were deposited.

6. On 9 January 2009, the appellant's solicitor wrote on his behalf to the respondent, stating in material part:

> '…[I]n order to bring this matter to a satisfactory conclusion, we are instructed to offer, on behalf of our client, the sum of €12,500.00 to include all taxes and duties up to and including the end of the financial year, 31/12/07. We will further arrange for our client to put in a Return for 2008.
>
> You might please note that the enclosed cheque from this office is the maximum amount our client can raise at this juncture and leaves him in a very vulnerable financial position. It may be that our client does not owe this much tax or it may transpire that he owes somewhat more. The cheque is sent on that basis and if it is not accepted in that means you might please return the cheque to us. Our client recognises that this is not entirely satisfactory from a Revenue point of view but is the best he can do in the circumstances.'

7. A cheque in the amount of €12,500, drawn on the solicitors' account, was included under cover of that letter.

8. The respondent wrote to the appellant's solicitors in response on 13 January 2009, stating:

> 'I refer to your submission, which was received in this office on 12/01/2009.
>
> This letter should be regarded as a receipt for the payment of €12,500.'

9. According to the uncontroverted evidence before the Circuit Court, the cheque was encashed by the respondent.

10. Over six months later, on 3 July 2009, the respondent wrote to the appellant's solicitors, referring to their 'submissions dated 09/01/09' and a recent telephone call between them. The author identified himself as the officer of the respondent to whom the matter had been referred, before stating that the appellant's disclosure had been selected for examination in accordance with paragraph 10.2 of the Code of Practice for Revenue Auditors. Presumably, that was a reference to the Code of Practice for Revenue Auditors 2002, since replaced by the 2010 Code, which came into effect on 1 October 2010. The letter went on to request the provision of bank statements for the period concerned and the computations, if any, involved in the offer of €12,500 to discharge the relevant liability, before stating in conclusion:

> 'Your submissions and your client's Notice of Intention to make a Qualifying Disclosure have highlighted a potential liability and I am suggesting, in the circumstances, that the payment made of €12,500 be treated as a payment on account against any final liability to tax, interest and penalties.'

11. The appellant's solicitors wrote in reply on 9 July 2009. In that letter, they stated that the payment they had made on behalf of

the appellant was offered on the terms set out in their letter of 9 January 2009 and was accepted by the respondent as such. Thus, they asserted, the respondent was not entitled to re-open the matter, nor to treat that payment of €12,500 as one made on account instead.

12. The respondent replied by letter dated 13 July 2009, stating:

> 'The monies paid were not accepted in the terms offered.
>
> As you are not happy that the payment of €12,500 be treated as a payment on account I am offering your client repayment of the amount. Please advise.
>
> I would refer you to the judgment handed down by Laffoy J on 18/04/2008 in the case of *Ross -v- C* [2007 No 125 MCA].'

13. At all material times since then, it has been the contention of the appellant that his liability and that of his wife (having regard to the relevant provisions of the Taxes Acts) have been settled with the respondent and it has been the contention of the respondent that no such settlement or accord exists.

The assessments
14. On 13 December 2010, the respondent issued various notices of assessment (and amended assessment) of income tax payable by the appellant. According to the terms of the case stated, the notices of assessment covered the years of assessment 2002 to 2006 inclusive, although the copies of those notices appended to that document do not include one for 2002. Copies of the notices of amended assessment for each of the years referred to in the case stated – 2007 to 2009 inclusive – are appended.

15. The notices of assessment covering the years 2003 to 2006 inclusive, and the notice of amended assessment for the year 2007, together covering the period in respect of which the appellant's payment of €12,500, however properly characterised, was made (except for the assessment year 2002, in respect of which the notice of assessment was not before me), asserted an aggregate liability to income tax for that period of €392,611.00, omitting any credit for that payment.

The grounds of appeal against the assessments
16. By various letters dated 27 January 2011, the appellant gave notice of his intention to appeal each of the assessments raised. For each year of assessment, the appellant appealed on the ground that the figure relied upon for 'miscellaneous income' as a component of the assessment was 'estimated and excessive, and not in accordance with the return submitted.' For each of the years of assessment between 2002 and 2008 inclusive, the appellant advanced the following further ground of appeal:

> 'For the tax years up to and including 31 December, 2008 a settlement has been made with the [respondent] by [the appellant's] legal adviser. The amount offered was accepted by [the respondent] in full and final satisfaction.'

17. It is not clear how the argument can be made that the appellant made a settlement with the respondent for the tax years up to and including 31 December 2008 when the terms of the offer evidenced by the letter of 9 January 2009 are that the payment enclosed was 'to include all taxes and duties up to and including the end of the financial year, 31/12/07' but nothing turns on that apparent discrepancy for the purpose of the present appeal.

The appeal before the Appeal Commissioner
18. Commissioner Kelly heard the appeal over four days on 23 October 2012, and 21 February, 21 March and 24 May 2013.

19. In respect of the contention that any liability to tax of the appellant to the respondent had been compromised, the appellant's agent relied on the terms of the correspondence already described and did not adduce any oral evidence.

The decision of the Appeal Commissioner
20. Although I have not seen Commissioner Kelly's decision(s), according to the terms of the present case stated:

> 'By decisions dated 4 January and 23 May 2013, the Appeal Commissioner rejected the argument of the [r]espondent that the Appeal Commissioner had no jurisdiction to determine whether or not a settlement had been reached, but found on the evidence before him that no settlement had been reached. He therefore confirmed the assessments under appeal.'

The further appeal before the Circuit Court
21. Being aggrieved by that determination, the appellant gave the appropriate notice in writing that he was exercising his entitlement under s. 942(1) of the TCA to have his appeal reheard by the Circuit Court. That rehearing took place on 24 January and 6 May 2014. In addition to considering the documentation already described, the Court heard evidence from the appellant's solicitor, who was called as a witness on behalf of the appellant, and from an identified officer of the respondent, who was called as a witness on the respondent's behalf.

22. As far as can be gleaned from the terms of the case stated, beyond receiving the evidence constituted by the written documentation already described, the Circuit Court heard and accepted the following testimony from those two witnesses.

23. The appellant's solicitor stated in evidence that the appellant came to him in a distressed state in or about January 2009, informing him that he had no means to inquire into allegations that he owed sums of money to the respondent and instructing him to enter into a settlement with the respondent. The appellant's solicitor has settled many tax cases, both in his career as a solicitor and in his former role as Bureau Legal Officer in the Criminal Assets Bureau. The appellant's solicitor intended the offer contained in the letter of 9 January 2009 to be in full and final settlement of any liabilities in respect of the years 2002 to 2007 inclusive. The appellant's solicitor considered the respondent's acknowledgment of receipt of the cheque and subsequent encashment of it to constitute acceptance of the appellant's offer and, hence, the settlement of the appellant's liabilities to the respondent.

24. The officer of the respondent who gave evidence testified that he was, at the relevant time, the Audit Manager of the Revenue case work team for the Cork East District and dealt with the appellant's file from mid-2009 onwards. The address provided by the respondent in connection with the relevant voluntary disclosure initiative was 'basically a post box' for the receipt of *Notices of Intention to make Qualifying Disclosures of Tax Defaults relating to Undisclosed Funds Invested with Financial Institutions*. The personnel at that address processed the cheques received and then sent the files to the relevant tax districts around the country, where the local Revenue inspectors would decide either to accept the submission or else select the submission for further examination. The relevant officer's belief was that the relevant payment had not been accepted by the respondent in full and final

settlement of the appellant's liabilities but was instead encashed as part of the normal administrative procedure and treated as a payment on account of the appellant's final liabilities to tax, interest and penalties.

25. I pause here to note that the basis upon which all of the testimony just described was admitted into evidence – whether as an exception to the parol evidence rule or on the basis of some other doctrine - is not made clear in the case stated. The appellant's case, as I understand it, is that his solicitor's letter of 9 January 2009 and the respondent's letter in reply of 13 January 2009 (and encashment of the proffered cheque), together represent and evidence in writing the terms of an agreement or accord that the appellant is entitled to rely upon. As Griffin J explained the basic rule for the Supreme Court (O'Higgins CJ and Henchy J concurring) in *Macklin v Graecen & Co* [1983] IR 61 (at 65-66), '[w]hen (as in this case) a transaction has been reduced to writing by agreement of the parties, no evidence may be given to prove the terms of the transaction accept the document itself and extrinsic evidence is not admissible to vary the terms of the document.'

26. Of course, there are exceptions to that rule. In *Tennants Building Products Ltd v O'Connell* [2013] IEHC 197 (Unreported, High Court, 17th April, 2013), Hogan J observed (at para. 20):

> 'It is certainly true that a party cannot be allowed to lead evidence as to what he or she subjectively believed the contract to mean: see, *eg*, the Supreme Court's decision in *Macklin v Graecen & Co* [1983] IR 61. Yet the full rigour of the parol evidence rule has been consistently diluted by doctrines such as *non est factum*, misrepresentation and the collateral contract rule. If the parol evidence rule were to be applied with remorseless and unbending logic, it might create a form of immunity for those who would carelessly, recklessly and perhaps even falsely misrepresent the terms of the written agreement, often to the disadvantage of the weaker party, thus undermining the very public policy on which the very existence of the parol evidence rule rests. While perfect consistency is impossible, the courts have nonetheless sought to strike a balance between the certainty of the written word on the one hand and guarding against the possible injustice which would be visited on those who entered into written agreements on the basis of an incorrect or even deliberately false representation on the other. This would be especially true where (as here) the written document has been prepared by one side for execution by the other.'

27. The basis for the dilution of the rule in respect of the testimony considered by the Circuit Court has not been explained. As it happens, the issue is irrelevant to the resolution of the questions presented for the opinion of this court.

The submissions of the parties to the Circuit Court

28. From the terms of the case stated it would appear that there were essentially three limbs to the appellant's submission to the Circuit Court.

29. First, the Circuit Court should be satisfied from the terms of the letter of 9 January 2009 that the cheque for €12,500 enclosed with it was offered 'in full and final settlement' of the tax liabilities that were the subject of the appellant's notice of intention to make a qualifying disclosure. Hence, the Circuit Court should be equally satisfied that the encashment (or presentation) of that cheque by the respondent, in conjunction with the terms of the respondent's letter of 13 January 2009, amounted to an unqualified acceptance of the offer reflected in the sending of that cheque.

30. As Laffoy J acknowledged in *Ross v W.C.* [2008] IEHC 103 (Unreported, High Court, 18th April, 2008), the applicable law is usefully summarised in Foskett, *The Law and Practice of Compromise*, 6th edn. (London, 2005) (at paras. 3-30 to 3-48). As Foskett notes (at para. 3-30), while the question is often posed as whether the presentation of a cheque for payment constituted 'an accord and satisfaction' of a disputed claim, the issue is confined initially (and - since the cheque here was both presented and honoured - in this case is confined entirely) to whether in all of the circumstances there was an accord between the parties at the material time.

31. I pause again here to note that, while the judgment in Ross (at para. 21) quotes the still authoritative statement of Bowen LJ in *Day v McLea* (1889) 22 Q.B.D. 610 (at 613) that the question of whether there was accord is one of fact, Laffoy J goes on to point out (at para. 22):

> 'The qualification discernible in the authorities cited by Foskett is that, if the negotiations have been conducted in writing, the construction of the correspondence is always a question of law.'

32. I refer to that aspect of the law on accord and satisfaction because it raises again the concern expressed in the preceding section of this judgment that the basis upon which the testimony of both the appellant's solicitor and an officer of the respondent was admitted and considered by the Circuit Court has not been made clear.

33. The respondent's submission in reply on the accord and satisfaction point was in two parts. First, the purported accord or settlement reached was surrounded by circumstances of latent ambiguity or mutual misunderstanding, or both, resulting in the absence of any *consensus ad idem* and rendering any apparent accord a nullity on the authority of the Supreme Court decision in *Mespil Ltd v Capaldi* [1986] ILRM 373. Second, the respondent had not called any evidence regarding its part in the exchange of correspondence that gave rise to the asserted accord because its legal representatives had understood that the Circuit Court would first decide on the respondent's principal submission that the issue fell outside the subject-matter jurisdiction of both the Appeal Commissioners and the Circuit Court under s. 934 of the TCA (which is the key issue for the purpose of the present appeal and is addressed in greater detail below). Without prejudice to that position, the respondent submitted that the evidence before the Circuit Court, taken at its height, was insufficient to establish the accord contended for.

34. As Counsel for both sides acknowledged in the course of submissions before me, any further argument on this point would now have to take account of the decision in *Ross v Cohalan* [2014] IEHC 686, (Unreported, High Court (White J), 15 May 2014) (at paras. 31-37).

35. The second limb of the appellant's submission was that the manner in which the respondent dealt with the appellant's correspondence and payment gave rise to an obligation or undertaking on its part to deal with the appellant's tax affairs on the basis proposed in that correspondence. Differently put, the respondent's conduct in acknowledging the appellant's submission, encashing the cheque received, and issuing a receipt for that payment gave rise to an estoppel preventing it from dealing with the appellant's tax affairs other than on the basis that that the relevant assessments had been reduced to an aggregate agreed assessment in the amount of the payment received or, taking account of that payment, one in the amount of zero. This argument was advanced on the authority of the decision of the Supreme Court in *Keogh v Criminal Assets Bureau* [2004] 2 IR 159. The respondent's submission on that point was that the facts at issue are distinguishable from those in in *Keogh*.

The submissions most pertinent to the present appeal

36. The third limb of the appellant's submission is the one directly pertinent to the present appeal. It was that the Circuit Court had jurisdiction to consider the impact of the asserted settlement or accord on the assessment of the quantum of tax due to the respondent from the appellant.

37. In advancing that argument, the appellant made clear that he was not relying on any jurisdiction exercisable by the Circuit Court broader than that expressly conferred on both the Appeal Commissioners and the Circuit Court under ss. 934 of the TCA, such that it was unnecessary for him to rely on the authority of the Supreme Court decision in *Inspector of Taxes v Arida Limited* [1995] 2 IR 230 to the effect that, in the absence of any indication to the contrary in the relevant taxation statute, any jurisdiction otherwise vested in the Circuit Court under the Courts Acts or the applicable rules of court is not disapplied in the exercise of the jurisdiction conferred by that statute.

38. According to the terms of the case stated, the respondent's principal submission was that, under s. 934 of the TCA properly construed, the jurisdiction of both an Appeal Commissioner and the Circuit Court is 'limited to deciding the amount of the taxpayer's income for the year(s) in respect of which the assessment(s) under appeal had been made' and that, in consequence, neither has the jurisdiction to decide whether a prior settlement has been reached between the parties in determining whether an appellant is overcharged by any assessment or in determining whether the respondent may be subject to an estoppel against raising, or relying upon, that assessment.

39. The case stated continues:

> 'In support of this argument, Counsel [for the respondent] relied upon section 942(3) of the Taxes Consolidation Act 1997 (as amended) and the decisions in *Inland Revenue Commissioners v Sneath* [1932] KB 362; *State (Whelan) v Smidic* [1938] 1 IR 626*; R v Income Tax Special Commissioners, Ex parte Elmhirst* [1936] 1 KB 487; *Menolly Homes v Appeal Commissioners & Anor* [2010] IEHC 49 (Unreported, High Court (Charleton J), 26th February, 2010); *State (Calcul International Ltd & Anor) v Appeal Commissioners & Anor* (Unreported, High Court (Barron J), 18th December, 1986); and *Bourke (Inspector of Taxes) v Lyster and Sons Ltd* (Unreported, High Court (Teevan J), 22nd January, 1958).' [citations provided]

The decision of the Circuit Court on the jurisdictional issue

40. The case stated summarises the ruling on the jurisdictional point that the Circuit Court gave on 24 January 2014, in the following terms:

> '27. …I ruled that the question was ultimately one of pure law, and was whether I, when hearing a statutory tax appeal, had the power to determine whether or not there had been a settlement agreed between the parties.
>
> 28. I held that the powers given to me were identical to those exercised by the Appeal Commissioners at the original hearing, and that my role was confined to determining the amount, if any, of tax which was due and owing. I held that the reference to 'lawful evidence" in the legislation did not allow me to extend my powers beyond those of the Appeal Commissioners.
>
> 29. I further held that the Appeal Commissioner had erred in law in finding that he did have jurisdiction to decide whether a settlement had been reached, and that I would compound that error if I came to the same conclusion.
>
> 30. I therefore held that I did not have the jurisdiction to determine whether or not a settlement had been agreed between the parties or whether the respondent was estopped from the denying the existence of such a settlement.'

The decision of the Circuit Court on the remaining issues

41. The appellant immediately declared dissatisfaction with the ruling of the Circuit Court on the jurisdictional issue. On the date fixed for the resumption of the appeal hearing, the appellant sought an adjournment to enable an appeal by way of case stated against that ruling to be taken to this court. The respondent opposed that application on the basis that, under s. 941 of the TCA properly construed, an appeal by way of case stated to the High Court lies only against the final determination on appeal of either the Appeal Commissioners or the Circuit Court, under s. 934 or s. 942 of that Act respectively, citing the decision to that effect of Hedigan J in *O'Rourke v Appeal Commissioners* [2010] IEHC 264 (Unreported, High Court, 1st July, 2010). The Circuit Court accepted the respondent's submission and refused the adjournment application.

42. The appellant did not give evidence, instead resting on his submission that the only evidence before the Circuit Court was that the quantum of his liability to tax on the relevant income had been reduced to zero, presumably by reference to the terms of the accord for which he was contending. The respondent submitted that the onus of proof in the appeal was on the appellant tax payer, citing *Menolly Homes Ltd* (at para. 44), and further submitted that there was no evidence before the Circuit Court that would justify the abatement or reduction of any of the assessments raised.

43. The Circuit Court then gave its final determination, ordering that the assessments should stand.

44. The appellant immediately expressed his dissatisfaction with that determination as erroneous in point of law.

The questions raised

45. The questions of law posed by His Honour Judge Riordan for the opinion of the High Court are, in substance, the following:-

> (a) Does a judge of the Circuit Court, hearing an appeal from an Appeal Commissioner, have jurisdiction under s. 942(3) of the TCA, or otherwise under statute or any rule of court, to determine whether the parties to an appeal have entered into a settlement in respect of the liability at issue in the said appeal?
>
> (b) Was the Circuit Court correct in law in holding that it only had jurisdiction to state a case on its final determination of the appeal before it and not on any interim determination or ruling?
>
> (c) Was the Circuit Court correct, on the evidence before it, to confirm the relevant assessments?

Analysis
46. The parties acknowledge that the second question raised is now superfluous because, in *O'Rourke v Appeal Commissioners* [2016] 2 IR 615, the Supreme Court (*per* Charleton J; Clarke and Dunne JJ concurring) has held that an appeal under s. 955(3) of the TCA is only determined – and, hence, appealable - when there is a final determination of the liability to tax and the amount of tax payable.

47. The first question is at the kernel of the appeal. While that question specifically refers to the jurisdiction of the Circuit Court under s. 942(3) of the TCA, the effect of that provision is merely to confirm that a judge of that court 'shall have and exercise the same powers and authorities in relation to the assessment appealed against, the determination and all consequent matters as the Appeal Commissioners might have and exercise.' Leaving aside the consideration of any wider jurisdiction that might be exercised by the Circuit Court under the Courts Acts or the Circuit Court rules (since no such jurisdiction is invoked by the appellant), the real question then is: 'What are the powers and authorities that the Appeal Commissioners have and can exercise in relation to an assessment appealed against?'

48. Incidentally, it is because the real question in issue relates to the relevant statutory powers of the Appeal Commissioners, as well as those of the Circuit Court, that, according to the respondent, the opinion sought retains potential future relevance, despite the introduction of a new appeals procedure under Part 40A of the TCA, as inserted by the Finance (Tax Appeals) Act 2015 which removed the right to a full re-hearing before the Circuit Court and which came into operation on 21 March 2016, bringing and end to what many felt was the anomaly of a right to an appeal *de novo* from the determination of an expert tribunal to a court without the relevant expertise.

49. It seems to me that the answer to the question can be found in s. 934 of the TCA. It provides, in material part:

> '…
>
> (3) Where on an appeal it appears to the Appeal Commissioners…, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.
>
> (4) Where on any appeal it appears to the Appeal Commissioners that the person assessed ought to be charged in an amount exceeding the amount contained in the assessment, they shall charge that person with the excess.'

50. Thus, it is necessary to consider the scope of the power or authority to abate, reduce, let stand, or increase an assessment. In doing so, the case of most obvious assistance is the decision of a divisional sitting of the former High Court in *The State (Whelan) v Smidic*, already cited. The prosecutor in that case (or the applicant, as we would now say) sought to quash the decision of one of the Special Commissioners (the precursor to the Appeal Commissioners) on his appeal under s. 133 (2) of the Income Tax Act 1918 against an assessment of his liability to income tax. As Hanna J pointed out (at 633-4), the limits of the jurisdiction of the Special Commissioners in Ireland on an appeal were contained in s. 137(4) and (5) of the Act of 1918, as follows:-

> '4. If, on an appeal, it appears…that the appellant is overcharged by any assessment or surcharge, the Commissioners shall abate or reduce the assessment of surcharge accordingly, but otherwise every such assessment or surcharge shall stand good.
>
> 5. If, on any appeal, it appears…that the person assessed or surcharged ought to be charged in an amount exceeding the amount contained in the assessment or surcharge, they shall charge him with the excess.'

51. The specific question that arose in *Smidic's Case* was whether the Special Commissioner exceeded his jurisdiction by purporting to revisit and reverse a ruling that he made on a question of fact (namely, whether a venture on which the prosecutor was assessed for tax for the year 1937 had been permanently discontinued in 1936) before reaching a final determination on the prosecutors appeal against the assessment of his liability to income tax for the years 1936 and 1937.

52. In that context, Byrne J (with whom Maguire J agreed) stated (at 640):

> 'What, then, are the powers of the Special Commissioners on the hearing of an appeal against an assessment? Various ancillary powers are conferred upon the Commissioners for the purpose of enabling them to exercise the very important function of hearing and determining appeals; but in so far as the final determination of the appeal is concerned, I am of opinion that their only powers are those contained in sub-sects. 4 and 5 of sect. 137 of the Act of 1918: they may abate, reduce or increase the assessment, and, subject to such abatement or variation, the assessment stands good. I am therefore of opinion, on an analysis of the material sections of the statutes, that the final determination of the Special Commissioners, on the hearing of an appeal against an assessment, must necessarily be an order directing:- (1), that the assessment shall abate altogether, or (2), that it be varied by increasing or diminishing it in a definite amount to be fixed by them, or (3), that the appeal be dismissed, in which event the original assessment stands good.'

53. Having noted that the Special Commissioner had made no such final determination, O'Byrne J then continued (at 641):

> 'It may be a matter of convenience in the hearing of the appeal for the Special Commissioners to give rulings on questions of law or fact which will assist in determining the taxpayer's liability to tax and the extent of such liability, and to have the figures, with reference to the taxpayer's income, examined in the light of such rulings, by the Surveyor of Taxes or others; but these seem to me to be merely steps leading up to the final determination.'

54. In confirmation of that analysis, O'Byrne J went on to consider the decisions of the English Court of Appeal in *Sneath's Case* and *Elmhirst's Case*, both already cited.

55. *Sneath's Case* concerned a challenge on behalf of a taxpayer to a decision of the Special Commissioners that, as a matter of law, certain deductions could not be lawfully be made from the taxpayer's gross income in assessing the appropriate figure on which liability to income tax (or super tax) was to be calculated. The taxpayer's argument was that the lawfulness of the said deductions was *res judicata* because, in a previous appeal brought on the same taxpayer's behalf in respect of previous years of assessment, the Commissioners had found the relevant deductions to have been lawfully made. Interestingly, the English High Court had accepted that argument, having regard to the decision of the Court of Appeal in Northern Ireland in the case of *Aylmer v Mahaffy* 10 Tax Cas. 594, which concerned the rehearing before the Recorder of Belfast of an appeal that had been heard by the Special Commissioners (in the same way that the Circuit Court in this case heard an appeal from the Appeal Commissioners).

56. The English Court of Appeal took a different view. The respondent relies very heavily on the following passage from the judgment of Greer LJ (at 385), cited by O'Byrne J in *Smidic's Case* (at 635):

> 'I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question.'

57. But O'Byrne J went on (at 635) to cite also the following passage from the judgment of Romer LJ in the same case (at 390-1):

> 'The appeal is merely another step taken by the Commissioners at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax. In estimating the total income of the taxpayer, the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact and law. But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question.'

58. As O'Byrne J noted in *Smidic's Case*, in *Elmhirst's Case* the English Court of Appeal cited with approval the passages just quoted from the judgment of Greer and Romer LJ in *Sneeth's Case*, in holding that the taxpayer in that case had no right to withdraw a notice of appeal to the Special Commissioners against an income tax assessment without the Commissioners' consent. It is, perhaps, significant to note that the decision of the Court of Appeal appears to be based more obviously on the proposition that the statutory jurisdiction of the Commissioners under the provisions of the Income Tax 1918 - equivalent to that of the Appeal Commissioners and Circuit Court under s. 934(3) and (4) of the TCA - is wider, rather than narrower, than that of a judge determining *a lis inter partes.* As Lord Wright MR observed (at 493):

> 'I may note here at once, that in making the assessment and in dealing with the appeals, the Commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are not in the position of judges deciding an issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have, and on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case inter partes; they are assessing or estimating the amount on which, in the interests of the country at large, the taxpayer ought to be taxed.'

59. The respondent's argument is that in describing, 'the estimating authorities' under the Income Tax Act 1918 as being 'merely in the position of valuers', even when they were dealing with an appeal, Greer LJ was by implication asserting a strict limitation on the subject-matter jurisdiction of the Special Commissioners in the conduct of an appeal under that statute. But there are difficulties with that position. It is plain that the limitation Greer LJ had in mind was temporal (or precedential) rather than jurisdictional. That is to say, his conclusion was that a decision of the Commissioners could not have any effect beyond 'valuing' the taxpayer's liability for the assessment period or periods under appeal and could not create an estoppel or *res judicata* in respect of the approach to the assessment of that – or any other - taxpayer's liability for any other period. The same view was taken by Teevan J in *Bourke (Inspector of Taxes) v Lyster and Sons Ltd,* already cited.

60. Moreover, it is clear from the authorities just quoted that the statutory powers and authority of the Appeal Commissioners must entail the jurisdiction – indeed, the obligation – to give rulings on incidental questions of law or fact where necessary or appropriate.

61. In *The State (Calcul International Ltd and Anor) v Appeal Commissioners and Anor,* already cited, Barron J was required to consider whether the exercise of the relevant powers and authority by the Appeal Commissioners amounted to the impermissible exercise by them of a power or function of a judicial nature contrary to the requirements of Article 34(1) and Article 37 of the Constitution. In addressing that question, Barron J commented on the scope of the Appeal Commissioners jurisdiction in the following way:

> 'The essence of a tax assessment is the determination of the amount of tax to be paid by the taxpayer. It is the particular proportion of this taxable income which is required by the tax code to be paid by way of tax. Undoubtedly, questions of fact and law require to be decided to determine taxable income. I am sure that a spectator to a hearing before the Appeal Commissioners will see no material difference between the conduct of the hearing and the conduct of many hearings in the courts. In each case there will be an adversarial procedure with each side seeking to establish the law and the facts to suit its own case.'

62. Later in his judgment, Barron J commented:

> 'Any taxpayer appearing before the Appeal Commissioners either seeks to establish that he has no tax liability or a tax liability less than that for which the tax inspector contends.'

63. Viewed in the light of these authorties, the question becomes whether the perceived limitation on the powers and authority of the Appeal Commissioners to abate, reduce, let stand or increase an assessment to income tax under s. 934(3) and (4) of the TCA because of their 'mere position as valuers', precludes them from considering, as an incidental question of law or fact, whether a binding settlement or accord was reached between the taxpayer and Revenue Commissioners that requires the abatement or reduction of an assessment or assessments in a larger amount subsequently raised in respect of the same period.

64. In arguing that the answer to that question should be no, the appellant relies on the following dictum of Keane CJ (Murray, McGuinness, Fennelly and McCracken JJ concurring) in *Criminal Assets Bureau v Hunt* [2003] 2 IR 168 (at 185):

> 'It is clear that it was the intention of the Oireacthas, in enacting the elaborate procedures for the determination of a taxpayer's liability by assessment and appeal to the appeal commissioners, accompanied by a right of appeal to the Circuit Court and a provision for the determination of questions of law arising by way of case stated in the High Court, to provide an exclusive machinery for the ascertainment of a taxpayer's liability.'

65. The appellant also points to the judgment of Charleton J in *Menolly Homes Ltd*, already cited, and in particular his endorsement (at para. 21) of the passage from the judgment of Lord Wright MR in *Elmhirst's Case*, already quoted at para. 57 above.

66. In urging the court to answer yes to the question as I have posed it, the respondent argues that the appellant would suffer no prejudice if the court were to adopt the more narrow construction of the Appeal Commissioners' jurisdiction for which it contends, because the appellant's claims that he had a binding settlement agreement or accord with the respondent and that the respondent is

estopped by its conduct from raising, or relying upon, the assessments at issue are matters that the appellant can pursue either by way of application for judicial review to this court or as a defence to any enforcement action that the respondent may take in respect of the appellant's liability under the relevant assessments.

67. The respondent laid great emphasis on the decision in *Menolly Homes Limited*, already cited as an example of as a case in which the court found that the dissatisfied taxpayer should have pursued an application for judicial review, rather than an appeal to the Appeal Commissioners. But the issue that the taxpayer in that case sought to raise before the Appeal Commissioners on a VAT appeal was whether the tax inspector concerned had properly or *bona fide* formed a 'reason to believe' that the relevant amount of VAT was due. Hence, the taxpayer there sought to challenge the lawfulness or vires of the original VAT assessment. That is very nearly the archetype of an issue governed by administrative law, rather than private law, principles.

68. In my judgment, in circumstances where the Oireachtas has enacted elaborate procedures for the determination of a taxpayer's liability by assessment and appeal to the appeal commissioners, accompanied by a right of appeal to the Circuit Court, it would be unwarranted and, indeed, unfair to adopt an artificially narrow construction of the powers and authority of those bodies to determine incidental questions of fact and law that may arise in that regard, thereby requiring taxpayers who wish to raise such questions to risk the attendant costs, and to incur the additional stress, of prosecuting or defending separate proceedings instead.

69. As the decision of Charleton J in *Menolly Homes Ltd* demonstrates, there are plainly some questions that it is more appropriate to raise by application for judicial review. The appellant's claims that he has a legitimate expectation that his income tax liability for the assessment period(s) in question has been settled in the amount of €12,500 or, obversely, that the respondent is estopped from asserting otherwise both raise questions of that kind. The doctrine of legitimate expectation is a creature of public law; that of promissory estoppel one of equity. Neither the Appeal Commissioners nor the Circuit Court have the necessary public law jurisdiction to consider them. And, in the words of Charleton J in *Menolly Holmes Ltd* (at para. 12), revenue law has no equity.

70. For those reasons, I am satisfied that, while the Appeal Commissioners (and the Circuit Court), in the exercise of the jurisdiction of each under s. 934 of the TCA, do have jurisdiction to consider a contract law claim that there exists a prior accord or settlement between the taxpayer and Revenue Commissioners that requires, where appropriate, the abatement or reduction of an assessment subsequently raised, they do not have jurisdiction to entertain a claim of legitimate expectation or promissory estoppel to the same effect. Claims of the latter sort must be raised in separate proceedings before the appropriate court.

Conclusion

71. For the reasons I have given, the answer to the first question raised in the case stated is that a judge of the Circuit Court, hearing an appeal from an Appeal Commissioner, does have jurisdiction under s. 942(3) of the TCA to determine whether the parties to an appeal have entered into a prior settlement or accord in respect of the liability at issue in the said appeal, as part of the jurisdiction conferred on the Appeal Commissioners and the Circuit Court under s. 934(3) and (4) of the TCA to abate, reduce, let stand, or increase the relevant assessment.

72. For the reasons I have given, it is unnecessary to address the second question raised.

73. In light of the answer to the first question, it would be inappropriate to address the third one.

74. In exercise of the powers conferred on this Court under s. 941(6) of the TCA, I will remit the matter to the Circuit Court to be reheard with due regard to the opinion I have given on the first question raised. In doing so, I wish to emphasise that I have expressed no opinion, much less reached any conclusion, on whether an accord or settlement exists between the parties. That is a matter for the Circuit Court to determine in accordance with whatever evidence is properly before it.