Neutral Citation: [2014] IEHC 94

THE HIGH COURT

[2012 No. 274 R]

BETWEEN

GERARD HARRAHILL

PLAINTIFF

AND

OWEN SWAINE

DEFENDANT

JUDGMENT of Mr. Justice Barrett delivered on the 28th day of February, 2014

1. This case arises from summary proceedings commenced by the Revenue Commissioners against Mr. Swaine for the amount of €1,662,288.01 plus interest and costs. Any views expressed in this judgment are tentative in terms of the strength or weakness of the case that might be made by either side at plenary hearing. The case centres on whether the Revenue Commissioners in an agreement which they concluded, or by virtue of an undertaking that they accepted, or otherwise in their course of dealings with Mr. Swaine can be argued to have bound themselves such that Mr. Swaine, until he receives certain anticipated income, is not liable to pay the claimed taxes that have been sought of him in these proceedings. The plaintiff in this case is the Collector General and an officer of the Revenue Commissioners duly authorised to collect the tax and interest sought.

Order sought

2. On 11th April, 2012, the Revenue Commissioners commenced summary proceedings against Mr. Swaine, a solicitor, seeking payment of certain amounts that they claim are owed to them. On 17th October, 2013, the Master of the High Court issued an order for payment of monies by Mr. Swaine. On 23rd October, 2013, Mr. Swaine commenced the present proceedings, seeking, *inter alia*, an order of the court setting aside the order made by the Master, and resulting in a *de novo* hearing of the summary proceedings before this Court.

The Agreement

3. Mr. Swaine asserts in his affidavit evidence that he had an agreement with the Revenue Commissioners as to how he should structure his affairs and settle his tax liabilities. In their affidavit evidence, the Revenue Commissioners indicate under the heading "*The alleged agreement*" that in fact "*a repayment agreement was entered into*". There was some argument before the court as to whether a binding repayment contract had been agreed between the parties. As it is common cause between the parties, having regard to the affidavit evidence, that a repayment 'agreement' has in fact subsisted between them, the court does not propose to embark upon a detailed consideration of the various elements of a valid contract, though it notes that all of the relevant elements appear to have pertained here. It does not seem that the repayment agreement was documented. It might perhaps be contended that it is surprising that the Revenue Commissioners, dealing as they were with unpaid taxes which have yielded the present claim for in excess of €1.6 million, did not execute a document indicating the key details of a repayment agreement that both parties accept to have subsisted between them. It might also perhaps be contended that any contract or, for that matter, any estoppel that may arise between the parties does not amount to a fettering by the Revenue Commissioners of their tax-collecting powers but instead involves or arises from the exercise by the Revenue Commissioners of the extensive powers enjoyed by them in the area of tax-collection.

4. It is obviously challenging for any court to determine the terms of a contract that have not been reduced entirely to writing. However, it appears from the evidence before the court that there was a repayment agreement between the parties and that Mr. Swaine acted to his detriment pursuant to that agreement. The general thrust of Mr. Swaine's case is that, in doing so, he believed himself to be 'buying time' from the Revenue Commissioners as regards the commencement of enforcement proceedings against him. In an affidavit of 5th March, 2013, Mr. Swaine states his understanding to have been that:

> *"In consideration for [the various actions he undertook pursuant to the agreement]…the Revenue Commissioners would not pursue the outstanding tax liabilities (the subject matter of the proceedings herein) until such time as the above mentioned…cases had resolved and legal fees had been paid".*

In short, Mr. Swaine appears to have understood that so long as he complied with the repayment agreement the Revenue Commissioners would stay their hand. However, on Mr. Swaine's own evidence it seems that he has not acted in compliance with the repayment agreement. He avers in his affidavit evidence that "*an agreement was reached with them [the Revenue Commissioners] to the effect that…I would rearrange my tax affairs so that my tax liabilities…would cease to increase*". But his tax liabilities have increased. Such a breach of the repayment agreement would mean that, were one to have regard to the repayment agreement alone, the Revenue Commissioners would not need to stay their hand now as regards the collection of taxes. It is difficult to see what defence Mr. Swaine would make in this regard. However, there are perhaps other contentions that Mr. Swaine might make, not least as regards the undertaking of 21st June, 2011.

Undertaking

5. On 21st June, 2011, Mr Swaine wrote to the Revenue Commissioners that:

> *"I undertake to discharge the audit liability and outstanding taxes from… [certain] High Court cases".*

In a reply letter of 14th July 2011, the Revenue Commissioners wrote that they were:

> *"accepting this letter [of 21st June] as a Letter of Undertaking, that you will pay all outstanding taxes due to Revenue from proceeds of settlement of High Court cases".*

6. The cases referred to are a number of cases brought by Mr. Swaine on behalf of circa. 140 clients against the State in respect of allegedly illegal charges for nursing home care. The court accepts the evidence of the Revenue Commissioners that it was believed

around the time of this undertaking that settlement of the relevant cases was imminent. Counsel for Mr. Swaine indicated to the court that one of the cases brought on behalf of the circa. 140 clients has since settled. It might perhaps be contended that it was unwise of the Revenue Commissioners to accept Mr. Swaine's undertaking without elaborating on the basis on which it was being accepted and, in particular, without indicating that the undertaking was being accepted subject to the cases settling within a particular time. However, the Revenue Commissioners, at least in their reply letter of 14th July, 2011, did not engage in any such elaboration or give any such indication.

7. If the undertaking was given as part of the repayment agreement considered above, it could perhaps be contended to suffer from the same deficiency that arguably afflicts the repayment agreement, *viz.* that Mr. Swaine has not acted in compliance with same and thus, as a matter of contract law, is exposed to revenue proceedings being commenced against him. However, the Revenue Commissioners themselves appear to have considered the undertaking as something above and beyond the repayment agreement. Thus it was contended before the court that the Revenue Commissioners saw the letter of undertaking as an additional form of 'security' for Mr. Swaine's outstanding tax liabilities, enhancing their ability ultimately to recover money from him. If the court assumes that the undertaking and reply were something separate from the repayment agreement, could it be argued that they are capable of giving rise to a contractual obligation between the parties? A consideration of the decision of Barron J. in *The Commodity Broking Company Limited v. Meehan* [1985] I.R. 12 is informative. In that case the plaintiff claimed that, pursuant to an agreement with, or representations by, the defendant, the plaintiff had forborne from suing a company of which the defendant was sole beneficial owner. After a consideration of relevant English and Commonwealth authorities, including the decision of the House of Lords in *Fullerton v. Provincial Bank of Ireland* [1903] A.C. 309, an appeal from the Irish Court of Appeal, Barron J. concluded, at 21, that:

> *"In my view, these cases establish that the better view is that where a request express or implied to forbear from bringing proceedings induces such forbearance this amounts to good consideration. It is not necessary as the majority decided in Miles v. New Zealand Alford Estate Company (1886) 32 Ch. D. 266 that there should be an actual agreement not to sue."*

8. In the present case the undertaking volunteered by Mr. Swaine is not contended to have been gratuitous. It could be argued that it involved an implied request to the Revenue Commissioners that they forbear from bringing proceedings against Mr. Swaine. It appears to the court that it is arguable that the Revenue Commissioners, by accepting the undertaking, were in effect acquiescing to such a request. This was not expressly agreed between the parties but, as Barron J. mentions in his judgment, it has been clear since at least the time of the Court of Appeal's decision in the *New Zealand Alford Estate Company* case that an actual agreement between the parties is not necessary. Thus, subject to the assumption made above as to the undertaking and reply being something separate from the repayment agreement, it seems to the court to be arguable that fresh consideration, and so a fresh contract, arose between the parties in the giving and taking of Mr. Swaine's undertaking of 21st June, 2011. Of course, even if the undertaking and the reply do not benefit Mr. Swaine as a matter of contract law that still leaves the possibility that the Revenue Commissioners may have bound themselves as a matter of equity in their dealings with Mr. Swaine.

Estoppel

9. Mr Swaine asserts in his affidavit evidence that:

> *"the Revenue Commissioners represented to me that the Revenue Commissioners/Collector General would not pursue the liabilities against me personally until such time as the above-mentioned cases had resolved. Therefore the Revenue Commissioners and the Collector General are estopped from pursuing the said liability until such time as litigation is resolved."*

10. It is a generally accepted principle that there is no equity in a taxing statute or, as Charleton J. succinctly put it in *Menolly Homes Ltd. v. Appeal Commissioners and Another* [2010] IEHC 49 at para. 12, "*Revenue law has no equity*". However, this does not mean, and Charleton J. did not suggest, that equitable relief is unavailable in revenue proceedings or against the Revenue Commissioners. In the recent case of *National Asset Loan Management Limited v. McMahon and Others*; *National Asset Management Limited v. Downes* (2012), Charleton J. considers the modern law of estoppel at some length, stating, at para. 20:

> *"Estoppel can arise pursuant to an oral or written representation, and that is the normal situation… Estoppel is based either on representations or on situations of behaviour that, reasonably construed, withdraw or alter the strictures of legal obligations in such a way that it would be unfair to later enforce these. Where the matter is one of representation, it should be easy to identify the legal term supposedly altered and the representation directed in this regard."*

11. The undertaking of 21st June, 2011, is a clear and unequivocal representation by Mr. Swaine that he will discharge his tax liabilities from the proceeds of the to-be-settled cases. The reply letter of 14th July, 2011, is a clear, unequivocal and, on its face, an entirely uncaveated acceptance by the Revenue Commissioners of this undertaking. Put at their simplest the undertaking and reply are to the effect that, per Mr. Swaine, 'I will pay you this way' and, per the Revenue Commissioners, 'That is fine'. The reply from the Revenue Commissioners does not include any proviso such as 'provided you comply with the agreement we have separately agreed' or 'provided the cases settle within a reasonable time'. The contentions made by the Revenue Commissioners to the court and the evidence as a whole before the court suggest that it is arguable that the undertaking and reply are to be seen as separate from the more general agreement between the parties. Even if this were not the case, the reply and undertaking are such that the court considers, to paraphrase the wording of Charleton J., that, reasonably construed, they could reasonably be contended to alter or withdraw the strictures of the legal obligations that subsisted between the parties in such a way that it may be unfair now to enforce them.

12. The evidence before the court suggests that Mr. Swaine has acted to his detriment in reliance on the understanding that he understood to be in place with the Revenue Commissioners and which receives its clearest expression in his undertaking of 21stJune, 2011, and the Revenue Commissioners' acceptance of same in their letter of 14th July, 2011. Of course the effect of any promissory estoppel that may arise need not be permanent. The decision of the House of Lords in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761 suggests that a representor may escape from the burdens of equity if he can ensure that the representee will not be prejudiced. This line of argument was not raised in these proceedings.

Obtaining summary judgment

13. The circumstances in which summary judgment should be granted have been considered by the courts in a number of cases in which leave to defend was sought, most notably *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 and *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1. The hurdle that must be surmounted as regards obtaining leave to defend is a low one. As Hardiman J. stated in the Supreme Court case of *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 at 623:

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the*

defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

14. In *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 at 7, McKechnie J. summarised the principles that he considered to be relevant when a court approaches the issue of whether to grant summary judgment or leave to defend, viz:

> *"(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…*
>
> *(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…*
>
> *(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?'…*
>
> *(viii) the test is not the same as and should not be 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 is 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."*

Conclusion

15. Taxes due must be paid. However, the rule of law must prevail. Contracts must be honoured and undertakings observed; where appropriate the court will apply equitable relief. Having regard to the facts of the present case and to the criteria propounded by Hardiman J. in the *Aer Rianta* case, it is not very clear that Mr. Swaine has no case as regards his contention that the Revenue Commissioners are bound in contract law and/or estoppel from demanding the amounts sought of him until he receives certain monies. There are issues to be tried and they are not simply and easily determined; oral evidence is necessary to decide them. Mr. Swaine's affidavits do not fail to disclose even an arguable defence to the amounts claimed. The court is conscious of McKechnieJ.'s observation in *Harrisrange* that the power to grant summary judgment should be exercised with discernible caution and considers that the achievement of a just result between the parties requires that all of the sums which are the subject of the present proceedings be adjudicated upon at plenary hearing. The court orders that the order made by the Master of the High Court on the 17th October, 2013, be set aside and grants Mr. Swaine leave to defend all of the amounts claimed in the present proceedings at plenary hearing. This judgment is confined strictly to those monies which the Revenue Commissioners sought to recover in the summary proceedings that have led to the current application.