

THE HIGH COURT

REVENUE

[2016 No. 17 R]

BETWEEN

MICHAEL GLADNEY

PLAINTIFF

AND

ONOME HUMPHREY UGBAWA

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 10th day of October, 2017

1. In the within application brought by notice of motion dated 14th July, 2016 the defendant seeks the following:

1. An order pursuant to O. 63 r. 9 of the Rules of the Superior Courts ("RSC") to discharge the order of the Master of the High Court made 7th July, 2016, giving liberty to enter final judgment in the herein proceedings;
2. An order striking out the proceedings herein, as a special endorsement of claim on the summary summons does not sufficiently comply with O. 4 r. 4 RSC, in that it does not specifically and with all necessary particulars state the relief claimed and the grounds thereof;
3. An order pursuant to O. 37 r. 9 granting the defendant leave to defend as the defendant has a good defence;
4. An order pursuant to O. 40 r. 19, granting leave to the defendant to file a replying affidavit out of time to the summary summons herein;
5. An order of discovery for copies of the returns of income and expenditure made by the defendant to the plaintiff for the income tax periods 1st January, 2010 to 31st December, 2010 and 1st January, 2011 to 31st December 2011, and used for the purposes of calculating any income tax due;
6. An order of discovery for copies of income tax computations and copies of the computations of any statutory interest charged and copies of the computation of any penalties charged;
7. An order of discovery for copies of any agreement entered into as a result of any revenue audit or audits conducted for the income tax periods 1st January, 2010 to 31st December 2010 and 1st January, 2011 to 31st December, 2011.

2. In the course of the hearing of the within application counsel for the defendant did not pursue with any degree of vigour the order claimed at para. 2 of the notice of motion, arguments made with regard to certain sums of interest and penalties variously claimed by the plaintiff from the defendant. This issue is addressed later in this judgment. By and large, the focus of the within application centred on whether the Court should set aside the order of the Master giving liberty to enter final judgment and adjourn the matter to plenary hearing.

3. While at paras. 5 to 7 inclusive of the notice of motion the defendant has sought discovery of various matters, the Court does not propose to deal with such application as the orders sought are not appropriate orders where the essential relief being sought is the setting aside the order of the Master of 7th July, 2016, and where the question of orders for Discovery would only arise consequent on an order of this Court adjourning the matter for plenary hearing.

Background

4. The background to the present application is as follows: on 2nd February, 2016, the Revenue Commissioners through their nominee, Mr. Gladney, commenced proceedings by way of summary summons seeking to recover from the defendant a sum of €1,063,228.86 by way of arrears of income tax and interest. An appearance was entered by the defendant on 15th March, 2016. By notice of motion dated 15th April, 2016, the plaintiff sought, *inter alia*, liberty to enter final judgment in the said sum. The application was grounded on the affidavit of Silvia Connolly of the Revenue Commissioners in which it was deposed that the plaintiff's claim was for arrears of €908,327.08 in respect of tax and a sum of €154,901.78 in respect of interest, as set out in the special endorsement of claim on the summary summons. Ms. Connolly averred that the defendant had no defence to the plaintiff's claim. By order of the Master of the High Court dated 7th July, 2016, the plaintiff was given liberty to enter final judgment for the sum of €1,063,228.86 with costs measured in the sum of €1,750.00.

5. For the purposes of the present application, and to put the arguments of both parties into context, it is necessary to set out in some detail the course of dealing between the plaintiff and the defendant which led ultimately to the institution of the within proceedings. This course of dealing is set out variously in the defendant's affidavit grounding the within application and in the replying affidavit of Bernard Torsney, Officer of the Revenue Commissioners. While there are a number of matters of contention between the parties which will be addressed later in this judgment, the following matters appear not to be in dispute.

6. The defendant is a medical doctor and he received his medical degree from the medical school of the University of Benin Edo State in Nigeria. He came to Ireland in 2002. He is resident in the State. His medical specialty is in General Practice and emergency medicine. It was the defendant's intention to set up as a GP in Ireland. He was registered with the General Medical Council in the United Kingdom as a fully registered doctor in 2007 and he began to practice medicine as a locum doctor in Ireland in July 2009. The defendant next applied for a licence to practice as a GP in Ireland but found that the Medical Council were unable to provide him with the requisite training to obtain such licence. Accordingly, he obtained a place in the West of Scotland Deanery to require such training. He took up this place in August 2011.

7. The defendant's income as a doctor was received by way of self employment earnings and PAYE earnings from a company, O.H. Ugbawa Ltd, established by the defendant.

In March, 2012, the plaintiff selected the defendant for a Revenue audit. The defendant and his tax agents, JC Walsh & Co., were duly notified that an audit would take place on 29th March, 2012 to deal with the tax period 1st January, 2008 to 29th February, 2012. On 20th March, 2012, JC Walsh & Co. wrote to the plaintiff outlining that the defendant would make a voluntary disclosure and for that reason a postponement of the audit was requested. The request was acceded to. By letter dated 21st March, 2012, the plaintiff advised the defendant and his tax agent that the audit would take place on 23rd May, 2012.

8. The defendant avers that following the communication from the plaintiff in March, 2012, his tax agents advised him that they required details of all his receipts and vouched expenditure so that the paperwork could be inspected by the Revenue officer who would conduct the audit. According to the defendant, he forwarded copies of his personal bank statements for the period of the audit to his tax agents by end March, 2012. The defendant avers that following the transmission of this documentation his tax agents telephoned him and enquired as to large transfers of moneys into his personal account and requesting explanations as to the nature of the transfers.

9. In his affidavit, the defendant accounts for the transfer of these monies as follows: in February 2010 he was contacted by an old school friend, Mr. Osborne Iweka, who advised him that he was a real estate investment agent in Africa and that he had instructions from a named client to advise on suitable real estate investments and to invest in excess of 1 million US dollars in suitable real estate investments. The defendant was asked by Mr. Iweka to become a commission agent for the latter's company "Fimco". The defendant agreed to do so. According to the defendant, he was offered a rate of 15% commission on "a particular real estate investment deal", with the 15% to be divided between himself and Mr. Iweka at a ratio of 8% and 7% respectively. The defendant was advised that his work as a commission agent was to receive transfers of money from Mr. Iweka's client in the US and to pay local expenses in Europe and to then transfer the balance of the money receipts to a bank account in Africa. The defendant avers that the series of transactions amounted to a gross receipt in excess of €1,395,000 into his personal current account for the period 28th May, 2010 to 18th October, 2011. According to the defendant, following his tax agent's query regarding the transactions, he explained to them the nature of and the reasons for the money transfers into his personal bank account and that he had paid over the 7% commission into Mr. Iweka in the same month as the receipt of the money from Mr. Iweka's client into his bank account.

10. At para. 39, the defendant avers that his tax agents advised him that he would need documents to show that the gross receipts into his personal bank account as commission agent were not another source of income that he had apart from his self employment earnings as a doctor and his PAYE earnings from his locum company.

11. The Revenue audit of the defendant (and the defendant's company) commenced at the defendant's home on 29th May, 2012. It was conducted by Mr. Torsney on behalf of the Revenue. The defendant's tax agent, Mr. Walsh, was also in attendance.

12. The defendant avers that he explained to Mr. Torsney the nature of and the reasons for the transactions into his personal bank account.

13. At para. 10 of his replying affidavit, Mr. Torsney avers that during the course of the audit meeting on 29th May, 2012, the defendant outlined to him that the large sums of money in the defendant's bank account did not amount to income but related to an arrangement with a friend of the defendant, whom the defendant had named as "Tunde Olanubi", whereby sums of money were transferred into the defendant's account to facilitate the purchase by his friend of equipment and trucks in the United Kingdom. The defendant would then make payments from his account to the suppliers of such equipment. Tab 1 of the booklet of exhibits to Mr. Torsney's affidavit contains, *inter alia*, a manuscript note by Mr. Torsney of the audit meeting of 29th May, 2012 which refers to the defendant's account of his arrangement with Mr. Olanubi and it records that "over the 2 year period [2010 to 2011] 102K US dollars was income from this service". Mr. Torsney notes the defendant as advising that the total amount Mr. Olanubi transferred from Nigeria to the defendant's account was "€170K" or "USD 254,970".

14. It is not in dispute as between the plaintiff and the defendant that, as averred to by Mr. Torsney, at the audit meeting of 29th May, 2012, he advised the defendant that he would need evidence to substantiate the defendant's explanation for the transactions in his bank account. According to Mr. Torsney, he requested the following: the defendant's bank lodgements and those of his wife for the period 1st January, 2009 to 31st December, 2011; a list of all business associates who lodged money into the defendant's personal bank account, their names, addresses, the businesses they were involved in and the reasons why the monies were lodged in the defendant's bank account. Mr. Torsney also requested all correspondence/agreements from the defendant's business associates with the instructions as to what the defendant was to do with the monies lodged to his bank account and the defendant was to include the name of all suppliers, their addresses, details of goods bought and payment details.

15. Although not referred to specifically by Mr. Torsney in his affidavit, Tab 1 of the exhibit booklet also contains a copy of an email which the defendant sent to Mr. Torsney on 29th May, 2012, and which forwarded a "Fimco" document. This document bears the date 22nd May, 2012 and is headed "Fimco Realty". This document which is addressed to "Humphrey Ugbawa" states that Fimco Realty "is into sales and management of properties" and reference is made to a property transaction involving client of Fimco Realty the payment for which property was made in instalments at various intervals spanning the period 2010 to 2011. It states that the cost of the property was 1,040,000 US dollars exclusive of tax. It states that a total payment of 1,092,000 USD was made and that "all titles have since been transferred and perfected in favour of [Fimco's client]", who is named in the document. The document goes on to state that "Dr. Humphrey Ugbawa acted on our behalf in facilitation of the transaction over the period and was compensated accordingly to the tune of 102,000 USD for his services." The documents exhibited by Mr. Torsney show that the above document was sent to the defendant by "Femi Akinrola" on 25th May, 2012.

16. Mr. Torsney avers that in the absence of receipt of the requested information, he wrote to the defendant's tax agent on 24th August, 2012, reiterating the request made at the meeting on 29th May, 2012. This letter was copied to the defendant on 28th August, 2012. On 19th September, 2012, the defendant's tax agent responded enclosing calculation of the defendant's income on voluntary disclosure (102,000 USD) and an analysis of lodgements to the defendant's account. The tax agent advised that they did not receive bank statements relating to the defendant's wife and that these were to have been supplied directly to the plaintiff by the defendant following the day of the audit. The tax agents also advised that details of the persons who paid the monies which give rise to the voluntary disclosure were provided verbally by the defendant on the day of the audit and that if further details were required the plaintiff should contact the defendant directly. The tax agent stated that there were no written agreements between the defendant and the persons involved and that the arrangement had been agreed verbally between the parties and that this could be confirmed with the defendant. The tax agent also enclosed a copy of the director's account for OH Ugbawa Ltd.

17. The next communication between the plaintiff and the defendant was a voice message left by Mr. Torsney for the defendant on 13th May, 2013 stating that he was awaiting details in relation to all bank statements. On the same day, he wrote to the defendant with reference to the ongoing audit, stating that he had not received any further correspondence in relation to his last request for full details of all bank lodgements. The letter went on to state: "as I mentioned the last time we spoke, I needed full particulars in

relation to all bank lodgements for you and your wife; "other" will not suffice." Mr. Torsney's reference to "other" appears to refer to the analysis the defendant's tax agents had done in relation to the lodgements into the defendant's bank accounts. This letter was copied to the defendant's tax agents.

18. There followed a hiatus until 7th January, 2014, when Mr. Torsney next wrote to the defendant, again reiterating that he needed full particulars in relation to the defendant's bank lodgements and those of his wife and that "other" will not suffice. This letter went on to state that failure to provide the documentation requested i.e. the source of the monies and the reasons for the monies being paid into the defendant's bank account, would leave "no option but to raise income tax assessments". This letter was copied to the defendant's tax agent.

19. On 13th March, 2014, Mr. Torsney wrote to the defendant in the following terms:-

"I refer to my letter dated 7th January, 2014.

To date I have received no communication in relation to my request for full explanations in relation to monies lodged to you and your wife's bank accounts.

Today I have amended your Form 11 income tax return for 2010 and 2011 to include all unexplained income. A notice of assessment will issue shortly.

If you wish to appeal the Income Tax assessment, you have 30 days from the date of the notice of assessment to appeal. You must submit your computations along with payment of tax and interest."

This letter was copied to the defendant's tax agent on the same date.

20. On 14th March, 2014, the plaintiff issued a notice of amended assessment in respect of income tax for the year ended 31st December, 2010, and a notice of amended assessment of income tax for the year ended 31st December, 2011, to the defendant. The amended assessments outlined that the defendant was liable in tax for the sum of €537,798, for year end 2010 and €370,528, for year end 2011.

21. Each of the amended assessments advised the defendant, *inter alia*, that if he wished to appeal the assessment to which the notices referred, he was obliged to give notice in writing within 30 days of the date of the notice of assessment.

22. It is common case that the defendant did not appeal either of the amended assessments. Mr. Torsney avers that in the absence of any appeal by the defendant, the assessments became final and conclusive on 13th April, 2014.

23. By letter dated 16th May, 2014, Mr. Torsney wrote to the defendant enclosing a "formal agreement as a result of a revenue audit conducted under the Code of Practice for Revenue Auditors". He advised that if the defendant had any questions in relation to the enclosed formal agreement, he should not hesitate to contact him. A copy of this letter was sent to the defendant's tax agents The Formal Agreement cites that €908,327.08 was due in respect of income tax, together with statutory interest of €154,901.78 and agreed penalties of €681,245.31, giving a total of €1,744,474.17.

24. Mr. Torsney avers that following the issue of the assessment and the appeal period expiring, "thus deeming the liability of the Defendant to be final and conclusive", a Form SA 1 Statement of Affairs was sent to the defendant by hand. Mr. Torsney avers that a Statement of Affairs signed by the defendant and his wife and bearing the date 24th June, 2014, was returned to the plaintiff.

25. Mr. Torsney met with the defendant on 24th June, 2014 at the plaintiff's Sligo office. According to Mr. Torsney, the defendant outlined to him that a friend had contacted the friend with whom the defendant had made the arrangements concerning the transfer of monies through his personal bank account but that his friend "did not want to get involved". Mr. Torsney's note of the meeting documents that the defendant planned to go to Nigeria for two weeks to meet his friend about the matter. Mr. Torsney avers that he outlined to the defendant that the assessments which had been raised had been based on unexplained lodgements into the defendant's bank account and that a very substantial time had elapsed since the first date of the audit and that ample opportunity had been given to the defendant to provide a satisfactory explanation but that he failed to do so.

26. On 27th June, 2014, some three days after their meeting, the defendant wrote to Mr. Torsney advising that he was "devastated" with the state of his "current predicament", and stating that he did not know what to do and that having assisted a friend had left him "in a mess". He stated that his friend "Femi Iweka", a self employed entrepreneur in real estate had approached him with a proposition of using the defendant's bank account as a holding account for receiving payments for Mr. Iweka's clients in Nigeria "due to the unstable nature of foreign currency in Nigeria". The defendant stated that he did not realise the implication of his actions and that he had received and paid out monies to various people/organisations "but did not... have/keep proper documentation". The defendant also stated that as the transactions had been between Mr. Iweka and his cohorts, the receipts and other documents had been sent to his friend directly. Mr. Torsney was advised that since the inception of the audit, the defendant's relationship with his friend had been strained and that his friend was not communicating with him and had been "very difficult forth coming with any form of documentation" to assist the defendant. The defendant also stated that his appeal to close acquaintances to speak with his friend had met with little success. The defendant sought "mercy" and time from Mr. Torsney. He advised that he would not be able to pay any liability "right now" as he was still in training in Scotland. He stated that once his training finished in August, 2015, he was hopeful of starting work as a GP and would be able to arrange a payment scheme/percentage from his monthly earnings. The defendant concluded the letter by thanking Mr. Torsney for the patience and understanding accorded to him.

27. On 29th September, 2014, the defendant telephoned Mr. Torsney advising that he had not gone to Nigeria as he had intimated he would at the meeting held on 24th June, 2014. He further advised that his friend who had transferred the monies into his account was now in South Africa. He again reiterated that it was difficult for him to have telephone contact with Nigeria because of telephone reception. Mr. Torsney's notes that he advised the defendant "this audit is opened two years" and that he had given the defendant ample time to get supporting documentation in relation to the large lodgements in his bank account and that to date he did not know who the defendant's friend was as he was not communicating with the defendant. The note makes reference to Mr. Torsney advising the defendant that a formal agreement regarding the audit would be sent to the defendant. Mr. Torsney also avers that he informed the defendant that as the assessments had not been appealed "there was no going behind them".

28. Mr. Torsney avers that on 9th October, 2014, he called to the defendant's home and left a new formal agreement in a sealed envelope with the defendant's mother-in-law.

Mr. Torsney next met with the defendant in the plaintiff's Sligo office on an unspecified date in November 2014. Neither Mr. Torsney nor the defendant gives the date. Mr. Torsney exhibits a copy of a Formal Agreement, bearing the date 21st November, 2014, which is signed by the defendant and witnessed by his wife. It is date stamped received by the plaintiff on 26th November, 2014. This document indicates that the defendant acknowledged and accepted a Revenue claim for "Tax Undercharges, Statutory Interest and Agreed Penalties in the amount of €1,544,644.93", broken down as follows:-

Income Tax €908,327.08

Statutory Interest €182,154.31

Agreed Penalties €454,163.54

29. In his grounding affidavit, the defendant makes a number of allegations with regard to how he came to sign the Formal Agreement to which I shall return in due course.

30. According to Mr. Torsney's records, on 11th December, 2014, having endeavoured unsuccessfully to speak to the defendant, he left a telephone message thanking the defendant for sending in signed Formal Agreement. Mr. Torsney's note records that he was of the opinion the last time he spoke with the defendant that the defendant was going to send him an "inability to pay claim" with the signed Formal Agreement. Mr. Torsney's note states that he left a message for the defendant as to whether he was going to send in a claim for inability to pay or whether he was going to pay the liability.

31. On 30th April, 2015, the District Manager of the plaintiff's Sligo office wrote to the defendant advising that his offer of €1,544,644.93 had been accepted by the Revenue "in settlement of additional liabilities, which were identified during the audit". The defendant was advised that the audit was now concluded and that details of the settlement would be published in due course in Iris Oifigiúil. The letter was copied to the defendant's tax agent

Considerations

32. In the course of the within application, the defendant raises a number of discrete arguments which, it is contended, satisfies the test for a plenary hearing in the within proceedings.

33. However, the first matter to be addressed is the averment of the defendant's solicitor, Ms Ashimiedua Okonkwo, in her affidavit sworn 14th July, 2016, that the defendant was unable to swear a replying affidavit to the affidavit sworn by Ms Connolly grounding the application for leave to enter summary judgment before the Master of the High Court because he was out of the country working on assignments. Ms. Okonkwo avers that despite the plaintiff being aware that the defendant was out of the country and unable to return to swear an affidavit, the plaintiff still proceeded before the Master of the High Court with the application for leave to enter judgment.

34. The within proceedings first came before the Master on 28th June, 2016. According to both Ms Okonkwo and Mr. Torsney, on that date counsel for the defendant made submissions at various intervals throughout the day to the Master as to the sufficiency of the summary summons and the particulars of the claim as endorsed thereon. Ultimately, the matter was adjourned by the Master to 7th July, 2016.

35. On 7th July, 2016, counsel for the defendant resumed his submissions in relation to the summary summons and whether it revealed a cause of action against the defendant. In this regard, the Master ruled against the defendant. Thereafter, the plaintiff proceeded with the application for liberty to enter final judgment in response to which legal submissions were made on behalf of the defendant. Mr. Torsney avers that at no stage did the defendant apply for an adjournment in order to file a replying affidavit. It is the plaintiff's contention in the within application that it was a matter for the defendant's legal advisers on 7th July, 2016, to apply for an adjournment if it was the defendant's intention to respond to the plaintiff's application on affidavit.

In the course of the within application, counsel for the defendant acknowledged that the defendant did not put in a replying affidavit before the Master. Part of the relief claimed in the within application is that the defendant would get time to file a replying affidavit to the summary procedure in the Master's Court. However, it seems to this Court that the horse has bolted in this regard in circumstances where it was open to the defendant on 7th July, 2016, to seek an adjournment from the Master in order to put in a replying affidavit. For whatever reason, this was not done and no explanation has been tendered as to why an adjournment was not sought.

36. That being said, the Court is of the view that the failure to do so cannot, of itself, dispose of the within application. It is accepted by the plaintiff and the defendant that the central issue is whether the defendant, by what he now puts before this Court, has demonstrated a reasonable probability of having a real or *bona fide* defence to the plaintiff's claim, in other words an arguable defence, that being the test enunciated by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1. The learned Judge stated as follows:

"8. In A.C.C. Bank plc. v. Malocco [2000] 3 I.R. 191, the High Court (Laffoy J.), in applying First National Commercial Bank plc. v. Anglin [1996] 1 I.R. 75, went on to say at p. 201 that the whole situation should be looked at, which in turn necessarily involved "an assessment of the cogency of the evidence adduced by the plaintiff in relation to the given situation which is to be the basis of the defence". In the most recent case in this area, namely Aer Rianta c.p.t. v. Ryanair Ltd. [2001] 4 I.R. 607, there were two judgments delivered in the Supreme Court. In her opinion, under the heading of "The law and conclusions", McGuinness J. applied the test as suggested by Murphy J. in First National Commercial Bank plc. v. Anglin. In his analysis of the law, Hardiman J. surveyed what might be described as the historical cases as well as the most modern authorities on this topic. His conclusion was, I think, that leave to defend should be granted unless it was "very clear" that the defendant had no defence, not even one which could be described as arguable.

9. From these cases it seems to me that the following is a summary of the present position:-

(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of

that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

37. A central plank of the defendant's arguments in the within application is that the plaintiff did not allow him sufficient time, which he had requested, to obtain the vouching documentation which, it is said, would establish the position now being advanced by the defendant on affidavit as to the nature and reasons for the transactions in his account and which would establish that the extent of the defendant's income from the transactions in question amounted to no more than €118,000.00 or thereabouts.

38. From a perusal of the relevant documentation in this case, it is clear that the plaintiff's request for documentation dated from 29th May, 2012, which was followed up on a number of occasions between that date and the raising of the amended assessments in March 2014, a period of almost twenty-one months. It is also the case that subsequent to the raising of the assessments, the plaintiff continued to seek documentation from the defendant. Even allowing for the fact that the defendant was working away from home for the period in question, it is the view of the Court that it cannot credibly be asserted by the defendant that the plaintiff failed to afford him sufficient time to procure the necessary documents. Accordingly, the Court does not consider that the arguments in this regard demonstrate an arguable defence to the plaintiff's claim.

39. In his affidavit, the defendant also avers that his tax agents never contacted him about the correspondence sent to the tax agents by the plaintiff regarding his tax affairs. He further avers that the plaintiff never gave him copies of any of the letters sent by the plaintiff to the tax agents. The Court considers that any issue the defendant may have with his tax agent cannot credibly amount to the probability of a *bona fide* defence in these proceedings. As regards his latter averment, the Court is satisfied that the plaintiff duly copied to the defendant all correspondence which the plaintiff had sent to the defendant's tax agents. In those circumstances I do not consider that the defendant's arguments raise an arguable defence to the plaintiff's claim.

40. At para. 63 to 78 of his affidavit, the defendant avers, *inter alia*, that he was advised by Mr. Torsney at the meeting in November, 2014 that the plaintiff was going to raise income tax on the full amount of the transactions in issue in these proceedings and not on the amount of income (118, 000) which the defendant had advised the plaintiff he had received by way of commission. The thrust of the defendant's averments in this regard is that it was only in November, 2014 that he was apprised of the plaintiff's intention to raise tax assessment on the full amount of the transactions in question. However, as is evident from the communications which passed between the plaintiff and the defendant, the plaintiff expressed the intention of raising an amended tax assessment for the year ending 31st December, 2010 and the year ending 31st December, 2011 in the letter to the plaintiff of 13th March, 2014. Previously, on 7th January, 2014, the defendant was advised that the plaintiff was considering such an option. Amended tax assessments for those years were in fact raised by notices which issued to the defendant on 14th March, 2014.

41. In response to the defendant's claim that it was not right to expect him to pay income tax on the full amount of the receipts in issued in his bank accounts, it is the plaintiff's contention that irrespective of what transpired between the plaintiff and the defendant both prior to and post March, 2014 (albeit it is submitted that that many of the matters raised by the defendant bear upon his credibility), such dealings are irrelevant to the subject matter of the plaintiff's proceedings against the defendant. It is submitted by the plaintiff that what is relevant is the fact of the tax assessments which were raised by letter dated 14th March 2014 which, counsel for the plaintiff contends, became final and conclusive on 13th April, 2014, in the absence of any appeal by the defendant to the Appeal Commissioners. At para. 26 of his affidavit, Mr. Torsney's avers as follows:-

"I say that the audit was closed with the final agreement signed by the defendant on 21 November 2014. Although the final agreement is an acknowledgment of the amount of tax owed, these proceedings concern the Amended Income Tax Assessments which were issued by the plaintiff on 14 March 2014. Accordingly, the events which post dated the Assessments are not matters which are relevant to the claim pursued by the plaintiff in these proceedings."

42. Counsel for the plaintiff relies on s. 933(1)(a) of the Tax Consolidation Act 1997 which provides:-

"A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall

be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.”

43. Section 933(6)(a) provides:-

“In default of notice of appeal by a person to whom notice of assessment has been given, the assessment made on that person shall be final and conclusive.”

44. Counsel for the plaintiff submits that the defendant does not make the case that he was unaware of the appeal procedure or appeal period, and that even if the defendant was minded to make that assertion he could not do so given that he was advised on two separate occasions of his right of appeal to the Appeal Commissioners on foot of the assessments raised in March 2014. In aid of her argument that the amended assessments became final and conclusive on the defendant at the expiry of the appeal period, counsel for the plaintiff relies on the decision of the Court of Appeal in *Harrahill v. Swaine* [2015] IECA 36, where Irvine J stated:

“11. Mr. Swaine also made a number of complaints in his affidavits regarding the computation of the sums claimed. However, it appears that he did not pursue these complaints in the course of the High Court hearing. It was also accepted on this appeal that the effect of s. 933 of the Taxes Consolidation Act 1997 is that the sums the subject matter of this claim became final and conclusive against the defendant given that he had not appealed the underlying assessments. Further, Mr. Swaine did not file a supplemental affidavit to contest the schedule of his indebtedness exhibited in Mr. Dillon's affidavit of 13th October 2013. Accordingly, there is no need to consider the validity of the sum claimed as forming a possible basis upon which these proceedings could be defended.”

Irvine J. also stated:

“16. The conclusions of the learned High Court judge can be summarised as follows. Firstly, he appears to have accepted that the defendant was lawfully indebted to the plaintiff in the sum of €1,662,288.01 together with interest thereon. No argument was apparently made to dispute the Commissioners submission that in the absence of any appeal by the defendant against the assessments underlying the proceedings, that the same had become binding and conclusive by reason of s. 933 of the Taxes Consolidation Act 1997.”

45. It is submitted on behalf of the plaintiff that the defendant has not made out any legitimate basis upon which the Court could go behind the amended assessments of March, 2014, given that the defendant did not appeal the assessments. Accordingly, it is contended that they are binding on the defendant. That, counsel submits, is the beginning and end of the matter as far as the present proceedings are concerned. Counsel for the plaintiff also contends that the Formal Agreement of itself is not relevant to the plaintiff's entitlement to pursue the defendant for the sums set out in the notices of assessment and submits that the Formal Agreement is simply a matter of finality after an audit has taken place in accordance with the plaintiff's Code of Practice. Counsel submits that even if there was no Formal Agreement in place, the plaintiff could still pursue the defendant on the basis of the assessments raised.

46. In the course of his submissions, counsel for the defendant agreed that the defendant had thirty days to appeal the income tax assessments and he acknowledged that no such appeal was made. Counsel nevertheless submits that the defendant would not be locked out from an appeal of the amended assessments if this Court were to determine that the Formal Agreement signed by the defendant on 21st November, 2014 was void or voidable or that it should otherwise be set aside.

47. As regards this argument, I note that the Formal Agreement was signed some months after the raising of the assessments and the expiry of the thirty day appeal period. Furthermore, even if the Formal Agreement was to be set aside for any of the reasons canvassed by the defendant (which are set out more fully below), it seems to me, given the provisions of s. 933 of the Taxes Consolidation Act 1997, and the manner in which that section has been interpreted in *Harrihill v. Swaine*, that the setting aside of the Formal Agreement would not of itself achieve the objective referred to by counsel for the defendant, namely that the defendant could in such circumstance then appeal the assessments which were raised in March, 2014.

48. Accordingly, notwithstanding the defendant's reliance on alleged irregularities and/or alleged breaches in respect of the Formal Agreement, I do not find that the defendant has demonstrated a reasonable probability of a *bona fide* defence to the sums of €537, 798.61 and €370, 528.47 claimed in the two notices of assessment dated 14th March, 2014, which were not appealed by the defendant within the statutory timeframe, and which equates with the income tax for the year ended 31st December, 2010 and the year end 31st December, 2011, claimed as due and owing in the Special Indorsement of Claim to the Summary Summons. Furthermore, it is of note that for the purpose of the present application, other than the assertions he makes on affidavit, the defendant has not put before the Court any evidence of the arrangement he had with the individuals with whom he says he entered an arrangement whereby his bank account was to be used as a conduit for the transactions which formed the basis for the tax assessments levied on him. While there are some documents exhibited in Mr. Torsney's affidavit, to which this Court has already referred (see para.15 hereof), in the absence of more, I am not persuaded that these documents are of such a nature as to form a possible or reasonable basis upon which it could be argued that the defendant should not be bound by his failure to appeal the notices of assessments which became final and conclusive on 13th April, 2014, and thus enabling the defendant to argue that he has a defence to the amount of income tax claimed by the plaintiff. This is particularly so when the defendant himself, in his communications with Mr. Torsney, acknowledged the requirement to provide proof of what he contends was the reality of the situation. In the absence of the defendant putting before the Court any evidence to support his assertions, I am constrained to find that, as far as the reason for the presence of the gross amounts of money in his account (which formed the basis for the tax assessments) is concerned, in the totality of the evidence, there is only the defendant's bare assertion of a given situation, which is not sufficient to form arguable grounds of defence.

49. Thus, in all the circumstances of this case, and in the absence of any evidence that the defendant did not know of his right of appeal the income tax assessments levied on him in March, 2014, I am persuaded (subject to what I set out below in relation to the Formal Agreement) by the plaintiff's submission that the March, 2014 assessments are binding on the defendant in circumstances where the assessments were not appealed by him.

50. While the defendant alleges that duress was brought to bear on him by Mr. Torsney in the context of the signing of the Formal Agreement in November, 2014, (which is more particularly set out below) his counsel, in the course of his submissions, sought to argue that the defendant, when addressing the issue of the alleged duress in his affidavit, was in fact addressing the entire of his course of dealing with the plaintiff i.e. from the commencement of the audit in May, 2012. It is clear that this submission is made with a view to impugning the audit process which ultimately led to the issuing of the notices of assessments, such as could raise an arguable defence (notwithstanding the defendant's failure to appeal the assessments within the statutory timeframe) to the claim set

out in the Indorsement of Claim in respect of income tax the plaintiff claims is due and owing by the defendant. However, in the absence of any such averment by the defendant in his affidavit that he was put under duress in the period leading up to the raising of the assessments such as might raise an arguable defence, the Court rejects the defendant's counsel's attempt to expand the scope of the alleged duress to the plaintiff's dealings with the defendant in the period pre-November, 2014.

51. I now turn to the sum of €154, 901.39 by way of interest claimed in the summary proceedings in respect of the liability for year end 31st December, 2010.

52. In his affidavit, the defendant avers, *inter alia*, that the plaintiff unfairly raised an assessment of income tax, interest and penalties on the gross amounts which were received into the defendant's account. I have dealt above with the income tax issue as claimed in the notices of assessment and which figures remained consistent as between the notices of assessments and the pleadings in this case, as acknowledged by counsel for the defendant. The plaintiff has not pursued any claim for penalties in these proceedings but seeks €154, 901.39 by way of interest.

53. The notices of assessment did not refer to interest. In the course of his submissions, counsel for the defendant pointed to the varying amounts claimed by the plaintiff in respect of "statutory interest" and "agreed penalties" in the various versions of the Formal Agreement sent to the defendant between May, 2016 and November, 2016. Counsel pointed to the Formal Agreement which was sent to the defendant in on 16th May, 2014 where €154, 901.78 was set out by way of "statutory interest" and €681, 245.31 by way of "agreed penalties". In the Formal Agreement which was furnished to the defendant on 9th October, 2014 and November, 2014 (and ultimately signed by the defendant), the claimed "statutory interest" was €182,154.31 and the "agreed penalties" was €454, 163.54. Ultimately, the interest sum sought in the Special Indorsement of Claim to the Summary Summons was €154, 901.78. Neither Ms Connolly's nor Mr. Torsney's respective affidavits address how the sum of €154, 901.78 is made up. One of the complaints canvassed on behalf of the defendant is that he does not know how the said sum is computed. I find merit in this submission, particularly when two different interest sums were posited by the plaintiff in respect of the same principal sum. Since the notices of assessment of March, 2014 dealt only with income tax and not interest, the plaintiff cannot rely on the defendant's failure to appeal the assessments as a bar to his raising complaint in respect of the interest amount of €154, 901.78. I am satisfied that the defendant has raised an arguable defence to the interest claimed in the summary summons by reason of his contention that it is not clear to him how the interest has been computed.

54. I return now to the defendant's further submissions as to why the plaintiff's entire claim is not a matter for summary judgment and that it should go to plenary hearing.

55. At paras. 61 and 95, respectively, of his affidavit, the defendant alludes to the failure of the plaintiff to advise him to obtain legal advice on the matter of his income tax affairs which were the subject of the Revenue audit commenced in May, 2012 and which led to the notices of assessment, and the Formal Agreement which was signed on 21st November, 2014. In support of the contention that it was incumbent on the plaintiff to advise the defendant that he should seek legal advice, counsel for the defendant cites the case of *Allcard v. Skinner* [1887] C.A. 145 and *Credit Lyonnaise Bank Netherland N.V. v. Burch* [1997] 1 All E.R. 144.

56. Counsel for the plaintiff disputes the contention that there was a requirement on the plaintiff, as Collector General, to recommend that the defendant, as a chargeable person under the Tax Code, seek legal advice. It is contended that the question of legal advice was the matter entirely for the defendant himself.

57. Notwithstanding the case law relied on by counsel for the defendant, the Court is not persuaded that it was incumbent on the plaintiff to advise the defendant regarding the provision of legal advice. I am not persuaded that the circumstances of the defendant's case can be equated to what transpired in *Allcard v. Skinner* or to the circumstances which arose in *Credit Lyonnaise* particularly in circumstances where, throughout the audit period, the plaintiff had a tax agent. Moreover, the plaintiff is a professional man and it is to be expected that he had a more than sufficient understanding or knowledge that he could avail of legal advice had he perceived the necessity to so do. Thus, the Court is not satisfied that the defendant's argument on the absence of legal advice during the audit period demonstrates a reasonable probability of his having a real or *bona fide* defence to the plaintiff's claim for the income tax amounts of €537,798 and €370,528, as assessed in March, 2014.

The Formal Agreement

58. At paras. 79 to 120 of his affidavit, the defendant makes a number of specific allegations regarding the Formal Agreement which he signed on 21st November, 2014. In summary, he alleges as follows:-

- That Mr. Torsney insisted despite the defendant's protestations that the defendant's wife would have to witness his signature on the Formal Agreement;
- That unless he signed the Formal Agreement the Revenue would publish his name in the public press as a tax defaulter;
- That he was told by Mr. Torsney that unless he signed the Formal Agreement, his career as a professional would be compromised and that it would be impossible for him to borrow money from any bank to start a GP practice in Ireland;
- That Mr. Torsney told him that the Revenue would take his house and sell it to settle the income tax assessment and the interest and penalties which attached thereto;
- That Mr. Torsney told him that the Revenue would not agree to accept a lesser amount of the alleged income tax if he were to seek the protection of the courts under the Insolvency Acts;
- That Mr. Torsney assured him that if he signed the Formal Agreement the Revenue would allow him time to pay the amounts stated within the Formal Agreement;
- That Mr. Torsney advised that the defendant would be allowed to make payments against an agreed schedule of the assessed income tax over a long period, as the Revenue would take account that once qualified and registered as a GP doctor the defendant's earning capacity would be very high and thus he would be able to make regular payments;
- That Mr. Torsney advised that together with the regular payments the defendant would make as a GP doctor, he could borrow money in order to discharge the alleged Revenue debt as a lump sum payment;

- That at no time was it suggested that the defendant obtain legal advice prior to signing the Formal Agreement;
- That the defendant was not allowed to take away a copy of the Formal Agreement from the Revenue office for consideration or for the purposes of taking it to a solicitor for legal advice;
- That Mr. Torsney had insisted that in order to avoid the “traumatic outcomes” Mr. Torsney had outlined, the defendant had to sign the Formal Agreement accepting the outcome of the audit and agreeing that the sums set out in the Formal Agreement were properly due to the Revenue;
- That the defendant would have taken the Formal Agreement to a solicitor if he had been allowed to;
- That the defendant felt under “the most tremendous pressure” to sign the Formal Agreement;
- That the defendant was put under duress to sign the Formal Agreement and that it was brought about by duress on the defendant to sign it by threats by the plaintiff to compromise his professional life and to render him unable to borrow money from any bank to start a GP practice;
- That as a result of the statements made by the plaintiff, the defendant was induced to enter the said Formal Agreement;
- That the Formal Agreement was the basis for the plaintiff’s application for leave for summary judgment; and
- That the Formal Agreement did not reflect the true position of the income tax the defendant might owe to the plaintiff.

59. It is further averred that it was an oral term of the agreement that the defendant would be allowed to make payments over a period of time against an agreed schedule of payments and that the plaintiff breached this oral term by not agreeing a schedule of payments with the defendant. It is further averred that it was an implied term of the formal agreement that the plaintiff would wait until the defendant was a practicing GP in Ireland before it would expect the defendant to make the payments alleged to be due and owing on foot of income tax, interest and penalties, and that in seeking summary judgment the plaintiff breached the said implied term.

60. The defendant avers that the formal agreement should thus be set aside “on the basis that it was brought about by clandestine means”, and/or that it should be set aside also on the basis that its terms have not been adhered to by the plaintiff.

61. Mr. Torsney addresses the defendant’s averments regarding the Formal Agreement at paras. 24 to 28 of his replying affidavit. He acknowledges a meeting with the defendant in November, 2014. His recollection is that he gave the defendant a copy of the Formal Agreement which he had previously delivered to the defendant’s home on 9th October, 2014 and that he advised the defendant at the meeting in November, 2014 that the penalties which had been previously assessed at 75% in the copy of the Formal Agreement which had been sent to the defendant on 16th May, 2014 had been reduced to 50%. Mr. Torsney further avers that he has no recollection of the Formal Agreement having been signed by the defendant at the November, 2014 meeting. He avers that it was signed on 21st November, 2014 and that it was received by the plaintiff’s Sligo office on 26th November, 2014. He further avers that the defendant’s wife, who witnessed the agreement, was not present at his meeting with the defendant in November 2014. He further avers that he went through the options available to the defendant, namely to make a payment of the audit liability in full or enter an instalment arrangement or make a claim for “an inability to pay.”

62. Mr. Torsney goes on to state as follows:-

“I categorically deny the very serious allegations made against me in the defendant’s affidavit. For the avoidance of doubt, I did not inform the defendant that he could borrow money to pay the debt, that the defendant’s professional career would be compromised, that it would be impossible to borrow money if he did not sign the agreement, that the plaintiff would take the defendant’s family home if the agreement was not signed, that the plaintiff would not agree to accept a lesser amount of the debt if the defendant should seek the protection of the court under the Insolvency Acts and that the defendant’s name would not be published as a tax defaulter.” (at para. 28)

63. Counsel for the plaintiff submits that the defendant’s signing of the Formal Agreement on 21st November, 2014, coupled with it being received by the plaintiff’s Sligo office on 26th November, 2014, does not render credible the defendant’s assertion that he was put under duress by the plaintiff to sign the agreement. Counsel submits that insofar as the defendant alleges that he had an agreement with the plaintiff as to an agreed schedule of payments and regarding other matters, same constitutes only a bare assertion, as does the defendant’s allegations against Mr. Torsney and it is submitted that the defendant has not set out the consideration for the oral terms which he alleges were agreed between himself and the plaintiff at the meeting in November, 2014.

64. It is submitted that while the defendant has put in a lengthy affidavit, the issue before this Court boils down to the fact that the plaintiff had raised amended assessments for the years in question which were not appealed by the defendant within the statutory timeframe, thereby rendering the assessments binding and conclusive on the defendant. Counsel for the plaintiff submits that the defendant’s averments are no more than bare assertions.

65. The plaintiff’s submission is that the salient issue for the purpose of determining whether the defendant’s allegations of duress bear upon the plaintiff’s claim for leave to enter final judgment is that the Formal Agreement of 21st November, 2015 was concluded well beyond the date on which the defendant could have appealed the notices of assessment and that, accordingly, the Formal Agreement has no relevance to the plaintiff’s entitlement to pursue the defendant for the income tax claimed in the within proceedings. As this Court has already found this to be the case in respect of the income tax as assessed, the defendant’s allegation of duress (whatever its merits) during the course of a meeting which took place in November, 2014 (by which time the assessments raised were binding on the defendant) cannot, to my mind, give rise to an arguable defence to the sums for income tax of €537,798 and €370,528 respectively, as sought in these proceedings. As I have found, this is so given the defendant’s failure to appeal the notices of assessment and the Court having found that the defendant has not put before the Court any arguable grounds of defence such as, notwithstanding the failure to appeal, would warrant a plenary hearing as to whether the liability claimed by the plaintiff truly arises.

66. My finding as to the above however is not dispositive of the issue of the Formal Agreement. A further aspect of the defendant’s contention that the matter should be adjourned to plenary hearing is that it was an implied term of the Formal Agreement that the

plaintiff would wait until the defendant was a practicing GP before they would expect him to make a total payment of the amounts claimed in the Formal Agreement as due and owing. He also avers that it was an oral term of the Formal Agreement that he would be allowed to make payments over a period of time and against an agreed schedule of payments.

67. Effectively, the defendant asserts that the plaintiff breached the implied/oral terms by issuing the within proceedings. I accept, in principle, that the defendant's claim in this regard could constitute the possibility of a *bona fide* defence to the within proceedings if there exists an arguable basis for the claim that the plaintiff had agreed a repayment schedule for the income tax as assessed. Counsel for the plaintiff contends that the defendant has not put forward evidence of the consideration he provided for the alleged oral agreement or the alleged implied terms. The defendant asserts, effectively, that his signing of the Formal Agreement constitutes the requisite consideration. This, to my mind, is arguable. Accordingly, given the low threshold for the transfer of a matter to plenary hearing, I am not satisfied that the defendant could not credibly at a plenary hearing contend for such an agreement, particularly in circumstances where no note of the November, 2014 meeting, which undoubtedly took place, exists. There is dispute as to what transpired at this meeting. The dispute is incapable of being resolved by this Court and thus, the issue as to whether some arrangement was arrived at during the meeting whereby the plaintiff would await the coming to pass of certain events and/or whether it was otherwise agreed that there would be a scheduled repayment of the sums set out in the Formal Agreement is a matter for plenary hearing.

68. In coming to my conclusions in the above regard, I have factored into the equation that it might well be argued that Mr. Torsney's note of his telephone message to the defendant of 11th December, 2014, asking whether the defendant was going to make a claim for inability to pay, or if he was going to pay the liability, is at odds with the defendant's assertion that Mr. Torsney had agreed that a repayment schedule would be agreed with the defendant. However, that is something which is best left to be determined by the trial judge after a full hearing on what transpired at the November, 2014 meeting.

69. A further argument canvassed on behalf of the defendant concerned specific wording in the Formal Agreement which was signed by the defendant on 21st November, 2014. Both it and a prior Formal Agreement furnished to him on 16th May, 2014 include, *inter alia*, the following:-

"Will this case be published in a List of Tax defaulters in accordance with Section 1086 TCA 1997?"

70. Opposite this query is the word "yes" appears, in bold. Counsel for the defendant contends that although the word "yes" appears on the face of the documents, this could not be taken as meaning that the defendant's name would be published, given the discretion as to publication afforded to the plaintiff under the relevant section of the Act. I do not accept the defendant's submission in this regard as it is clear from the face of the Formal Agreement which was furnished to the defendant in May, 2014, in October, 2014 and yet again in November, 2014, that the defendant had to be aware, from the contents of the document, in particular the word "yes" in , bold, that his name would be published.

71. In his affidavit, the defendant advances a separate argument on this issue. He asserts that irrespective of what was set out in the Formal Agreement, there was an oral agreement entered into between him and the plaintiff that his name would not be published as a tax defaulter. It is alleged that this term was breached by the plaintiff subsequently publishing his name. To my mind, even taking the defendant's claim in this regard at its height, this issue of fact, if it be the fact, cannot be said to be material to the claim which constitutes the subject matter of these proceedings and, accordingly, it is no basis upon which to send that particular issue to plenary hearing.

72. In summary, the Court has determined that certain issues as raised in the within application, namely the tax sought by the plaintiff, and the defendant's contention that at the November, 2014 meeting it was agreed that he could make repayments over a period against an agreed schedule of the assessed income tax, give rise to the possibility of an arguable defence in the within proceedings. I will hear submissions as to the form of the Order that is required to adjourn those aspects of the case which the Court has determined should go to plenary hearing.