

THE HIGH COURT

[2012 No. 1040 R]

BETWEEN

MICHAEL GLADNEY

PLAINTIFF

AND

GEORGE RAYMOND AND RUTH RAYMOND

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 30th June, 2016.

Part 1

Reliefs Sought

1. Mr Gladney is the Collector General and an officer of the Revenue Commissioners duly authorised to collect tax and associated interest. Mr George Raymond is a businessman. Ms Ruth Raymond is Mr Raymond's former wife. Mr Gladney brings this summary claim seeking: (1) €822,765.41 due by the defendants to the Central Fund; (2) interest pursuant to the Courts Act 1981; (3) interest at the statutory rate of 0.0274% for each day or part of a day in relation to VAT from 19th November, 2012, until judgment or (and this does not seem likely) prior payment; and (4) certain ancillary relief.

2. Ms Hayes, an officer of the Collector General's office has sworn the grounding affidavit. This identifies, *inter alia*: (1) the amounts owing and sought; (2) that the relevant returns have become final and conclusive within the meaning of the Tax Acts; and (3) that demand has been made and no payment made. It also asserts that the defendants have no defence to the amount sought.

3. The monies sought now by Mr Gladney are due ultimately as a result of default by the defendants on certain VAT payments. The liability outstanding has been determined on the basis of returns filed by or on behalf of the defendants in relation to the sale of six properties, which returns are final and conclusive in accordance with the Tax Acts. The VAT periods and amounts submitted to the Revenue Commissioners and shown in the summary summons are as follows:

Period	VAT Return	Interest	Total
1.i.07-31.xii.07	€318,781.00	€162,332.21	€481,113.21
1.i.08-29.ii.08	€130,725.00	€64,043.22	€194,768.22
1.iii.08-30.iv.08	€99,903.00	€46,980.98	€146,883.998
Total	€549,409.00	€273,356.41	€822,765.41

4. In or around the time that the defendants filed the above-mentioned returns, Mr Raymond signed an 'Inability to Pay' document which, notably, acknowledged and accepted the Revenue Commissioners' claim for tax undercharges and statutory interest.

Part 2

Defences Raised

A. General.

5. In his affidavit evidence, Mr Raymond acknowledges a VAT liability to arise. Notwithstanding this acknowledgement and also the acknowledgement contained in the 'Inability to Pay' document, Mr Raymond has sought to advance a number of defences to the within summary proceedings. First, he points to the fact that prior to the within proceedings, he and his wife have always been tax compliant. Second, he points to the fact that proceedings alleging, *inter alia*, professional negligence have been commenced by the defendants against certain certified accountants to whom the defendants entrusted the care of their tax affairs. In consequence, Mr Raymond has asked that a stay be placed on the within proceedings pending the conclusion of these professional negligence proceedings. Third, Mr Raymond makes various allegations of criminality and misfeasance on the part of the Revenue Commissioners. The court deals with each of these issues in turn.

B. Previous History of Compliance.

6. In his affidavit evidence, Mr Raymond avers that the defendants "*have been fully tax compliant at all times in both our personal and business capacities and that the current Revenue liability is the first such liability that we have incurred in the thirty years that we have been operating businesses in the State*". This may be so, and it is laudable if so. But a past history of tax compliance is no defence to a present event of tax default.

C. Other Proceedings Extant.

7. Mr Raymond points to the extant professional negligence, etc. proceedings against the defendants' onetime tax consultants and asks that the court place a stay on the within proceedings, pending the resolution of those other proceedings. In his affidavit evidence, Mr Raymond also indicates a *willingness "to sign an irrevocable authority authorising and instructing our solicitors to hold the net proceeds that are recovered in the above action, after all costs and outlays incurred in taking the action...have been paid, in their client account pending the determination of our current liability"*. There are a number of reasons why, unfortunately for the defendants, the court considers itself coerced by law into declining the relief sought:

- first, s.5(1)(a) of the Value-Added Tax Consolidation Act 2010, states, *inter alia*, as follows:

"[A] taxable person who engages in the supply, within the State, of taxable goods or services shall be –

(i) an accountable person, and

(ii) accountable for and liable to pay the tax charged in respect of such supply."

It appears to the court that the intention underpinning this provision is that the focus of revenue collection and revenue enforcement proceedings (and hence summary proceedings such as these) must first and foremost be on the taxable person and that person's actions, and not, *inter alia*, such liabilities as a third party may or may not have towards that taxable person.

- second, s.76 of the Value-Added Tax Consolidation Act 2010 provides, *inter alia*, that an accountable person who is liable for VAT is obliged to *"furnish to the Collector-General a true and correct return"* in respect of any such liability and *"remit to the Collector-General, at the same time as so furnishing such return, the amount of tax (if any) payable by the person"* in respect of the relevant taxable period. It appears to the court that this exclusive responsibility of an accountable person again points to the intention of the Oireachtas being that the focus of revenue collection and revenue enforcement proceedings (and hence summary proceedings such as these) must first and foremost be on the taxable person and that person's actions, and not the related actions of some third party.

- third, the court notes the somewhat self-serving form of Mr Raymond's proposed undertaking which would keep any monies recovered out of the reach of the Revenue Commissioners, presumably with the intention that some compromise deal might then be struck with the Revenue Commissioners. However, the court does not consider it appropriate that in a tripartite situation such as that is now presenting, in which there are tax defaulters in one corner, a number of persons claimed to have been (*inter alia*) professionally negligent in a second corner, and the Revenue Commissioners (who are entirely innocent of any wrongdoing) in the third corner, the Revenue Commissioners as the innocent party should have to wait for judgment in their favour, in order that a dispute, which may or may not be of substance, might be litigated between the other parties. Such a proposition is unfair in the context now arising. It is not a proposition that finds favour with the court, not least because it seems inconsistent with the general legislative intention identified above. And it is a proposition which, if accepted by the court, would have the potential to bring havoc to the process of revenue collection, not least because (and the court makes no comment in this regard on the separate proceedings that, *inter alia*, the defendants to the within proceedings have commenced) it could well prompt defaulting taxpayers to commence and continue spurious claims against professional advisors with the true end of such proceedings being merely to postpone the day when those taxpayers would have to meet entirely legitimate tax demands made by the Revenue Commissioners.

D. No Wrongdoing by the Revenue Commissioners.

8. Mr Raymond has made very serious allegations against the Revenue Commissioners and Revenue officials, accusing them of *"deliberate acts of criminality"*, *"theft"*, *"fraud"*, collusion in a *"tax scam"*, and so on. These are remarkable assertions to make – and they are assertions, no more. There is not a whisper of a scintilla of evidence before the court that the Revenue Commissioners or any person within the Revenue Commissioners have or has been guilty of even the slightest semblance of any wrongdoing when it comes to dealings with the defendants or the defendants' tax affairs or the pursuit of the monies now sought.

Part 3

Applicable Law

9. The hurdle that the defendants must cross in order to succeed in having matters sent to plenary hearing is low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, 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?"

10. In *Harrisrange Limited. v. Duncan* [2003] 4 I.R. 1, 7, McKechnie J. summarised, as follows, the relevant principles that apply when a court approaches the issue of whether to grant summary judgment or leave to defend:

"(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) this 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."

Part 4

Conclusion

11. The defendants have the court's sympathy for the financial predicament in which they find themselves. In material terms, they appear generally to have done well in life and only belatedly to have suffered financial misfortune. That would be a difficult turn in anyone's life and it is doubtless difficult to bear. However, as a matter of law the court must regretfully conclude that so far as the within summary proceedings are concerned: the defendants have no case; there is no issue to be tried; and the defendants have failed to disclose even an arguable defence. In light of the foregoing, having regard to the various reasons identified above, and notwithstanding that "*discernible caution*" which, consistent with the observations of McKechnie J. in *Harrisrange*, this Court has brought to the within summary proceedings, the court is coerced as a matter of law into (a) declining to grant a stay on the within proceedings, (b) declining to send this matter to plenary hearing, and (c) granting Mr Gladney the reliefs that he now seeks.