

THE HIGH COURT

REVENUE

Record No. 2014 No. 156 R.

BETWEEN

MICHAEL GLADNEY

PLAINTIFF

AND

MALACHY GREHAN

RESPONDENT

JUDGMENT of Mr. Justice Hunt delivered on the 3rd day of October, 2016

1. The plaintiff's claim against the defendant in this case is for various sums due by way of outstanding taxes and interest thereon, as set out in the special indorsement of claim on the summary summons issued by the plaintiff on 21st March, 2014. The particulars set out therein assert that each individual component of the total sum claimed by the plaintiff is based on returns made by the defendant in respect of income tax for the years 2005 to 2010 inclusive. This assertion is factually incorrect, as the defendant did not lodge such returns with the Revenue Commissioners, and the sole basis of any claim that the plaintiff has against the defendant is the assessments raised against him by his Inspector of Taxes in November 2012 in respect of income tax assessed as due in respect of the years in question.

2. Peter H. Jones & Co. entered an appearance on behalf of the defendant on 12th May, 2014. This was followed by the plaintiff's motion for liberty to enter final judgment against the defendant, notwithstanding the appearance so filed. This was first listed before the Master of the High Court on 10th July, 2014, followed by an exchange of affidavits and various adjournments. At some point, probably in November 2014, when the matter was pointed out by the defendant in an affidavit, the error in the special indorsement of claim became apparent to the plaintiff's legal advisers. This caused the plaintiff to move an *ex parte* application before this Court on 8th June, 2015, as a result of which Noonan J. ordered that the plaintiff be at liberty to amend the summary summons herein by replacing the word "*return*" with the word "*assessment*" where it appears in six places under the heading "Charge" in the particulars on the special indorsement of claim.

3. The defendant now applies pursuant to the provisions of O. 52, r. 3 of the Rules of the Superior Courts, or alternatively pursuant to the inherent jurisdiction of the Court, to set aside the order of 8th June, 2015. The defendant complains that the plaintiff did not disclose all material facts concerning the proceedings and associated correspondence to Noonan J. in the course of the *ex parte* application, and asserts that he is significantly prejudiced by the amendment to the proceedings. The defendant also complains of delay by the plaintiff prior to moving for the amendment. The plaintiff does not accept that there was material non-disclosure and asserts that there is no prejudice to the defendant by reason of the amendment to the pleadings. The plaintiff also points to delays on the part of the defendant in dealing with his tax affairs and with these proceedings.

4. The main issue in this case is whether the defendant is or would be prejudiced by the amendment made to the pleadings. It appears to be common case that the existence of such prejudice is dependent on the interpretation and application of the wording of s. 933 of the Taxes Consolidation Act 2007. In essence, this section provides a statutory scheme of appeals against assessments to income tax by disgruntled recipients. However, that appeal system, and in particular a "late appeal" under these statutory provisions, is not available when the provisions of s. 993(9)(a) apply. This provides that "*where action for the recovery of income tax or corporation tax charged by an assessment has been taken*" the preceding sub-sections (concerning appeals) "*shall not apply in relation to that assessment until that action has been completed*".

5. In summary, the plaintiff argued that the meaning and effect of this subsection in this case is that the issue of the summary summons by the plaintiff constituted the taking of an action for the recovery of income tax charged by the assessments in question, being an action by means of the institution of court proceedings. The plaintiff further contended that the defendant was not prejudiced by the *ex parte* amendment to the particulars on the endorsement of claim on the summary summons, because even if the amendment was set aside, the proceedings still fell within the ambit of s. 993(9)(a) so as to preclude the defendant from availing of the avenue of "late appeal" under s. 993(7) of the 2007 Act.

6. The defendant argued that the statutory phrase in question ought to be interpreted conjunctively, rather than disjunctively as suggested by the plaintiff. That being so, where the indorsement of claim on the summons specified that the sums claimed therein were based on returns rather than assessments, such proceedings were could not be properly characterised as an action for the recovery of tax charged by an assessment within the meaning of the relevant provision, and the defendant is still entitled to avail of a late appeal. Consequently, if the amendment is permitted to stand, it would have the prejudicial consequence for the defendant that he is thereby deprived of access to a late appeal.

7. There is no doubt that the plaintiff intended to sue the defendant for recovery of the various sum rendered chargeable against the defendant on the issue of the various assessments referred to above. It is also clear that the special indorsement of claim was compiled under some misapprehension as to the course of dealings between the tax inspector and the defendant preceding the issue of the proceedings. In effect, it appears to me that the plaintiff argues that I should look to the intention behind the proceedings, and disregard the form of words actually used, in determining whether these proceedings amount to "action for the recovery of income tax or corporation tax charged by an assessment".

8. In most cases, an obvious error in the drafting of pleadings ought to be corrected unless the opposing party is thereby exposed to a real and substantial prejudice. There is no question of the defendant in this case being misled by an obvious error. However, the nature of these proceedings is made particularly relevant by the statutory consequences that follow if the proceedings have the particular purpose of the recovery of taxes "charged by an assessment". The plain and ordinary meaning of the phrase used in the statute in issue requires that the proceedings must conform to the statutory description if they are to have the effect of preventing a late appeal.

9. In general, the nature of proceedings is primarily ascertained from an examination of the form and substance of the pleadings. It

appears to me that it is highly unlikely that any taxes could have been recovered on foot of the proceedings as originally issued in this case. Consequently, they cannot be said to be proceedings for the recovery of taxes "charged by assessment" in either substance or form. Presumably that is why the plaintiff thought it necessary to amend the particulars of claim in the first place. On this basis, the defendant has been precluded from lodging a late appeal by proceedings which had no reasonable prospect of success, in that no valid judgment permitting recovery of the sums claimed could have been obtained by the plaintiff until the pleadings were corrected. In my view, the real purpose of the amendment of the pleadings was to enable the plaintiff by the action to recover taxes charged by an assessment. If the plaintiff is so enabled where he was not previously, the nature of the proceedings will clearly be changed to the detriment of the defendant if the amendment stands, and the nature of the prejudice to the defendant from the amendment then becomes clear.

10. In addition to giving plain meaning to the words used in the statute, it is also reasonable to presume that it was enacted with the rules relating to the summary summons procedure in mind. In my view, the section should be interpreted in that context. Order 4, Rule 4 of the Rules of the Superior Courts provides that the special indorsement of claim on such a summons "*shall state specifically and with all necessary particulars the relief claimed and the grounds thereof.*" I doubt whether the summons could be regarded as being compliant with this provision in the original form. Furthermore, I think that the approach suggested by the plaintiff downplays the importance and relevance of the function of pleadings. An equivalent provision was considered by Hanna J. in *Caulfield v Bolger* [1927] I.R. 117 at p. 126, where he set out what is meant by "necessary particulars" in rule 4:-

"In my judgment it connotes such particulars as are essential to make the indorsement a good statement of claim both in particularity of fact and law. It is the analogue of the statement of claim in plenary proceedings. While it contemplates an abbreviated and concise form, this is no bar to containing all the essentials of a correct pleading."

This pleading clearly did not meet these strictures, by failing to specify the correct legal basis for the recovery of tax. To be an action for recovery of tax "charged by an assessment", the pleading in question must specify the simple factual and legal basis upon which the action is issued.

11. The purpose of such a pleading was further considered by Mumaghan J. in *Stacey and Harding Ltd. v O'Callaghan* [1958] I.R. 320 at p.322 as follows:-

"It is not easy nor do I propose to lay down any hard and fast rule as to what is and what is not sufficient indorsement... Each case must be considered in the light of the particular claim and must depend on the particular circumstances. I will say, however, that such particulars must be given in every case as may reasonably be necessary to enable the defendant to know whether he ought to pay or to resist..."

In the absence of the single particular necessary to signify the proper legal basis of the claim, the defendant here would have been very likely to have been in a position to resist the entry of judgment by the plaintiff, thereby concluding the proceedings in his favour, unless or until the defective pleadings were corrected by amendment. This would have had the statutory consequence that on completion of the proceedings in his favour, his right to a late appeal would have been revived, untrammelled by the accrual to the plaintiff of any judgment or access to consequent enforcement procedures. If the amendment stands, the defendant has no access to an appeal, and will not do so until proceedings conclude, presumably on the basis that the plaintiff will obtain liberty to enter final judgment on foot of the amended claim.

12. Given the ability of the Revenue Commissioners to collate, manage and maintain data relating to taxpayers, it is not unduly onerous to expect from them a modest level of clarity and care in the drafting and issuing of proceedings, particularly where the issue of such proceedings has the collateral effect of sealing off an internal appeal against the subject matter of the claim. In this case, there has been a clear mis-statement of a material fact which must be proved by the plaintiff in order to succeed in his claim against the defendant. The terms of s. 993(9)(a) appear to contemplate that the late appeal provisions may in effect be revived after completion, by providing that "*neither subs. 7 nor 8 shall apply in relation to that assessment until that action has been completed*". The resuscitation of the late appeal procedure may well be less valuable or convenient for the defendant if the plaintiff succeeds in obtaining liberty to enter final judgment for the significant sums claimed in the amended pleadings.

13. In addition, I prefer the statutory interpretation put forward by counsel on behalf of the defendant as to the interpretation and application of the provisions of s. 993(7) of the 2007 Act in the circumstances of this case. The purpose and objective of proceedings is primarily gleaned from that which is expressed in the pleadings, rather than by reference to the presumed intent of the issuing party. If the defendant cannot lodge a late appeal pending the completion of these proceedings, they must strictly comply with the statutory requirement that they are "*an action for the recovery of income tax charged by an assessment*". The words used on the special endorsement of claim did not signify that this was the purpose of the action. A statutory provision having a potentially detrimental effect must be strictly construed in favour of the taxpayer. The words of the statute and the particulars of claim cannot be simply overlooked in the manner effectively suggested by the plaintiff.

14. In order to operate as a bar to a late appeal, such proceedings must demonstrate compliance with the simple statutory prerequisite that they are an action for the recovery of taxes "*charged by an assessment*" and not otherwise. In these circumstances, the order amending the proceedings will be set aside. The plaintiff is perfectly free to continue with the proceedings based on returns as originally constituted if he sees fit, but in my opinion, they are not now constituted so as to debar the defendant from lodging a late appeal until completion.

15. I express no views on the other matters canvassed by the parties, other than to note that the respondent must now act in a timely manner, having regard to his dilatory approach to his revenue affairs to date.