

THE HIGH COURT

[2012 No. 485 R.]

BETWEEN

GERARD HARRAHILL

PLAINTIFF

AND

ANN O'DONNELL

DEFENDENT

JUDGMENT of Mr. Justice Eagar delivered on the 25th day of July, 2017

1. This is a judgment on an application by the plaintiff to enter final judgment in the sum of €161,433.19 together with further interest on the principle sum of €117,600.40 at the statutory rate of 0.0219% for each day or part of day in relation to Capital Gains Tax from the 22nd of May, 2012.

2. The application was grounded on an affidavit of Sheila Condon who states that she is an officer of the Revenue Commissioners and sets out the amount of the claim. She says the plaintiff's claim is for arrears of tax and interest on foot of a return duly made which return has become final and conclusion within the meaning of the Tax Acts. She also states that the defendant has no defence to these proceedings either in law or on the merits of the case.

3. The affidavit of Ann O'Donnell sworn on the 27th of February, 2014 states that the background of the alleged tax liability is that she entered into a contract to sell shares in a company called K&F Sarolla Teoranta to Kilmac Formwork Ltd. The said sale was completed in or around September 2007. Under the terms of the sale a total consideration of €735,000.00 were to be paid for the shares of which she was to receive €612,500.00 which reflected her shareholding in the company and the balance of €122,500.00 were received by her children in respect of their shareholding in the agreement. She said that on the signing of the share sale agreement she was paid €235,000.00 and her children were paid the sum of €122,500.00 out of the €235,000.00 which was full consideration for their shareholding.

4. She said that her understanding of the taxation situation is as follows:-

(1) Her children have fully discharged their Capital Gains Tax (CGT) liability.

(2) She says in relation to her own CGT liability, the CGT liability was initially calculated based on the maximum consideration due notwithstanding that the sum of €500,000.00 remained outstanding. That is €735,000.00 minus €235,000.00. She said she never received the sum of €500,000.00 as the purchaser claimed that significant additional costs were incurred in relation to the lands which the company owned and which could have been claimed under the warranties/indemnity including in the share agreement.

(3) In any event Kilmac Formworks Ltd. went into Receivership with effect from the 12th of January, 2012 and it is now clear that the balance of consideration will never be received by her.

She says that as a result of the above and the fact that the consideration is not going to be received her accountant has informed her that her assessment should be amended under s. 959AA(2)(c). In that regard, an amended computation of the actual consideration received by her resulted in a CGT liability of €21,454.00.

5. She says she has now submitted a revised tax return for the year 2007 along with supporting computation to the Office of the Revenue Commissioners. She says that she has a good defence in law and on the merits.

6. The supplemental affidavit of Mary Hughes sworn on the 30th of April, 2014 indicates that she is an officer of the Revenue Commissioners, she states that having read the Share Sale Purchase Agreement provided by the defendant it appeared to be a contract to sell shares in a company K&F Sarolla Teoranta to Kilmac Formwork Ltd. for consideration of €735,000.00. The agreement was dated and she understands that the sale was completed on or about the 14th of September, 2007 and she says the agreement also fails to purport on a consideration between the defendant and her children and simply states that the consideration is of €735,000.00.

7. She says that the CG58 Form exhibited is not used for the calculation of tax nor is it a return for CGT purposes. A CG58 Form is a Capital Gains Tax clearance certificate issued by the Revenue Commissioners in circumstances where the consideration in a transaction exceeds €500,000.00. This certificate merely allows a purchaser to pay consideration without the deducting of tax. She says that in correspondence dated the 11th of October, 2007 which she exhibits. The defendant's agent confirms that the defendant's consideration of further transaction between K&F Sarolla Teoranta to Kilmac Formwork Ltd. was €612,500.00 given rise to a total CGT liability of €117,700.19. She said the notice of assessment to CGT issued to the defendant on the 28th of November, 2011 and is based on the amounts contained in this computation submitted to the Revenue Commissioners on behalf of the defendant. She says that in her affidavit the defendant avers that she never received the balance of €500,000.00 from the purchaser Kilmac Formwork Ltd. due to issues that arose which allegedly could have been claimed under the warranties/indemnities provision of the Share Purchase Agreement. Ms. Hughes says that having reviewed this agreement, these warranties/indemnities provisions expired two years after the agreement was signed in or around September 2009, yet it appears that these alleged issues were not pursued by the purchaser within that time.

8. The defendant states that she is now unlikely to recover any monies from the company as it went into receivership on or about the 12th of January, 2012, but she says the receivership of Kilmac Formwork Ltd. is entirely unconnected to these proceedings and the defendant's outstanding tax liability.

9. The defendant also avers to advice given to her by her accountant in relation to amending an assessment under s. 959AA(2)(c) of the Taxes Consolidation Act 1997. She says that this amendment would adjust her capital gains liability to €21,454.00. Ms. Hughes says that this section is ineffective in the present circumstances. Section 959AA(2)(c) refers to the time limit for the making and amending assessments by reference to when a return was delivered. She says that a purported and later return for the defendant's

2007 Capital Gains Tax was only made on the 21st of February, 2014 after these proceedings were issued and she confirms that this did not displace the notice of assessment dated the 28th of December, 2011 which states that the defendants Capital Gains Tax liability to be €117,700.19. She says that under s. 945 of the Taxes Consolidation Act 1997, an agreed person has thirty days from the date of the notice of assessment to appeal or assessment to the Appeal Commissioners.

10. For clarity she says that the notice of assessment underlines these proceedings in the amount of €117,700.19 was issued to the defendant on the 28th of December, 2011. She confirmed that no appeal against the assessment was made by or on behalf of the defendant within the time limits prescribed or at all and accordingly the assessment has become final and conclusive pursuant to the provisions of the Tax Consolidation Act 1997.

11. She says that provision is made under s. 563(b)(1) of the Taxes Consolidation Act 1997 to apply for an adjustment of CGT where a person proves to the inspector that any part of the postponed consideration has become irrecoverable. In the present case, the defendant has failed to establish that any part of the consideration is either owned or has become irrecoverable. She says that the defendant had failed to show that any legal steps were taken against Kilmac Formwork Ltd. to recover the outstanding consideration since the date of sale in September 2007 as would have occurred in an arm's length transaction.

12. She says that the inspector cannot amend the notice of assessment and it remains final and conclusive.

13. The supplemental affidavit of Ann O'Donnell as sworn on the 26th of June, 2014. She first of all apologies for what she realises is a completely false statement in para. 6 of her first affidavit, it is that the significant additional costs that Kilmac Formwork Ltd. incurred following its purchase of her shareholding at K&F Sarolla Teoranta could have been claimed under the warranties/indemnities including in the share purchase and sale agreement.

14. She says that the additional costs and expenditure that Kilmac Formwork Ltd. incurred related to a dispute with Pat Clinton the owner of the adjoining nursing home in relation to the decision in extent of the sewage system serving his first nursing home located on the property of K&F Sarolla Teoranta and in respect of which K&F Sarolla Teoranta had granted Mr. Clinton an easement. Details of Mr. Clinton's easement were fully disclosed by her solicitors to the purchasers for the purchasing of her company prior to completion of sale.

15. She says and believes and is advised that whatever additional costs and expenditure Kilmac Formwork Ltd. incurred in its dispute and resulting High Court litigation with Mr. Clinton could not have been claimed under any warranties or indemnities including the shares, sales and purchase agreement. She said that whatever may have been the view of Kilmac Formwork Ltd. neither that company nor its managing director, her son, John O'Donnell or Messrs. Gibson and Associates ever claimed or even suggested to her or to her solicitors that there had been any failure, disclosure on her part in relation to Mr. Clinton's easement or that they could have claimed against her under the warranties/indemnities included in the share agreement.

16. When the plaintiff instituted these proceedings she considered that it was incumbent upon her son to sort out the difficulty on her behalf and if necessary to procure and pay to the cost of legal representation for her. Her son decided to engage on her behalf Messrs. Gibson and Associates who had acted for him and for the Kilmac Formwork Ltd. in relation to the purchase of my children's shareholding in K&F Sarolla Teoranta in 2007.

17. She says she now appreciates that Messrs. Gibson and Associates may have had a conflict of interest in acting for her in these proceedings having acted for Kilmac Formwork Ltd. and her son in the purchase of the shareholding and subsequently and taken her instructions in the matter of the proceedings from her son.

18. When the conflict of interest was drawn to her attention and explained to her by Messrs. Quinn, Dillon and Company she decided to dispense with the services of Messrs. Gibson and Associates and to engage Messrs. Quinn, Dillon and Company on her behalf in the defence of these proceedings.

19. She referred in her affidavit to Mary Hughes's affidavit and says that when the letter of the 11th of October, 2007 was written by her solicitors at a time when they and she expected that she would receive the unpaid balance of €500,000.00 on foot of the purchase price for her shareholding in K&F Sarolla Teoranta on which unpaid balance or any part thereof she has never received and has long accepted that she will never receive.

20. She says it was on foot of this computation enclosed with that letter that the Inspector of Taxes issued his notice of assessment on the 28th of December, 2011, notwithstanding that she has still not then received the said outstanding balance of the consideration or part of it.

21. She says that Ms. Hughes's affidavit seeks to dismiss the defendant's belief that she will not recover the outstanding balance from Kilmac Formwork Ltd. as completely speculation. She says that in this regard the plaintiff takes no account of the realities of the situation to the best of her knowledge and believe all assets in Kilmac Formwork Ltd. have been and are being implied towards a satisfaction of that company's liabilities to its bank and to the best of her knowledge and believe there will be nothing available or remaining of that company's assets following the completion of the receivership from which any further payment could be made.

22. She says that it is almost seven years since she sold to that company her shareholding in K&F Sarolla Teoranta and since the said outstanding balance fell due. She says that any right of action she would have had against that company in respect of the outstanding debt is now statute barred. She further says the institution of proceedings against that company within the first year following the completion of the sale of her shareholding would have served no useful purpose as it became apparent to her by the end of 2007 that the company was in financial difficulty and already owed very substantial monies to its bank and it would not be in a position to discharge the outstanding balance unless and until it succeeded in sending units of its development on the lands at Magheradrummond, Milford, which site was the property of K&F Sarolla Teoranta.

23. She says that she continued to hope that whenever Kilmac Formwork Ltd. had resolved its dispute with Mr. Clinton it might then be in a position to proceed with this development and then be in a position to discharge to her all or some of the outstanding balance of €500,000.00.

24. With regard to para. 7 of Ms. Hughes affidavit she says that the notice of assessment of the 28th of November, 2011 was based on the CGT computation enclosed with a solicitor's letter of the 11th of October, 2007 to the Inspector of Taxes. She believed that Kilmac Formwork Ltd. would provide her with a bank draft payable to the Revenue Commissioners in the sum of €117,720.00 to cover CGT liability of the disposal of her shareholding by the CGT deadline at the end of October 2007. That on or about early September 2007, her son explained to her that his company would not be in a position to pay the full agreed purchase price of €735,000.00 in

one sum on completion and could only pay €235,000.00 of that amount at that stage and would pay the outstanding balance of €500,000.00 during the December 2007 and no later than 31st of December 2007.

25. She accepted his assurances regarding the outstanding balances and informed Mr. Carl Quinn of Quinn, Dillon solicitors on the 13th of September, 2007. She said she never at any stage agreed with her son John or with his company that the said outstanding balance be treated as a loan and she says that her solicitors made this clear to Mr. Gibson solicitor by letter dated the 25th of September, 2007 in which they confirmed their first knowledge that I had agreed to permit the purchasers company to defer payment of €500,000.00 on the purchase price was when they received a telephone call from Mr. Gibson on the 12th of September, 2007 in which they also stated:-

"We should make it clear that the arrangement between our respective clients for deferred payment of the outstanding balance until December next is not and never was intended to amount to a loan, but simply an arrangement for deferred payment until December next. Ms. O'Donnell agreed to this strictly subject to the outstanding balance being discharged by the 31st of December, 2007 at the latest. The Capital Gains Tax will have to be paid by the 31st of October, 2007 in respect of the full amount of the sale price and not just the part payment already received of €235,000.00. The accountants are at present working on the Capital Gains Tax computation. Our clients concern is to avoid unnecessary penalties and interest and ensure that the tax is paid before the due date of the 31st of October next."

26. She also stated by letter of the 11th of October, 2007, her solicitors had informed Messrs. Gibson and Kelly solicitors that her accountants had computed her CGT liability on her share of the agreed consideration of €117,720.00 and reminded them that their client had agreed with her that he would discharge her CGT liability on her behalf or put her solicitors in funds to do so in good time before the 31st of October deadline. She says that on the morning of the 31st of October, 2007 her solicitor Cathal Quinn telephoned Mr. Gibson solicitor and reminded him that that date was the deadline date for payment of her CGT liability.

27. Mr. Quinn telephoned her on the same day and informed her that Mr. Gibson had told him he had neither been put in funds nor had received any recent instructions with regard to the discharge of her CGT liability or in relation to the discharge of the outstanding balance. She decided to let the matter rest until the end of December in the hope that the promises that she had been made in September, that the balance purchase money would be paid to her by the end of December might yet be fulfilled.

28. She informed Mr. Quinn in January 2008 that she had not received any part of the outstanding balance of €500,000.00 by the end of December 2007 and by letter of the 9th of January, 2008 Mr. Quinn wrote again to Mr. Gibson and reminded him that it was in consideration of the client's promise made to her the previous September that she had consented to his request that he be permitted until the 31st of December to discharge the outstanding balance of the sale price less the CGT amount that her son John had promised her would be paid by the CGT deadline date of 31st of October, 2007.

29. She said that from the items of correspondence which she exhibited in her email she and her solicitors persisted in their efforts to compel Kilmac Formwork Ltd. to discharge as a first priority her CGT liability on the outstanding balance of the consideration and as much as possible of that balance throughout the period from October 2007 until at least June 2011 but that their effort was to no avail and no further payment whatever was received on account of the balance purchase monies. She says for all those reasons the notice of assessment for the Year 2007 should not be considered final and conclusive.

30. In the course of this affidavit they are exhibited a letter from John Curran, Principal Officer of the Revenue Commissioners which is addressed to Michael Meehan of Quinn Meehan and Company, The Diamond Centre, Donegal Town, Co. Donegal dated the 31st of March, 2014. Wherein the following appears by way of background:-

"K&F Sarolla Teoranta was a long established trading company. The entire shareholding of the company was sold by unconditional contract for €735,000.00 by Ann O'Donnell and her six children to Kilmac Formwork Ltd. the company controlled by Ann O'Donnell's son John. Ann O'Donnell owned one share and had become entitled to 2/3rds of the other shares arising on the intestacy of her late husband. Their six children became similarly entitled to the other 1/3rd. The sale proceeds therefore fell to be shared 5/6th to Ann O'Donnell (€612,500.00) and 1/6th to the children (€122,500.00). A payment of €235,000.00 appeared to have been paid by the purchaser at the time of signing the contract by both parties.

In their correspondence of the 11th of October, 2007 Quinn, Dillon and Company solicitors enclosed a cheque payment in discharge of the CGT liabilities of Siobhan, Danny, Michelle, Mairead and Niall O'Donnell. The solicitors stated that they expected to receive a bank draft payable to the Revenue Commissioners in the sum of €117,720.00 in respect of Ann O'Donnell's CGT liability shortly.

No payment was received from Ann O'Donnell in respect of her liabilities so the Revenue wrote to the solicitors on the 28th of July, 2010 requesting payment with interest, there was no reply."

31. He finishes the correspondence by saying:-

"I know you appreciate that assessments which have become final and conclusive under the statutory provisions may not be amended without due reason in accordance with the Taxes Consolidation Act, 1997 ... The CGT liability is being enforced by the Collector General."

32. The Supreme Court held unanimously in the case of *Deighan v. Hearne and Others* [1991] I.R. 499:-

"That the exercise by the Inspector of Taxes of the powers vested in him by the then Income Tax Act of 1967 to make an assessment in default of return and by the Collector General of the power vested in him to issue a certificate to a sheriff, did not constitute an administration of justice in breach of Article 34 of the Constitution as (a) they do not impose a binding liability on the taxpayer, (b) there is not a justiciable controversy between the taxpayer and the Revenue Commissioners or Collector General to issue a certificate to a sheriff, does not constitute an administration of justice in breach of Article 34 of the Constitution."

A notice of assessment to Capital Gains Tax was issued to the defendant in this case on the 28th of September, 2011 and this was based on the amounts contained in the computation submitted to the Revenue Commissioners on behalf of the defendant.

33. The Taxes Consolidation Act, s. 945(1) provides:-

"(1) A person aggrieved by any assessment under the Capital Gains Tax Acts made on the person by the inspector or other officer mentioned in section 931 (1) shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer, and in default of notice of appeal by a person to whom notice of assessment has been given the assessment made on such person shall be final and conclusive."

It is clear that the notice of assessment by the Revenue Commissioners was issued to the defendant on 28th November, 2011. No appeal against the assessment was made on behalf of the defendant within the time and, therefore, the assessment had become final and conclusive pursuant to the provisions of the Taxes Consolidation Act 1997.

34. The court accepts and is bound by the principle of the Supreme Court in *Deighan v. Hearne and Others* [1991] I.R. 499 in that the Inspector of Taxes has a power vested in him to make an assessment and if the Inspector raises an assessment and the applicant does not appeal within time the only way the court could interfere to set aside or vary the assessment otherwise than under the procedure provided by the Income Tax Acts would be if it were established that either the procedure carried out was *ultra vires* the statutory provisions or that one or other of those statutory provisions was invalid, having regard to the provisions of the Constitution.

35. It seems clear to the court that the valid assessment had been made by the plaintiff and this assessment was not appealed by the defendant. In those circumstances, it appears that no valid defence can be raised in this court as to summary judgment save for where there are judicial review proceedings.

36. In the circumstances of this case, the court is of the view that no valid defence has been raised by the defendant and the plaintiff is entitled to judgment in the sum of €161,433.19.