Neutral Citation Number: [2008] IEHC 103

IN CAMERA MATTER

THE HIGH COURT

REVENUE

2007 No. 125 MCA

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 908

OF THE TAXES CONSOLIDATION ACT 1997

BETWEEN

GEORGE ROSS

APPLICANT

AND
W. C.

RESPONDENT

Judgment of Miss Justice Laffoy delivered on 18th April, 2008.

1. On this application the applicant, who is an inspector of taxes, seeks orders against various banks in relation to accounts of the respondent tax payer held by them under paragraph (a) (for inspection of the books, records and other documents specified in relation to the accounts) and (b) (for the information, explanations and particulars specified in relation to the accounts) of subs. (5) of s. 908 of the Taxes Consolidation Act 1997. It is common case that the applicant is an authorised officer within the meaning of s. 908 and the application is brought with the consent in writing of a Revenue Commissioner. It is also common case that the preconditions to bringing an application under s. 908, which are stipulated in subs. (3) thereof, have been complied with. The basis on which the respondent resists the application is that the matter in relation to his liability to tax which was being investigated by the applicant and which gave rise to the application has been compromised by virtue of the Revenue Commissioners having accepted and cashed a cheque given by the respondent to the applicant on 8th September, 2004, which it is contended was tendered in full and final settlement of the respondent's liability. In short, the respondent says that that matter is closed and cannot be re-opened.

2. The matter in question arose out of a voluntary disclosure made by a firm of accountants on behalf of the respondent on 15th November, 2001 in relation to so-called bogus non-resident accounts held by the respondent. Arising out of that disclosure, on 17th April, 2002 the respondent's accountants were notified that his disclosure had been selected for review by the Revenue Commissioners. There ensued through 2002, 2003 and into 2004 an investigation of the disclosure made by the respondent on the BNR1 form in November, 2001 and the respondent's participation in the 1993 amnesty.

3. The respondent had submitted to the Revenue Commissioners with the form BNR1 a cheque in the sum of €25,779.49 in respect of his total liability for underlying tax (income tax, PRSI and levies) and also his liability for interest and penalties in connection with the accounts disclosed thereon. In the course of the review, on 2nd October, 2003, the respondent's accountants furnished a cheque for €83,000 to the Revenue Commissioners by way of payment of taxes due per their revised workings. The review continued.

4. The starting point of the submissions made on behalf of the respondent that the matter is now closed is a meeting dated 26th July, 2004 between the respondent's then accountant (Mr. C) and the applicant. At that meeting Mr. C gave the applicant a further cheque for €17,808 in discharge of the respondent's liability on the BNR1 on the basis of Mr. C's revised workings. The respondent's case is that, at that meeting, on Mr. C's suggestion, the parties moved to a different mode of negotiation. Mr. C indicated that it would be his preferred option to agree a settlement in the case. The applicant indicated that he would consider any proposal made, but stated that it would have to be a reasonable figure and the ultimate approval would be by a revenue commissioner. There was a further meeting on 1st September, 2004 at which the respondent accompanied Mr. C. That meeting did not bring any resolution to the issues between the Revenue Commissioners and the respondent, although a further meeting was arranged for the following week, 8th September, 2004.

5. The respondent attended the meeting on 8th September, 2004 with Mr. C. The applicant's affidavit evidence on this application was based on a contemporaneous note he made of that meeting which recorded what happened as follows:

> "Mr. [C] said that he would prefer to settle the case without any further correspondence and wanted to agree on a final liability. I said I was prepared to listen to any offer, but could not guarantee final acceptance at this meeting. Both [the respondent] and Mr. [C] accepted this.
>
> Mr. [C] said that he had revised workings in this case, and that he had increased the interest and penalties due. He preferred to agree the case without my seeing these workings and said his calculations showed a total liability of €400,000. His records showed that [the respondent] had already paid €122,000, leaving a balance of €278,000 due. [The respondent] gave me a cheque for this amount. I agreed to put his proposal forward, but again stressed that even though I was taking the cheque, they should not assume final acceptance of their offer."

6. The code of practice applicable to settlements by the Revenue Commissioners in operation at the time provided that settlements in excess of €100,000 had to be approved by one of the three Revenue Commissioners. The applicant has asserted that Mr. C, a tax adviser of longstanding and experience, would have been fully aware of that requirement.

7. The respondent's account of the meeting on 8th September, 2004 on affidavit is as follows:

> "I put my best foot forward and accepted a total liability of €400,000. I believed that my precise liability may have been more or less than that but not by so much and I wanted the matter closed. The applicant stated that he too wanted the matter settled. I presented the applicant with a cheque for the balance of the said sum of €400,000 (i.e. €278,000) in full and final settlement of my liability which he accepted subject to the approval of his manager whom the applicant stated would have to approve the compromise. I am in no doubt that the agreed intention of all parties at that meeting was to achieve a final compromise and that the procedure agreed between us was that the applicant would transmit the cheque to his superior with a recommendation that it be accepted in settlement of the liability and that his superior had authority to conclude a final compromise. … The applicant stated that he did not have the authority to compromise the matter but that he would recommend to his manager … who would have to approve his recommendation for it to be accepted and he did not see any difficulties with [the manager] accepting it."

8. Mr. C has also put his account of his dealings on behalf of the respondent with the applicant on affidavit. He has averred that at the meeting on 1st September, 2004 "we all agreed that it would be mutually beneficial to settle the case".

9. As to the basis on which the applicant accepted the cheque for €278,000 at the meeting of 8th September, 2004, he has averred as follows:

> "… I agree with the applicant when he avers that he left us in no doubt that he could not approve the settlement himself. He stated clearly that he could not do so and that it was up to his manager to make the decision as to whether or not to accept the compromise but that the applicant would relay to us the decision of his principal in regard to the settlement and that the applicant was authorised to communicate this decision to us in due course."

10. On 8th September, 2004 the applicant referred the matter up the line to his superiors. On the following day the District Manager of the area contacted him and stated that he could not consider the offer without a detailed submission from the tax agent, that is to say, Mr. C. The applicant's account on affidavit of his subsequent dealings with Mr. C is as follows:

> "I spoke with Mr. C on 10th September, 2004 and explained the position to him. Mr. C sought a meeting with [the District Manager]. After speaking with [the District Manager] I told Mr. C that [the District Manager] would meet him but that [the District Manager] would not be able to discuss the case in the absence of computations. Mr. C stated that he would speak to his client and revert to me. I spoke with Mr. C again on 11th October, 2004. He said that he would talk to his client and get back to me about arranging another meeting. I reminded him that his computations should be forwarded in advance of that meeting.
>
> Again, for the avoidance of doubt, I wish to reiterate that in the conversations discussed above, I made it perfectly clear that the proposed settlement offer could not be considered, let alone accepted, in the absence of computations or calculations showing how the tax agents had arrived at the settlement figure. I have no doubt that Mr. C was fully aware of and understood the position and could not at any time have believed that a settlement had been agreed."

11. Mr. C did not advert to the telephone conversations on 10th September, 2004 and 11th October, 2004 in his first affidavit. He merely averred, following the passage which I have quoted above, that he was made aware by the Respondent that the cheque for €278,000 was "cashed" on 8th September, 2004 and he considered that was the end of the matter. In a subsequent affidavit he averred as follows:

> "I agree that he asked me for computations. Those workings were not a condition precedent to settlement: had they been I would have furnished them immediately after the settlement meeting of 8th September, 2004. I was requested to provide them after agreement was reached. The absence of full records means that those workings are 'rough and ready' and the matter was settled with both sides knowing that the settlement sum was and could only be an estimate. Having sight of my workings would not have assisted the Applicant in determining the liability …"

12. Following the telephone calls of 10th September, 2004 and 11th October, 2004, the next communication between the parties was a letter dated 5th November, 2004 from the respondent's accountants. The opening paragraph in that letter referred to "the recent meetings and discussions over the last few weeks between the Revenue Commissions, [the respondent] and ourselves concerning [the respondent's] proposal to finalise an income tax settlement with Revenue". The letter then went on to explain and justify the shortcomings in the respondent's disclosure and continued:

> "In an effort to finalise matters at our last meeting [the respondent] made a without prejudice payment on the basis of non-publication and that is in full and final settlement.
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> As requested, we have now attached herewith a schedule setting out the basis on which the final figure was based for you to review.
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> We would be obliged if you would acknowledge receipt of payment and confirm that the matter has now been closed. If in the meantime you have any queries, please let us know."

13. The Revenue Commissioners did not consider the matter as having been closed and subsequently contended that the respondent has not discharged his full liability to Revenue.

14. After it was received, the cheque for €278,000 was immediately presented for payment. The applicant has sworn that this was in accordance with Revenue practice under which all cheques are presented for payment immediately when they are received. Communication of acceptance of a settlement is by way of formal letter setting out the details of the settlement, in accordance with paragraph 6.2 of the Revenue Code of Practice.

15. I have recorded the averments in the affidavits in relation to the crucial issues of fact in detail, because, if a conflict arose on the affidavits on any crucial issue of fact, the court could not resolve that conflict without oral evidence. I am satisfied that there is no conflict on any material primary fact, although there is disagreement as to the inferences to be drawn from the primary facts.

16. The respondent's case is that there is no dispute as to the basis on which the cheque for €278,000 was tendered to the applicant and accepted: it was on the basis that that sum would be in full and final settlement of the matter being reviewed; and the presentation of the cheque for payment constituted acceptance of the offer. The position of the applicant is that the presentation of the cheque for payment is to be construed as the acceptance of a payment on account of the respondent's liability. However, counsel for the respondent made the point that that position was not adopted by the applicant in correspondence.

17. Counsel for the respondent supported her submission that the Revenue Commissioners' claim against the respondent to which this application relates has been compromised on the commentary in the 4th edition (1996) of Foskett on The Law and Practice on Compromise and the authorities referred to. In this judgment, I will refer to the corresponding passages from the latest edition of Foskett, the 6th edition (2005), because I am satisfied that, as regards the relevant principles, there has been no change in the period between the two editions.

18. In addressing the question whether the presentation for payment of a cheque sent "in full and final settlement" of a dispute amounts to an unqualified acceptance of the offer reflected in the sending of the cheque on those terms, Foskett first identifies the issue. Having commented that the question is often posed on the basis of whether the presentation of the cheque for payment constitutes an "accord and satisfaction" of the disputed claim, it is suggested that, having regard to the classic definition of "accord

and satisfaction" and ordinary contractual principles reflected in that definition, the issue is more accurately stated as being confined initially to whether an accord has been reached in the circumstances, satisfaction depending on whether acceptance of the cheque per se is sufficient or whether payment on presentation of the cheque is required. The classic definition of "accord and satisfaction" referred to is to be found in the following passage of the judgment of Scrutton L.J. in *British Russian Gazette Limited v. Associated Newspapers* [1933] 2 K.B. 616 (at p. 643):

> "Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, or by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."

19. Whether an "accord" has been reached depends on whether, construed objectively, the actions of the recipient of the cheque constitute acceptance of the offer reflected in the sending of the cheque (para. 3-30).

20. The issue as to whether an accord has been reached arises only where two preconditions are complied with: that the cheque is offered unequivocally on a "full and final settlement basis"; and that it is offered in settlement of a dispute (paras. 3-31 and 3-32). The offer made on 8th September, 2004 fulfilled both requirements.

21. In addressing how the issue as to whether an accord has been reached is determined, Foskett considers first whether it is a question of fact or law. The authorities cited support the view that it is a question of fact, subject to one qualification. In *Day v. McLea* (1889) 22 Q.B.D. 610 Bowen L.J. put the matter as follows:

> "If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact."

22. The qualification discernible in the authorities cited by Foskett is that, if the negotiations have been conducted in writing, the construction of the correspondence is always a question of law (paras. 3-33 and 3-34).

23. As to how the issue of fact is resolved, Foskett states that the starting point for addressing the analysis of facts in any case where the issue falls for consideration is that an objective construction must be placed on the material terms (para. 3-36). Foskett illustrates that point by reference to a number of authorities and draws certain conclusions from them. For instance, the presentation for payment of a cheque tendered "in full and final settlement" of a dispute, without demur or qualification, will be taken as an objective manifestation of an intention to accept the offer of settlement thus made. The examples given by Foskett illustrate that where there was a clearly definable and not insignificant delay between the receipt of and/or the payment in of the cheque and the subsequent manifestation of intention not to accept the proceeds of the cheque other than as part payment the inference to be drawn is that there was accord. On whether there is any clear dividing line between cases where delay is not sufficient to give rise to an inference of acceptance, and those where it is, Foskett states that the answer is to be found in the following passage from the judgment of Lloyd L.J. in *Stour Valley Buildings v. Stewart* (1992) C.A.T. 1281:

> "Cashing the cheque is always strong evidence of acceptance, especially if it is not accompanied by immediate rejection of the offer. Retention of the cheque without rejection is also strong evidence of acceptance depending on the length of the delay. But neither of these factors are conclusive; and it would … be artificial to draw a hard and fast line between cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or a few days."

24. The only Irish authority to which the court was referred, the decision of the Supreme Court in *Mespil Limited v. Capaldi* [1986] I.L.R.M. 373, while not specifically concerned with the concept of accord and satisfaction, does address the basic contractual principles which underlie that concept. It was a case in which the scope of the settlement of a High Court action which had been reduced to writing was in issue. Having upheld the finding at first instance of mutual mistake on the part of counsel who negotiated the settlement, Henchy J. considered the effect of mutual or bilateral mistake, stating (at p. 376):

> "It is of the essence of an enforceable simple contract that there be a consensus *ad idem*, expressed in an offer and an acceptance. Such consensus cannot be said to exist unless there is a correspondence between the offer and the acceptance. If the offer made is accepted by the other person in a fundamentally different sense from that in which it was tendered by the offeror, and the circumstances are objectively such as to justify such acceptance, there cannot be said to be the meeting of minds which is essential for an enforceable contract. In such circumstances the alleged contract is a nullity."

25. In this case, the respondent's deponents acknowledge that, in accepting the cheque, the applicant made it clear that he did not have authority to compromise and that the matter would have to be referred to the District Manager. It was referred to the District Manager. Two days after the cheque was accepted the applicant told Mr. C that the District Manager would not consider the offer without a detailed submission from the tax agent. It is implicit in the respondent's response to this application that that meant that, once Mr. C furnished the documentation on the basis of which he calculated the respondent's total liability at €400,000, the compromise of the respondent's tax liability would automatically become effective and the Revenue Commissioners' review of the respondent's compliance with the bogus non-resident accounts disclosure scheme and the 1993 amnesty would automatically cease. That does not stand up to objective scrutiny. No reasonable accountant would have interpreted the message the applicant conveyed to Mr. C on 10th September, 2004 in that way. On an objective appraisal, the message could only have meant that the District Manager wanted to assess the appropriateness of settling on the basis of the amount tendered by reference to Mr. C's computations.

26. It was submitted on behalf of the respondent that if the Revenue Commissioners intended to accept the cheque in part satisfaction, one of the following courses should have been adopted:

> (a) it should have been made clear to the respondent that that was the intention, or
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> (b) the cheque should not have been presented for payment; or
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> (c) before it was presented for payment the respondent should have been told that it was being accepted on account of

his liability and that, if that was not acceptable to him, he could withdraw it.

27. It is not clear on the evidence when the respondent's cheque was cleared or when the respondent became aware that it had been cleared. Whenever that happened, in view of the agreed position as to what had transpired at the meeting of 8th September, 2004 and the conversation between the applicant and the respondent's agent, Mr. C, on 10th September, 2004, looking at the matter objectively the respondent and his advisers could not have concluded that the Revenue Commissioners were accepting the cheque in full and final settlement of the respondent's liability.

28. On the basis of the undisputed primary facts, in my view, the only inference which can be drawn is that there was no meeting of minds that acceptance of the cheque and receiving value for it by the Revenue Commissioners was in full and final settlement of the respondent's liabilities arising from the BNR 1 disclosure and the 1993 amnesty so as to terminate the revenue review.

29. The power conferred on the court by s. 908 is a discretionary power. Therefore, the question of prejudice has to be considered. It was suggested, not too forcibly it has to be acknowledged, that the respondent was prejudiced by not having been given the opportunity to withdraw the cheque. It is hard to see how there is any substance in this argument given that the respondent's own evidence is that the cheque tendered represented the balance due by him to the Revenue Commissioners "more or less" and that there was not much in the difference. If the Revenue had not got value for the cheque, interest would have continued to run on the totality of the respondent's liability which, on the respondent's own case, is in the region of €278,000.

30. There will be an order in the terms sought by the applicant.