Neutral Citation: [2014] IEHC 350

HIGH COURT

[2012 No. 868 R]

MICHAEL GLADNEY

PLAINTIFF

AND

CAROLINE LAMBE

DEFENDANT

JUDGMENT of Mr Justice Bernard Barton delivered the 8th day of July 2014

1. These proceedings are brought by way of summary summons whereby the Collector General of the Revenue Commissioners seeks to recover judgment against the defendant in the sum of €219,551.42 in respect of capital gains tax of which the sum of €193,220.53 comprises the appropriate tax and interest for the year 1st of January 2007 to 31st December 2007 and €26,330.89 in respect of the tax and interest for the year 1st January 2008 to the 31st December 2008.

2. This matter comes before the court by way of motion on notice dated 5th of February 2013, whereby the plaintiff seeks liberty to enter final judgment in the amount claimed on foot of the summary summons issued herein. Affidavits have been sworn by or on behalf of the plaintiff and the defendant in these proceedings. When the matter came on for hearing counsel for the plaintiff submitted that, as the assessments for the years in question had not been the subject matter of valid notices of appeal by the defendant, the capital gains tax liability assessments for those years became due and were final and conclusive by virtue of the provisions of the Taxes Consolidation Act, 1997 (hereinafter referred to as the TCA of 1997), accordingly, it followed that there could not be a *bona fide* defence to the plaintiffs claim and that the plaintiff should be given liberty to enter summary judgment against the defendant.

3. On behalf of the defendant it was submitted that there was a defence to the claim the essence of which is that there was no liability on the part of the defendant to pay the amounts claimed, moreover, the defendant had, through her accountant, Harry Conlon & Co., by letter dated the 2nd February 2011, given Notice of Appeal in respect of each assessment in accordance with the TCA of 1997.

4. There was broad agreement between the parties as to the principles to be applied on an application for liberty to enter the final judgment in summary proceedings. In this regard the court was referred to *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 and *Harrahill v. Kane* [2009] IEHC 322 as well as the other authorities referred to in the judgments delivered in those cases.

5. Whilst I do not think it necessary to recite either the facts nor the decisions in those cases I think it useful to adopt, as I did in *Ulster Bank Ireland Limited v. Fortune and Another* (Unreported, 16th May, 2014), the summary of the principles enumerated in the judgment of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 at 7 and which are as follows:

> (i) The power to grant summary judgment should be exercised with discernable caution.
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> (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;
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> (iii) In doing so the court should assess not only the defendants 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;
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> (iv) Where truly there are no issues or issues of simplicity only or issues easily discernible, then this procedure is suitable for use;
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> (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 on 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;
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> (viii) This test is not the same as and should not be elevated into a threshold of a defendant having to prove that its defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
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> (ix) Leave to defend should be granted unless it is very clear that there is no defence;
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> (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;
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> (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 persons right to 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."

6. Counsel for the plaintiff, Mr Neuman Shanahan, submitted that the whole matter really depended upon the determination of what was, in essence, a net point of law, namely whether or not the letters of the 21st February 2011, and sent by the defendant's accountant, constituted valid notices of appeal against the relevant assessments. It was submitted that this was a question upon which the court could and should make a determination on the within application. In this regard he cited the decision of this Court in

Irwin v. Grimes (2008) IEHC 86. That was a case in which the Revenue Commissioners sought summary judgment against the defendant for €96,576.28 in respect of arrears of income tax for the years 1978 through to 1990.

7. It is clear from a reading of the judgment in that case, however, that there was agreement between the parties that the court should deal with the net legal point on an application such as that now before the court, accordingly, the decision is not an authority for the proposition that the court is required or should deal with the net legal point on an application for summary judgment.

8. What is of relevance, however, is that the issue which had to be decided in that case was whether or not there were valid and subsisting appeals from the assessments by the revenue. The defendant argued that because the revenue had not responded in writing to his purported notices of appeal he was to be regarded as having live appeals in respect of each of the tax years in question and that therefore the assessments in each year could not be regarded as final or conclusive. Having regard to the particular facts of that case, the court decided that issue against the defendant with the result that the assessments for each of the years were final and conclusive. It is also to be noted from the judgment that in respect of four of the tax years the court found that the assessments were not appealed against within time and that in relation to an application on the 12th July 1982 to have a late appeal considered, that was properly refused as there were no good grounds demonstrated to justify the admission of a late appeal.

9. Whilst the court considered that there was nothing specific in the legislation precluding a tax payer from applying on any number of occasions to have a late appeal considered, the court also expressed the view that there was no obligation on an inspector of taxes to entertain any such applications or indeed to respond to them '…unless some new circumstances are advanced'. In that case the inspector of taxes although not obliged to do so, did entertain a second application on the 11th September 2000 but refused it. The court also held that the inspector was entitled to refuse to reply to a further application, no new grounds having been advanced.

10. Counsel for the defendant, Ms. Brennan, submitted, however, that unlike the situation which pertained in *Irwin v. Grimes*, the letters of the 21st February 2011, had been sent in time and constituted valid and subsisting appeals against the assessments in question. She submitted that if the inspector was of the opinion that the defendant was not entitled to appeal then the inspector was required to refuse the application and to notify the person aggrieved by the assessment and that in that regard the grounds for such refusal had to be specified, however, no reply and particularly no reply within the meaning of s.933 (1) (b) of the TCA 1997 had been received in respect of either notice. It was contended on behalf of the defendant that had there been such a refusal in writing sufficient to comply with the provisions of s.933 (1) (b) the defendant would then have been entitled by virtue of the provisions of subs. (1)(c) of that section to appeal against such a refusal to the Appeal Commissioners. In addition it was submitted that the inspector had no function in and was not entitled to make any decision concerning the validity or otherwise of the letter giving notice of the appeal. The only function of the inspector was to form an opinion as to whether or not the person concerned was entitled to appeal the decision in question and if not then there was a statutory requirement on the Inspector to so notify the person concerned and to give reasons for such refusal; but the inspector had failed to do so.

11. Apart altogether from the fact that there were valid and subsisting notices of appeal and that there could not, therefore, be any liability for the sums claimed on that ground alone, the defendant also contended that she had a full defence to the claim for capital gains tax on substantive grounds the effect of which was that the defendant did not have any liability therefore, accordingly, the effect of a determination that the assessments were now final and conclusive would be to render the defendant liable for a tax debt which was not due, a result that would be wholly unjust and inequitable. Counsel for the plaintiff submitted that equity had no part to play in providing a defence to the defendant in respect of the plaintiffs claim and relied upon the decision of *Menolly Homes Ltd v. Appeal Commissioners and the Revenue Commissioners* [2010] IEHC 49, in particular he drew the attention of the court to the judgment of Charleton J. wherein he stated

> "Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modern concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection. How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation. In a similar way, what remedy that taxpayer has against a taxation demand is not general but specific. It is cut from the cloth whereby the precise liability is set by statute law and tailored individually by the legislature in the way that suits their perception of how an income tax, a corporation tax, a capital gains or acquisitions tax or a value added tax appeal should be set up as to the scope of appeal, the procedure on that appeal and the remedies available to the appellate body. In all relevant legislation in Ireland, appeal against a claim of taxation liability is to the Appeal Commissioners."

12. In reply counsel for the defendant relied on the decision of this court in *Harrahill v. Swaine* [2014] IEHC 94, wherein specific reference is made to a later decision of Charleton J. in *National Asset Loan Management Ltd v. McMahon and Ors; National Asset Management Ltd v. Downes* [2012] in which the relevant law was reviewed but where it was not suggested that equitable relief was unavailable in revenue procedure or against the revenue commissioners.

13. Counsel for the plaintiff submitted that that case had to be distinguished because the decision of the court centred on whether the Revenue Commissioners had bound themselves by agreement or undertaking to a position where the plaintiff was not liable to pay certain taxes pertaining to those proceedings; such a factual matrix did not exist in the case under consideration here.

14. With regard to the defendant's submission that the letters of the 21st February, 2011, constituted valid appeals within the meaning of the TCA 1997, counsel for the plaintiff relied upon the provisions of s. s. 957(2)(a) and in particular subs. (4) and (5) of that section.

15. Section 957(4) provides that:-

> "Where an appeal is brought against an assessment or amended assessment made on a chargeable person for any chargeable period, the chargeable person shall specify in the notice of appeal -
>
> (a) Each amount or matter in the assessment or amended assessment with which the chargeable person is aggrieved, and
>
> (b) The grounds in detail of the chargeable person's appeal as respects each such amount or matter."

16. Section 957 subs. (5) provides:

> "Where, as respects an amount or matter to which a notice of appeal relates, the notice does not comply with sub. (4) the notice shall, insofar as it relates to that amount or matter, be invalid and the appeal concerned shall, insofar as it relates to that amount or matter, be deemed not to have been brought."

17. Counsel for the plaintiff submitted that the letters failed to comply with the provisions of subs. (4) and that by virtue of the provisions of subs. (5) those letters as notices of appeal were invalid; accordingly, there was no necessity for the inspector to reply pursuant to the provisions of s. 933(1)(b) of the TCA 1997.

18. Section 945 of the TCA of 1997, provides for an appeal against capital gains assessments. Subsection. (2) of that section applies the provisions of the Income Tax Acts in relation to appeals, including the procedures to an appeal under any provision of the Capital Gains Tax Acts and which are set out in s. 933 of the TCA 1997.

19. Counsel on behalf of the defendant referred to the return mentioned in the letter of the 21st February, 2011, in respect of the tax year 2007 and drew the attention of the court to the content of the return from which it was submitted that it had to have been perfectly clear to the Inspector when considering the letter together with the return the matter in respect of which the defendant was appealing, moreover, the content of the return and the letter satisfied the statutory requirement that the "amount" and/or the "matter" the subject of the appeal together with the details thereof be specified in the notice.

20. As to the letter of even date addressed to the plaintiff in respect of the capital gains tax year 2008 the following appears:

> "Dear Sir,
>
> With reference to your notice of assessment to capital gains tax for 2008, issued on the 11th February, 2011, we wish to appeal against this assessment as it is estimated.
>
> Please note that there is no capital gains tax for 2008.
>
> The above sold a portion of her site of 4 The Old Well, Lough Shinney, Skerries, County Dublin on the 6th of June, 2006, with a closing date of the 18th of August, 2006 for €100,000.
>
> The sale closed on the 31st of August, 2006. However, the purchaser Mr. Steven Lambe never took a deed of transfer until March 2008.
>
> The above transaction of €100,000 has been reflected in the income tax return for 2006 and is shown as income tax from dealing in residential development land at a tax rate of 20%."

21. It was submitted on behalf of the defendant that the terms of that letter could not have been clearer and that there could not have been any doubt as to the details of the matter in respect of which the defendant was appealing.

22. Counsel for the plaintiff submitted that reference to the returns admittedly filed on behalf of the defendant, was not permissible for the purpose of complying with and satisfying the statutory requirement as to the provision of details in respect of the "amount" or "matter" the subject of the appeal and as required to be specified in the notice by subs. (4) and that therefore the letters as notices of appeal were invalid.

23. Finally it was submitted that as the notices of appeal were invalid on grounds of non compliance with subs. (4) and that as the effect of subs. (5) was to deem that no appeals had been brought, there was in fact no defence to the plaintiff's claim on any other ground notwithstanding the defendant's contention to the contrary because the assessment were now final and conclusive.

Decision

24. Having regard to an applicable legal principle to be applied on an application for liberty to enter final judgment referred to herein and to the evidence before the court and the submissions of counsel, there would seem to be little or no doubt but that if the letters of the 21st February, 2011, fail to comply with the requirements of s. 957(4) of the TCA 1997, then the effect of subs. (5) of that section on the defendant would be the same as if she had never appealed in respect of either assessment.

25. The consequence of a failure to serve a notice of appeal against an assessment are set out in s 933(6)(a) of the TCA 1997, which 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."

26. With regard to the contention of the defendant, therefore, that she does not in fact have any capital gains tax liability, it would seem that the effect of a failure to appeal those assessments would, nevertheless, render her liable for the amount specified therein by virtue of the provisions of s. 933(6)(a) of TCA 1997.

27. Whilst provision is made to enable a person to make an application to permit the bringing of a late notice of appeal, s. 933(7)(a) of the TCA 1997, limits the time within which this must be done namely not later than twelve moths after the date of the notice of assessment.

28. Equally it would also seem to follow that if the letters of 21st January, 2011, do constitute valid notices of appeal for the purposes of complying with s. 957(4) of the TCA 1997, then that would afford the defendant a complete defence to the plaintiff's claim, since her appeals against those assessments are pending, and have yet to be determined, moreover, any determination by the Appeal Commissioners would itself be subject to a right of appeal to the Circuit Court pursuant to the provisions of s. 942 of the TCA of 1997, or to be the subject matter of a case stated pursuant to the provisions of s. 941 of that Act.

29. It follows from the foregoing that there is a controversy between the parties the determination of which will lead to the result of either the plaintiff being entitled to summary judgment against the defendant or alternatively of providing the defendant with a defence to the plaintiff's claim. The issue in question is whether or not the letters of the 21st February, 2011, constitute valid notices of appeal within the meaning of s. 957(4) of the TCA of 1997. There may, no doubt, be subsidiary issues arising upon the facts of the case, but in relation to the matter now before the court, this is the essential question and issue for determination.

30. Whilst it is also clear from the principles already enunciated herein, that on a motion for summary judgment, it is open to the court

in certain circumstances to resolve a net question of law or to construe the provisions of a contract or a statute, there is in fact no obligation on the court to do so. See *Danske Bank v. Durkin New Homes* [2010] IEHC 22 and *Bussoleno Limited v. Kelly* [2011] IEHC 220.

31. As the question for determination here is a mixed question of fact and law and as I am not satisfied that fuller argument and greater thought is evidently not required for the better determination of the issues involved and that in the circumstances of this case it is both desirable and appropriate that these be determined in the context of a plenary hearing rather than on an application for liberty to enter final judgment, it is the decision of the court that the plaintiff's application be refused and the proceedings be adjourned for plenary hearing and that the defendant be given liberty to defend those proceedings.