THE HIGH COURT
REVENUE

[2002 No. 31 M.C.A.]

IN THE MATTER OF SECTION 908 OF THE TAXES CONSOLIDATION ACT 1997 AS SUBSTITUTED BY SECTION 207(I) OF THE FINANCE ACT, 1999

BETWEEN

GERARD HOWARD

APPLICANT

AND
IRISH LIFE AND PERMANENT PLC AND GUINNESS AND MAHON (IRELAND) LIMITED

RESPONDENTS

Judgment of Mr. Justice O'Sullivan delivered on the 19th December 2006

Introduction
1. This is an application by the respondents by way of notice of motion consequent upon the making of an order by the President of the High Court dated 24th June 2002, (and subsequent orders varying same) pursuant to the above section of the Taxes Consolidation Act, whereby they were required to furnish to the applicant (an authorised inspector acting on the authority and on behalf of the Revenue Commissioners) certain specified information in relation to account holders with the respondents. This motion seeks payment of

(a) The costs of appearing before the court in response to the applicant's motions and

(b) The costs of complying with same.

The latter amounts to a large figure in excess of €3 million.

2. I am told that a significant number of similar orders have been made and that in every case the respondent financial institution has been awarded both of the foregoing categories of costs, by order of the court made at the same time as the substantive order. This therefore is an exception for reasons which will shortly appear.

Contentions of the Applicant and Respondents to the Motion
3. In a nutshell counsel for the applicant says that by their conduct the respondent institutions have disentitled themselves from being paid the foregoing costs. He submits that the evidence now available shows that the respondents were at the very least negligent in and about establishing and maintaining the relevant non-resident accounts; that this was a widespread phenomenon throughout the branches of the respondents; that there were some obviously high profile individuals who were well known in the community and therefore must have been well known to the respondents to have been resident within the jurisdiction who were nonetheless accorded non-resident status and that all of this can be supported in sufficient factual detail on affidavit from the information provided to it by the respondent institution pursuant to these orders. Accordingly it can be said that the respondents were negligent; that they facilitated the maintenance of non-residents accounts which were not *bona fide* and were known not to be *bona fide* or at the very least ought to have been so known and in respect of which now these respondent banks must bear responsibility inter alia in the form of not being paid their costs of providing this information.

4. It is further submitted that the need for applying to court at all arose directly from the negligence, if not the complicity of the respondent institutions with, concerning the tax evasion activities of its clients which were known or ought to have been known to the respondents. Therefore the cost of all of this should be paid for by the respondent institutions rather than by the taxpayer, because if the respondents had complied with the law and had acted properly these applications would not have been necessary at all. Alternatively, they would have cost significantly less because much of the expense involved in complying with the orders was caused by the non-availability or non-availability in convenient and appropriate form of the relevant information. The extra cost is not something which the taxpayer should have to pay in these circumstances.

5. It is further submitted that the very fact that the original order had to be amended and time extended for compliance reflects not only difficulties brought about by the failure of the respondents to keep proper records and indeed to be appropriately satisfied as to the *bona fides* of their clients' claims to be non-resident in the first place but also by, at least initially, its failure to comply, or comply appropriately, with the court order.

6. It is further submitted that the question of both categories of cost is a matter for the unfettered discretion of the court given that s. 908 is silent as to the matter of costs. In that circumstance, it is appropriate that the court consider not only the narrow issue of whether and how the respondents have complied with the orders of the court but the wider issues referred to above. When all of this is put into the balance the court in its discretion should refuse to award the respondents the costs referred to.

7. I now set out in summary and sample form some of the detail relied upon on affidavit by the applicant.

Examples of issues evidenced on affidavit.
8. The case made by the applicant is, broadly, that the original application would not have been necessary had the respondents complied with their legal obligations and that the affidavits show on the balance of probabilities that the respondents must have been aware that a substantial number of their customers were abusing the tax system by maintaining bogus non-resident accounts. It is suggested that the court by awarding costs of compliance with the court order would thereby be condoning these abuses.

9. Specifically the grounds upon which the foregoing case rests include: That the Public Accounts Committee of the Oireachtas ("PAC") found that deposit takers knowingly facilitated the practice (of operating bogus non-resident accounts for customers) and that this was specifically noted in respect of the Killarney branch of the first named respondent where this practice had been discovered by the their internal auditors who required mass reclassification of the accounts but this had continued notwithstanding such requirement. A decision by the internal auditor to abandon DIRT audits later was considered by PAC to be ill-judged and thought to be a contributory factor leading to the necessity of further reclassification of accounts.

10. A further point is that there were almost 6,500 non-resident accounts for which the respondents could not locate an appropriate declaration and a further 1,650 which should have been but were not redesignated, which information came to light following a

Revenue inspection. Particular emphasis is laid on defalcations in the Killarney branch which had been identified in the PAC report and had indeed been identified by the respondents' own internal auditor in his report. Criticism is made of the respondents to the effect that they failed to take prompt or sometimes any action following these recommendations and criticisms or that they did not follow up these reports with sufficient vigour. They simply accepted assurances given by the local managers and it took the court orders to procure, eventually, such compliance which revealed in turn that a substantial number of relevant accounts were bogus. Moreover, the Bank consistently defended the legitimacy of its customers' accounts and only conceded that they were non-compliant when the evidence was overwhelming.

11. Furthermore, their initial response to the court orders was merely to search for information on a systems basis which proved inadequate and it was only at the insistence of the applicant that a more focused approach was developed which in turn yielded useful information.

12. The foregoing is a sample only and without specific detail of the character of the averments which ground the general allegations on foot of which the applicant resists the respondents' entitlement to costs.

The response
13. Apart from fundamental legal issues which I will refer to later it can be said that the response in general is to trenchantly refute the allegations; to point to the fact that the vast majority of the 28,280 accounts which were dealt with pursuant to the court order involved account holders who did not have tax liability and were not bogus. It is said that many of the allegations made in a general way against the respondents were referable in fact to the operations of the Trustee Savings Bank which at the relevant time was indirectly owned by the State in that the dividends were paid to the Minister for Finance and were acquired by the respondents only after the relevant period. No distinction however, it is said, is made in order to eliminate alleged defalcations which were referable to the Trustee Savings Bank in respect of which the respondents could not in fairness be held responsible. It is said that the follow-up pursuant to information provided by the respondents was of significant benefit to the applicant in that it enabled the applicant to collect some €16 million in respect of tax arrears and penalties from the relevant account holders.

14. The respondents say that the applicant seeks to draw unfair inferences from the information relied on, for example the assertion by the applicant that "hardened tax payers" (being customers of the respondents) only came forward on a voluntary basis to make settlements with the applicant because of their fear that the financial institutions would reveal their identity and that this in turn could only have applied if the banks knew who they were. It is said that this is an unfair imputation of that knowledge to the respondents. The criticism of the judgment and professional opinion of the internal auditor is not, it is submitted, sufficient to justify an allegation of negligence or worse against the respondents.

The Killarney issue
15. This arises primarily it seems from the report of the PAC which found that the respondents' internal auditor's report in 1991 detected dubious paperwork supporting non-resident accounts. There followed an investigation which discovered a very large-scale operation of bogus non-resident accounts at the branch which was organised and abetted by the manager. The respondents' auditor insisted on a mass reclassification involving more than £5 million. After this, the manager complained to his Regional Manager that the branch had lost deposits, more than £1 million, through not being able to accommodate residents seeking to establish non-resident accounts. The internal auditor discovered that the branch continued to open bogus non-resident accounts after the inspection and reclassification. This led to further action by the internal auditor who responded strongly to the manager. The report says that Irish Life and Permanent plc, on legal advice, accepted that they were fixed with the knowledge of their branch manager even though he acted contrary to the practices and procedures of the institution and accordingly it subsequently engaged with the Revenue and ultimately settled.

16. All this appears from the report of the Controller and Auditor General who also refers to disciplinary action taken against the manager in that he was demoted to Assistant Branch Manager for six months, received a final written disciplinary warning and suffered a loss of increments. The position was reviewed at the end of six months, he says, by the internal auditor who found that virtually every non-resident account had been eliminated.

17. The applicant says that following a Revenue inspection the Bank was left with 6,423 non-resident accounts for which there was no declaration (they had obligations under the relevant code to be satisfied that the non-resident account status was genuine). Mr. Howard goes on to paint a picture of confusion, non-compliance or tardy compliance, resulting in added work ultimately for the respondents in complying with the court orders. None of this work he says, or certainly very little of it, would have been necessary had the Bank carried out its obligations in the first place.

18. The applicant refers to further reports of the internal auditor indicating similar problems at other branches leading to a conclusion that the same problems occur in every region and widespread abuse of non-resident accounts and failure on many occasions of managers to follow recommendations in respect of internal audit reports.

Legal Submissions of the Respondents
19. The respondents say they are entitled as a matter of law to be paid. The court should apply the well-established principle that if a party is required by another to perform work on behalf of that other (whether by court order or otherwise) then the first party is entitled to be paid for carrying out that work. That is a clear and unambiguous principle and has been so acknowledged by the High Court (per Murphy J.) in *J.B. O'C., Applicant v. P.C.D. and a Bank, Respondents* [1985] 185-265 at p. 275 where he said:-

> "As the affidavit sworn on behalf of the Bank in the present case clearly establishes, an order directing the provision of information in broad terms could involve the Bank concerned in time consuming research and it is clear – and indeed accepted by the applicant in the present case – that the proper costs of the financial institution in complying with an order must be borne by the revenue authorities."

This principle was not disturbed by the Supreme Court on appeal.

20. It is submitted that the principle applies unless there is a clear provision to the contrary in the statute which in turn should take account of any constitutional rights of the respondent financial institutions. Furthermore, the work done by those institutions in the present case conferred a very substantial benefit on the applicant where in the instant case some €16 million was recouped from taxpaying clients of the respondents (not being in respect of DIRT). The charge that the respondents were in delay or otherwise in default in complying with the court orders is overtaken by the fact that it is now accepted that there has been full compliance. Furthermore the order was complex and the institutions had to be careful when complying with it not to go beyond its terms in a way that would infringe its confidentiality obligations to its clients.

21. Whilst these institutions dispute the allegations that they were negligent or complicit with the clients who were evading their own obligations to pay tax, and the factual basis on which such allegations are based it is accepted by them that there was a failure to ensure compliance with the relevant provisions dealing with DIRT and in that context the law imposes upon the institutions themselves an obligation to pay the revenue in respect of the DIRT liability of its clients. This has been done and was the subject of a full and final settlement completed in 2001 and therefore any issues arising in connection with their clients' liability to pay this tax have all been dealt with and the applicant should not now seek to reopen these issues or to procure a further payment in respect or partly in respect thereof.

22. It is further submitted that the court does not have the wide discretion contended for by the applicant but rather a discretion only within the confines of s. 908 itself. The court should not be asked to adjudicate on issues between the parties which are outside the ambit of s. 908. They are, in fact, irrelevant.

23. Furthermore the procedure adopted is wholly unsuited to the resolving of hotly disputed factual issues given that they are the subject only of affidavit evidence with no cross examination. For the court to attempt to determine those issues in any way would be contrary to procedural principle. Again, the material sought to be relied upon by the applicant to defeat the respondents' right to costs has been selected from material furnished by them and is selective only. It is sought to induce the court to draw inferences and conclusions from such material, some of which could not have been known or accessed by the respondents at all. Such a procedure entails a fundamental breach of fair procedures.

24. It would be unfair if, for example, knowledge in the possession of an employee of a branch of the respondents were to be imputed in the present context to the respondent itself in the absence of any evidence that this knowledge constituted the directing mind and will of the respondent. Moreover there is a separate provision in the Tax Consolidation Acts, available to the applicant whereby the applicants can recoup from the respondents any tax with interest and penalties and this has been done in the present case. It would be contrary to principle to impose upon the respondents an additional cost to them for their compliance with a court order: moreover, such an imposition would tend to undermine the tax code and the objectives of s. 908.

25. The contention or suggestion that the respondents were complicit with defaulting client taxpayers is entirely refuted and quite unjustified. Moreover, it is based on only a selection from the entire of the relevant material.

26. Furthermore there is no attempt to quantify the suggestion that the costs of complying with the order would have been a fraction of what they actually were had the respondents kept proper records. Indeed much of the information furnished related to compliant taxpayers and this has been acknowledged by the applicant.

27. Section 908, comprises a self-contained procedure for the benefit of the applicant which is invasive of the rights of the respondents and their clients and has involved cost and expense by the respondents. The information provided was used by the applicant to collect tax liabilities in respect of the monies in the respondents' clients' accounts which had nothing to do with direct interest retention tax at all but related to the obligations to those taxpayers under other provisions of the tax code. A considerable benefit was therefore conferred upon the applicant and it would be unfair alone on this basis to penalise the respondents for complying with the order. The attitude of the applicant in the present motion is that the respondent should be paid nothing – not a penny – in respect of the work done, notwithstanding the uncontroverted fact that the vast majority of the information provided related to the affairs of compliant taxpayers.

28. There is nothing, therefore, either in s. 908 itself or indeed on the facts of the case (which include a settlement by the respondents of its own liabilities under the tax code in respect of the DIRT obligations of its clients) which would justify the court in departing from the clear and well established principle that the respondents should be paid their costs of complying with the court order; even if this could be done, however, in a case where the facts are hotly disputed and where the only evidence before the court is provided by affidavit without cross examination, it would be contrary to all procedural principle to do it.

Conclusions

29. I accept that it is an established principle that where a party carries out work at the behest and for the benefit of another the first should be paid the costs and expenses of carrying out that work. This principle applies regardless of whether the work is carried out pursuant to a court order, as here, or otherwise.

30. Secondly it appears that the work required to be carried out pursuant to the court orders in this case is more than the respondents would be required to do under the tax code, albeit that a significant dispute exists as to how much of the extra work would have had to have been done had the respondents fully complied with their obligations under the tax code in the first place.

31. Thirdly I accept that in light of the principle referred to above, it would require some clear, if not unambiguous, counter-principle (whether by way of statutory provision or otherwise) to displace its application. Accordingly I turn to consider a number of issues in this context which arose in the course of the submissions.

32. In the first place is there anything in s. 908, itself which assists?

33. The section is silent as to the costs unless subsection (5) (which refers to the attaching of proper conditions to the order) is intended to deal with them. Even if this is the case, however, in my opinion there is nothing in s. 908 itself which is sufficiently clear cut (not to say unambiguous) to displace the application of the principle already referred to.

34. Mr. Aston for the applicant submits that the court has a full and unfettered discretion in the ordinary way pursuant to the Rules of the Superior Courts. Mr. Gallagher submits, on the contrary, that the court's jurisdiction in relation to costs must be construed by reference to the purpose of s. 908 itself – and he refers to the well known principle established in *East Donegal Marts Co-Operative Limited v. Attorney General* [1970] I.R. 317.

35. In the course of submissions it was made clear that the instant application was made in a hurry and that the parties by agreement adjourned the issue of costs to a later date. I was also told that usually costs are awarded to the respondents at the time of making of the order itself – that is before the character of the respondent's "housekeeping" can be seen from the quality of the information produced on foot of the order. In the present case, of course, the applicant had a considerable amount of advance information, and was in a position to take a strong line with the respondents at the time of the application for the order, indicating a stance which was subsequently elaborated in affidavit and argument before me.

36. Section 908, finds itself in a code which is replete with a multiplicity of powers available to the applicant whereby to ensure that potential taxpayers comply with the law. It exists for a specific purpose, namely, to provide an effective method of unearthing

information relevant to the tax liability, not primarily of the respondent, but of the clients of the respondents. It involves an intrusion on the rights of both of these, whereby work for the public benefit is carried out by a private institution. It is important, I think, that the remedy be kept effective and available if necessary on a swift and non-controversial basis. The instant applications were urgent at the time they were made and the present respondents agreed to have the issue of costs deferred.

37. It seems to me that having regard to the specific purpose of s. 908, and also having regard to the statutory context in which it finds itself which includes many other powers available to the applicant and specifically and relevantly a power which in effect makes the respondent liable for the direct interest retention tax obligations of its clients in the present circumstances – a liability which was paid by way of full and final settlement - the true construction of s. 908, is that it is not intended to enlarge those other powers and accordingly that the discretion of the court in relation to awarding these costs is a discretion referable only to the four corners of s. 908, and not to other collateral issues outside it. In practise the discretion would enable the court to consider such matters as whether there was or was not compliance with the order. I reach this conclusion in addition to the other reasons stated herein because I think it is important that the power available under s. 908 should not be itself fettered or clogged by issues which might interfere with its effectiveness in any given case.

38. I also consider that had it been the intention of the legislature that matters such as are prayed in aid by the applicant on this application should indeed be relevant to the court's jurisdiction on a s. 908 costs application one surely would have found something in s. 908 itself to indicate this. I will, later, be dealing with the difficulties which have arisen for both sides in processing the instant application on the assumption that the court is at large in exercising its discretion. In principle, however, one surely would expect such difficulties of procedure as have arisen in this case and as are detailed below to have, at least in principle, been anticipated and provided for by s. 908. No such help is to be found in the section and my conclusion is that the clear principle enunciated and acknowledged by Murphy J. in the case already referred to, was assumed to apply.

39. I am told not only that this is the basis upon which less controversial or non-controversial orders are made but also that an order for costs was made in favour of a financial institution involved in what has come to known as the "Ansbacher" scandal, notwithstanding that the institution in question had an established policy of assisting its clients to evade tax. I do not rest my judgment on this anecdotal allusion. However, if true, it does seem to me consistent with the inherently pragmatic nature of the tax code and with a view that s. 908 thereof is to be interpreted and applied in a way that ensures that its purpose is carried out effectively, efficiently, swiftly and with as little potential controversy as possible.

40. My view, therefore, is that the issues now relied upon by the applicant which are extraneous, so to speak, to the operation of s. 908 itself, are not appropriate for determination in that context but rather in the context of other procedures available to the applicant.

41. The difficulty of deciding hotly contested factual matters on affidavit without cross examination or the benefit of oral evidence are apparent: if s. 908, were to be construed so as to provide effectively for plenary proceedings with potentially the full panoply of procedural and evidential remedies available its effectiveness could be trammelled and become bogged down in collateral and ancillary matters much more appropriately dealt with in other proceedings.

42. In the present case further allegations were made, of course, to the effect that the respondents were in delay or ineffective in complying with the orders of the court and indeed a number of applications had to be made to extend the time for compliance. However the end position is that it is now accepted that there was full compliance and in those circumstances it seems to me that the respondents are entitled to their costs (and expenses) of complying with the orders of the court together with the costs of appearing in court when those orders were made.

The Alternative View

43. It is of course quite possible that I am incorrect in my foregoing conclusion, and that Mr. Aston is correct, contrary to my own view, in saying that the court is indeed at large with a full and wide discretion to take into account all the collateral matters upon which the applicant now seeks to rely in order to defeat the respondents' right to be paid for complying with the orders. I intend, accordingly, briefly to consider the position on the assumption that I am incorrect in my primary conclusion.

44. There are substantial affidavits and exhibits in the case and a deep and fundamental conflict of fact. There has been no cross examination and there is no oral evidence. At the outset of this part of my judgment, I wish first to face head on the proposition that assuming a strong prima facie case can be made that the respondents have been negligent or even complicit with their customers in defeating the proper operation of the tax law and assuming that the court can take all of this into account, should not the court in these circumstances make an order the effect of which would be to impose the burden of compliance upon the recalcitrant and erroneous respondent rather than upon the innocent taxpayer? Even so couched, it seems to me that there are a number of difficulties in reaching a conclusion to that effect.

45. In the first place, as I have already indicated, other remedies are available to the applicant which are more suited to the resolution of factual disputes than an application on a motion grounded on affidavit without cross examination or oral evidence. Indeed, it is a breach of a fundamental principle of fair procedures that a court would decide a deeply relevant factual conflict without cross examination.

46. Secondly there are the specific difficulties, already referred to, if I were to take on board, so to speak, the case made on affidavit on behalf of the applicant in the present case. Thirdly it appears that a significant proportion of the information furnished in the case related to compliant taxpayers so that the notorious dangers of applying a "broad brush" approach apply in the present case; and fourthly there has been no attempt to identify how much of the costs of compliance can be related to the alleged defalcations of the respondents so as to enable the court to distinguish between those costs which (on the applicant's argument) ought not to be paid and those which ought. Indeed counsel for the applicant acknowledged that there would be an element of "rough justice" in refusing the respondents their costs, although he submitted that it would not be very rough in the present case.

47. Quite apart from the foregoing it is also clear that the evidence furnished pursuant to these orders was of significant value to the applicant who collected in excess of €16 million from the clients of the respondents on foot of their tax liabilities which were independent of any DIRT liability.

48. Having regard to the foregoing conclusions, therefore, my view is that even if I am incorrect in my initial opinion and I should now exercise a wide and full discretion, I should nonetheless award the respondents their costs because to decline to do so would be to accept an allegation of fraud and, in effect, conspiracy to defraud the Revenue which is hotly contested and made out only on a *prima facie* basis, without the benefit of cross-examination, and which relies on evidence which is only partial. The courts have repeatedly insisted that allegations of serious wrongdoing such as fraud or worse must be established with great particularity and

specificity so that the court can be firmly convinced that the allegations are true. No matter how convincing a prima facie case may appear to be my view is that the comprehensive proofs repeatedly insisted upon by the courts are those which the courts would require in the present case if it were to displace the clear principle that the respondents are entitled to be paid their costs of compliance with the orders of the court. Accordingly, even upon the basis that my discretion is as contended for by Mr. Aston, I would have to conclude that the respondents are entitled to the costs they seek.