



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 42

**Kelly J.
Irvine J.
Hogan J.**

Appeal No. 2014/676

[Article 64 transfer]

BETWEEN/

GERARD HARRAHILL

PLAINTIFF/RESPONDENT

AND

FINIAN BRANNIGAN

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 2nd day of March 2015

1. This is an appeal by the defendant, Mr. Brannigan ("the defendant") against the decision of the High Court dated 12th November 2012 (Cross J.) whereby it was ordered that the plaintiff, who is the Collector General, recover the sum of €188,412 in respect of the arrears of taxes (including income tax, PRSI and VAT payments) due from the defendant. In his ruling Cross J. accepted that the plaintiff was entitled to summary judgment in respect of this sum.

2. The defendant had originally appealed to the Supreme Court against the decision of Mr. Justice Cross. This appeal was, however, transferred to this Court by direction of the Chief Justice (with the concurrence of the other members of the Supreme Court) pursuant to Article 64 of the Constitution, following the establishment of this Court on 29th October 2014.

3. The defendant is a solicitor who unfortunately fell into arrears with his tax affairs some time ago. As it happens, he has not been able to obtain a tax clearance certificate since his last certificate lapsed in June 2004. So far as this appeal is concerned, Mr. Brannigan does not really dispute but that substantial sums are due to the Revenue Commissioners. He contends, however, that by reason of a conversation which he had with a Revenue official, Mr. Michael Cunningham, on 12th August 2010, he had obtained an agreement which he could enforce to defeat the present application. Mr. Brannigan contended on affidavit that, as a result of the meeting, the following was agreed:

"(i) A limited Tax Clearance Certificate would be issued by Revenue so that the Criminal Legal Aid of the Department of Justice would, on his behalf, make payments due to him directly to Revenue's Collector General.

(ii) The appellant agreed to his Criminal Legal Aid earnings being "attached" to meet the tax arrears of current taxation due to Revenue:

(iii) On receipt of the limited Tax Clearance Certificate, the appellant would lodge claims in respect of his substantial work which had been done by him but which had not been previously claimed by him:

(iv) Revenue would take no further enforcement proceedings against the appellant provided that he agreed to credit the Collector General directly with his Criminal Legal Aid earnings:

(v) Revenue would not "attach" his earnings in respect of his prosecution work for the Fisheries Board."

4. These contentions were specifically denied in two replying affidavits filed by another Revenue official, Ms. Tait and by Mr. Cunningham himself. Ms. Tait contended that there was no such agreement, a contention underscored by Mr. Cunningham in his affidavit. The fundamental point made by Ms. Tait was that the Revenue Commissioners could not have issued a tax clearance certificate to Mr. Brannigan given the existence of the arrears and the fact that he had had no such certificate since June 2004.

5. There is no doubt but that a significant portion of the defendant's income from legal practice was – or, at least, should have been – derived from legally aided criminal defence work. There seems little doubt but that the defendant did represent a large number of accused persons in respect of which, all other things being equal, he would have been entitled to payment under the terms of the Criminal Justice (Legal Aid) Scheme.

6. Unfortunately, all other things were not equal, because the defendant's entitlement to payment in respect of the Criminal Justice (Legal Aid) Scheme is, in fact, governed by the provisions of the Criminal Justice (Legal Aid) (Tax Clearance Certificate) Regulations 1999 (S.I. No. 135 of 1999) ("the 1999 Regulations"). Article 4(2) of the 1999 Regulations makes it clear that a solicitor cannot have their name added to the solicitors' panel unless a tax clearance certificate is supplied by that solicitor:

"(2) Notwithstanding the provisions of Regulation 4 (2) of the Principal Regulations (as amended) the County Registrar shall not add the name of the solicitor concerned to the solicitors' panel until a tax clearance certificate has been furnished to the County Registrar concerned."

7. Article 11 of the 1999 Regulations provides in relevant part as follows:

"(1) Responsibility for ensuring eligibility for inclusion or retention of a solicitor's name on a solicitors' panel shall at all times remain the responsibility of the solicitor concerned.

(2) No fees under the Criminal Justice (Legal Aid) Regulations should be payable to a solicitor accepts an assignment to a case if his or her name is not, the date of the assignment, on the relevant solicitors' panel.

(3) A solicitor shall be entitled to payment of fees under the Criminal Justice (Legal Aid) Regulations where at the time of the assignment was made the name of the solicitor concerned was on the relevant solicitors' panel..."

8. It is perfectly clear from the terms of the 1999 Regulations that a solicitor who accepts an assignment in respect of a matter which might otherwise be covered by the 1999 Regulations is not entitled to payment unless his or her name is at the time of the assignment on the relevant solicitors' panel. The provisions of Article 11(1) of the 1999 Regulations further presuppose that the relevant solicitor would have obtained the necessary Tax Clearance Certificate, which, as Article 4(2) of the 1999 Regulations make clear, is a pre-condition for inclusion, and, for that matter, remaining, on the solicitors' panel in respect of defence criminal legal aid work

9. These difficulties were brought to a head in the present case on 6th April 2011 when the Revenue Commissioners wrote to the defendant drawing his attention to the effect of these provisions. The letter continued:

"We have been informed by the Department of Justice that your name was not on the relevant panel and that fees are not payable to you for cases in which you accepted assignment at the time. Therefore, currently, there are no fees for Revenue to attach to aid in the satisfaction of your liabilities...With respect to your issue of tax clearance, this will not be forthcoming until your tax clearance liabilities are cleared. I understand that Ms. O'Brien has offered you the opportunity to enter into a concessional instalment arrangement for the rest of your debts and you have refused."

10. This letter really summed up the extent of the defendant's difficulties. Because he had no tax clearance certificate, he could not have his name entered on the solicitor's legal aid panel. This has then led to the unfortunate situation that he was not entitled to be paid for the work which he had done. In other words, the projected income stream from the criminal legal aid work turned out to be illusory because as the 1999 Regulations stand, Mr. Brannigan simply has no entitlement to be paid for the work which he has done.

11. There are many possible objections to the line of the defence for which the defendant contends, not all of which it is necessary for me to consider. It probably suffices to observe that the defendant has not advanced even an arguable case such as would defeat the Collector-General's entitlement to judgment in respect of the sums due by way of unpaid taxes. The defendant does not even dispute the fact that the sum of €188,412 is due and owing to the Revenue Commissioners. The defence that is in fact advanced is not a defence in the strict term, but is rather in the nature of a cross-claim based on the agreement of August 2010 which the defendant says he has with the Revenue Commissioners.

12. As Clarke J. pointed out in *Moohan v. SR Motors Ltd.* [2007] IEHC 435, [2008] 3 I.R. 650, 655 the first question to be asked in the case of a cross-claim of this kind is whether

"... that cross claim would give rise to a defence in equity to the proceedings. It is clear from *Prendergast v. Biddle* (Unreported, Supreme Court, 21st July, 1957, Kingsmill Moore J.), that the test as to whether a cross claim gives rise to a defence in equity, depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out."

13. Whatever else can be said, it could not be contended that the cross claim here arises from the same set of facts. Even passing over the fact that the Revenue generally enjoys a special statutory status as preferential creditor – a status generally inconsistent with and immune to cross-claims in equity, given that Ord. 68, r. 20 of the Rules of the Superior Courts 1986 expressly disappplies the power of set-off to Revenue claims – the present claim does not arise from the same set of facts as the primary claim of the Revenue. That latter claim arises from the simple non-payment of taxes to the Revenue Commissioners, whereas the defendant's claim arises from a supposed agreement at a much later stage.

14. This is accordingly a case where, returning to the words of Clarke J. in *Moohan*, the cross claim arises ([2008] 3 I.R. 650, 655-656):

"....from some independent set of circumstances then the claim (unless it can be defended on separate grounds) will have to be allowed, but the defendant may be able to establish a counter claim in due course, which may in whole or in part, be set against the claim. What the position is to be in the intervening period creates a difficulty as explained by Kingsmill Moore J., in *Prendergast v. Biddle* in the following terms:-

"On the one hand it may be asked, why a plaintiff with approved and perhaps uncontested claim should wait for a judgment or execution of judgment on this claim because the defendant asserts a plausible but unproved and contested counter claim. On the other hand it may equally be asked why a defendant should be required to pay the plaintiffs demand when he asserts and may be able to prove that the plaintiff owes him a larger amount".

15. The court's discretion must, however, be exercised on the basis of the principles set out by Kingsmill Moore J. later in the course of the same judgment in the following terms:-

"It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim, until after the counter claim had been heard, for the plaintiff having received payment by dues the monies to pay his debts or otherwise dissipated so the judgment on a counter claim would be fruitless. I mentioned earlier some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion".

16. In *Moohan* Clarke J. continued by observing that it also followed that a court must determine whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, a defendant seeking to assert such a set off must himself do equity. Clarke J. continued ([2008] 3 I.R. 650, 656-657):

"On that basis the overall approach to a case such as this (involving, as it does, a cross claim) seems to me to be the following:-

(a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiffs claim. In order for the asserted cross claim to amount to a defence as such, it must arguably give rise to a set off in equity, and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendants case, it would not be inequitable to allow the asserted set off;

(b) If, and to the extent that, a *prima facie* case for such a set off arises the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);

(c) If the cross claim amounts to an independent claim, then judgment should be entered on the claim but the question of whether execution of such judgment should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle*."

17. Applying, then, the principles enunciated by Clarke J. in *Moohan* and those of Kingsmill Moore J. in *Prendergast v. Biddle*, it is clear that there is no defence to the plaintiff's claim as such. Leaving aside for the moment any questions as to the particular statutory status of the Revenue in respect of revenue debts, the next question to be considered is whether it would be appropriate to place a stay on that judgment having regard to the *Prendergast v. Biddle* principles. These principles require us to consider "the apparent strength of the counter claim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims", among a variety of other relevant factors.

18. It is again probably sufficient to say that the counter-claim or cross claim which the defendant seeks to amount is not itself very strong. It amounts to saying that the Revenue agreed to hold off enforcement of the Revenue debt pending the collection of monies due to the defendant from the Department of Justice under the Criminal Justice (Legal Aid) Scheme. But even if – as Cross J. pointed out to counsel in the course of argument in the High Court – there was in fact such an agreement between the Revenue and the defendant in the present case, how would that assist him? The reality is that, as the Department of Justice itself confirmed to the Revenue by September 2010, there are, in fact, no fees due to the defendant having regard to the provisions of the 1999 Regulations and the regrettable fact that the defendant has not had a tax clearance certificate for over a decade. It is also clear that the Revenue sought unsuccessfully to attach such earnings, but it then became clear that there were no such reasons for the reasons which have just been stated. If the defendant has a complaint in that regard, it is really with the Department of Justice and the manner in which the terms of the 1999 Regulations themselves operate.

19. Absent a tax clearance certificate, there are in fact no fees due to the defendant, irrespective of the work which he did for accused persons who would otherwise have been eligible to avail of the Scheme. It is not a case of where sums presently held in some form of suspensive escrow would be released in discharge of tax liabilities if only a tax clearance certificate could be furnished. It is rather more than that, inasmuch as that the defendant is simply debarred from taking assignments from clients which would count for the purposes of payment under the Scheme pending the furnishing of the tax clearance certificate.

20. A further consideration, in any event, is that the defendant did not do equity in the manner envisaged by Kingsmill Moore J. in *Prendergast*. The defendant claimed to be entitled to what was described as a "partial" tax clearance certificate by reason of the agreement with Mr. Cunningham, yet no meaningful steps were taken by him to seek such a certificate or to claim that the Revenue were bound to furnish him with such a certificate between August 2010 (the date of the alleged agreement) and April 2011 (the date of the correspondence from Revenue). As Mr. Cunningham put it in his affidavit:

"I informed Mr. Brannigan at the meeting that if he were to agree some instalment arrangement with Revenue, this might assist in the overall outcome of the case. After the meeting my expectation was that Mr. Brannigan would subsequently contact the Collector General's Office to work out and agree an action-plan following the submission of my report and recommendation, but I now understand that this was not done by Mr. Brannigan."

21. The defendant chose not to reply to that affidavit. A notice to cross-examine was admittedly served in respect of this latter affidavit, but the extent to which this matter was pursued at the hearing before Cross J. is unclear. What is plain, however, that the defendant had taken no steps to agree a phased payment agreement with Revenue in this interval, such that might have allowed a tax clearance certificate to have been issued. It is clear from Revenue briefing notes to tax practitioners (Revenue eBrief No. 11/15) that "in some instances" a tax clearance certificate "may be issued to a customer who has tax arrears covered by a phased payment arrangement that has been agreed with Revenue."

22. By any standards, therefore, even assuming that the defendant could actually establish the existence of such an agreement – something which, in itself, has been robustly denied by the Revenue – the unpalatable fact remains from his perspective that he is simply not in a position to point to the existence of a putative income stream which might defray the tax liability which has been established. As such, the defendant cannot show that his cross claim is strong and, moreover, he has delayed taking steps to enforce the agreement which he says he had with the Revenue Commissioners.

23. It is clear, therefore, that applying the standard *Prendergast v. Biddle* and *Moohan* principles, the defendant cannot realistically show that he has any merits such as would persuade this Court to place a stay on the judgment in favour of the Revenue Commissioners in respect of this cross claim.

Conclusions

24. It follows, therefore, that for the reasons stated, I am of the view that the appeal must be dismissed.