Neutral Citation Number: [2009] IEHC 322

THE HIGH COURT

REVENUE

COMMERCIAL

2009 324 R

BETWEEN

GERARD HARRAHILL

PLAINTIFF

AND

PAURAIG KANE

DEFENDANT

THE HIGH COURT

2009 325 R

BETWEEN

GERARD HARRAHILL

PLAINTIFF

AND

JOHN KANE

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 3rd day of July, 2009

Introduction
The plaintiff in each of these cases is the Collector General of Revenue and is duly authorised to collect tax for and on behalf of the Minister for Finance for the benefit of the Central Fund.

On 3rd April, 2009, these proceedings were commenced against each of the defendants. In the case of the defendant, Pauraig Kane, a sum of €5,271,004.07 is alleged to be due in respect of arrears of Value Added Tax and interest. In the case of the defendant, John Kane, a sum of €4,941,997.52 is alleged to be due also in respect of Value Added Tax and interest.

The proceedings were transferred to the Commercial List on 25th May, 2009 and the plaintiff's application for summary judgment as against the defendants was fixed for hearing on 11th June, 2009. In the event, that application was adjourned and came on for hearing on Friday last the 26th June, 2009.

This is my judgment on the plaintiff's application for summary judgment.

Background
As far as the Revenue Commissioners are concerned there is a considerable history of unsatisfactory behaviour on the part of the defendants concerning their tax affairs.

The defendants' motor sales business commenced in 2000. They claim to be one of Irelands 4 X 4 specialists with what is described *as "very significant numbers of used and unused vehicles in stock".*

In 2004, the Revenue Commissioners commenced an investigation into separate sole trade businesses operated by the defendants at premises in Barrack Street, Granard, Co. Longford. The separate business of Pauraig Kane was operated under the style of Granard Motors. The separate business of John Kane was operated under the styles of John Kane and Kanes of Granard.

The Revenue investigation was undertaken because of concerns that there were serious VAT and other tax irregularities in the operation of the businesses of Granard Motors and Kanes of Granard. The main concern was that the business had substantial sales of commercial jeeps (which they had converted from passenger vehicles) to persons who are registered for VAT in this jurisdiction and which were being incorrectly recorded as intra community acquisitions. As part of the investigation, search warrants were obtained and the premises were searched in December 2004. Extensive documentation was seized and as a result of the examination of it, assessments on the defendant Pauraig Kane for Value Added Tax were raised. The Revenue Commissioners took the view that the defendant Pauraig Kane had liabilities in excess of €3,300,000 for VAT in respect of the years 2000 – 2004, which included a large sum which they believed had been understated on the statutory VAT returns. In the case of John Kane, the Revenue Commissioners formed the view

that sales of certain goods were not recorded nor was VAT accounted for on those sales. They estimated that the VAT element of undisclosed sales of tractors and machinery was in excess of €127,000 for 2003 and in excess of €144,000 for 2004.

The Revenue Commissioners were satisfied that there were undisclosed sales invoices in the case of both defendants.

There were many other elements of the defendants' fiscal arrangements with which the Revenue Commissioners were deeply dissatisfied but it is not necessary to recite them in any detail for the purposes of this ruling.

It is sufficient to record that the assessments which led to these proceedings were raised under the relevant statutory provisions and this judgment is largely concerned with what happened subsequent to the raising of those assessments.

Steps since Assessment
The assessments in question were raised on the basis of the information obtained following the investigations which I have already alluded to. In the case of each defendant, the assessments were subject to an appeal. The defendants at all material times were represented by Mr. Paul Madden Solicitor.

The appeals first came before an Appeal Commissioner on 12th June, 2008. At that hearing, a number of complaints were made by the Revenue Commissioners. The principal complaint was that numerous letters issued by the Revenue Commissioners between April 2005 and early 2007 seeking information from the defendants arising from an examination of the records obtained on foot of the warrants in December 2004 had not been replied to. On that hearing, the Appeal Commissioner indicated that he would issue precepts pursuant to the powers invested in him by s. 935 of the Taxes Consolidation Act 1997. On 15th July, 2008, the Appeal Commissioner duly issued the precepts requiring the defendants to provide information as specified in them. He fixed 21st September, 2008 as the date by which the information would have to be furnished.

It is common case that the precepts issued by the Appeal Commissioner were not obeyed by either defendant.

The matter came before the Appeal Commissioner again on 6th November, 2008.

Mr. Paul Madden on behalf of the defendants sought an adjournment of the hearing and that was granted on his undertaking that he would make written legal submissions to the Commissioner no later than 8th December, 2008. Those legal submissions were to deal with the provisions of s. 933(6)(c)(ii)(II)(C), of the Taxes Consolidation Act 1997, which deals with dismissal of appeals in the event of non-compliance with a precept issued by an Appeal Commissioner. In the event, no submissions were made by Mr. Madden by 8th December, 2008 or at all.

The Appeal Commissioner then notified the defendants and the Revenue Commissioners that the appeal hearing would resume on 25th February, 2009.

On 13th January, 2009, Mr. Madden wrote to the Revenue Solicitor requesting a meeting which took place on 5th February, 2009. In a letter of 18th February, 2009, the Revenue Commissioners indicated that having considered all matters, they were not prepared to make any reduction in the assessments. A further discussion took place between Mr. Madden and officials in the Office of the Revenue Solicitor who again confirmed the position of the Revenue Commissioners concerning the quantum of the assessments.

On 24th February, 2009, Mr. Madden wrote the following letter to the Revenue Commissioners:-

> *"Re: Appeals Against Valued Added Tax Assessments*
> (a) John Kane PPS No. 6791330P
>
> (b) Pauraig Kane PPS No. 5157523F
>
> *Dear Sirs*
>
> *We refer to the above which as you are aware is due to commence rehearing before Appeal Commissioner O'Callaghan on Wednesday 25th February, 2009 at the Ballymascallion (sic) Hotel, Dundalk.*
>
> *In this regard and in compliance with section 933(3)(d) Taxes Consolidation Act, 1997, we now give formal notice that the above appellants, John Kane and Pauraig Kane desire not to proceed with their appeals against the assessments to which the aforementioned appeals relate.*
>
> *If you require anything further in relation to this matter, please do not hesitate to contact our offices.*
>
> *Yours faithfully*
>
> *Paul Madden and Company Solicitors."*

The Revenue Commissioners are of the view that pursuant to s. 933(3)(d) of the Taxes Consolidation Act 1997, withdrawal of an appeal is the same as an agreement in writing that the assessment is to stand good. Accordingly, they instituted these proceedings on 3rd April, 2009.

Later events
Even before the cases were transferred to the Commercial List, the plaintiff on 20th May, 2009 applied to me for a *mareva* injunction against each of the defendants and also for an order restraining motor vehicles located at the premises known as Kane's of Granard from being removed from the State or disposed of or transferred. Two days later on Friday, 22nd May, 2009 on the basis of affidavit evidence put before me, I was satisfied that the plaintiff's position was not sufficiently secured by the existence of the injunctions and accordingly I appointed William G. O'Riordan as receiver and manager over the assets of the defendants with specified powers which are contained in the relevant orders.

It goes without saying that I would not have been prepared to grant those orders unless I was satisfied that there was evidence of misbehaviour on the part of the defendants warranting their grant. That misbehaviour alleged against the defendants arose from:

(a) the conduct of the appeal to the Appeals Commissioner which was dragged out over a period of time and at the same time the defendant Pauraig Kane set up a limited liability company;

(b) that just prior to withdrawing his appeal Pauraig Kane set up Prestige 4 x 4 Specialists. It is the belief of the Revenue Commissioners that that was done with a view to taking over the business formerly carried on by the defendant;

(c) the long history of deliberately concealing and falsifying books and records for the purpose of avoiding obligations to the Revenue Commissioners. This included the keeping of two sets of accounts, one for the Revenue Commissioners and the other for the defendant's own purposes;

(d) the fact that the defendant John Kane has not prepared any income tax returns since 2004. The defendant Pauraig Kane has not prepared any income tax returns for 2005, 2006 and 2007;

(e) that each defendant failed, despite requests, to furnish income tax returns for those years;

(f) the failure by the defendants to prepare and submit a statement of affairs despite an obligation to do so;

(g) the results of the Revenue investigation which demonstrated that the defendant, John Kane, had filed false VAT returns which understated his liability for over €3 million. His income tax returns for the years in question are also false;

(h) that the defendant, Pauraig Kane, was convicted of various VRT offences and misuse of a VAT number in 1999 and 2000.

The above is but a summary of some of the evidence which was placed before me dealing quite extensively with the alleged wrongdoing of the defendants.

The *mareva* injunctions have continued in force with the defendants' consent, subject to a number of variations so as to enable wages and living expenses to be paid along with a contribution to legal costs. The receiver has likewise remained in office.

The motion for summary judgment
The motion for summary judgment came on for hearing on the 25th May, 2009. On that occasion each of the defendants swore affidavits dated that date. It is not necessary to repeat much of the material contained in these affidavits save the specific averment made by each defendant that they had instructed their solicitor to formally withdraw the appeals before the Appeal Commissioners and that that was done in writing on the 24th February, 2009.

The affidavits also sought an adjournment of the motions so as to obtain legal advice with a view to mounting a challenge to the constitutionality of certain of the provisions of the Taxes Consolidation Act of 1997.

I granted the adjournment and the matter was stood over to the 11th June, 2009.

Finlay Geoghegan J. dealt with the matter on the 11th June, 2009, at which stage draft proceedings contesting the constitutionality of certain provisions of the Taxes Consolidation Act 1997 were produced and the matter was further adjourned to the 26th June, 2009.

On the 26th June, 2009 the defendants were represented by a new firm of solicitors and by new counsel. On the preceding day they swore affidavits in the course of which they alleged *inter alia* that Mr. Madden, their previous solicitor, had not been instructed to withdraw their appeals from the Appeal Commissioner and furthermore alleged that the averment in their affidavits of the 25th May, 2009 where they deposed to instructing their solicitor to withdraw the appeal from the Appeal Commissioner was not correct and that they were unaware of that averment.

The contemplated proceedings seeking to challenge the provisions of the Taxes Consolidation Act 1997 were not and indeed have not been instituted.

Instead, the defendants now seek to defend the matter on the basis that their former solicitor had no authority to withdraw the appeals from the Appeal Commissioner and furthermore that when they swore their affidavits on the 25th May, 2009, they did not know that they contained an averment confirming that they had, in fact, instructed him to withdraw the appeals.

In fairness to Mr. Madden, I ought to point out that on the hearing before me on the 26th June, 2009, the defendants' Senior Counsel, with the agreement of counsel for the plaintiff, drew my attention to a letter emanating from him dated the 24th June, 2009 where he says as follows:-

"With regard to your paragraph pertaining to the withdrawal of the tax appeal, our position in this matter is quite clear. At all times since we have received instruction in this matter we have acted in accordance with our instructions. Further you make reference to the averment in an affidavit sworn by Pauraig Kane and indicate that certain averments within the said affidavit were not read out to Mr. Kane before he signed the affidavit. This is incorrect. These affidavits were typed by counsel upon our client's instructions on the morning of the 24th May, 2009. Counsel presented the affidavits to me in the company of both Pauraig Kane and John Kane outside the Law Library on the said date. This was the first opportunity I had to peruse the affidavits and to which (sic) accordingly I read out each affidavit out loud to both the gentlemen for a twofold purpose. One was for the purposes of proof reading the affidavit and secondly for the purposes of advising the clients as to the content of

the affidavit and as to the information they would give oath (sic). Upon their instructions certain changes were made to the affidavits which were then returned to counsel to have the said amendments made. When counsel returned the affidavits to I, (sic) still in the presence of both Pauraig Kane and John Kane outside the Law Library, I then approached a solicitor in the company of John and Pauraig Kane who I attested (sic) as to their identity for the solicitor who then duly commissioned (sic) the said affidavits. Any suggestion that the affidavits were executed with anything other than full knowledge by Pauraig and John Kane is incorrect. We trust that this clarifies our position in relation to this matter."

The Test
The defendants contend that they have raised an arguable defence to these proceedings necessitating their adjournment to a plenary hearing.

It is common case that the test which must be applied on an application of this sort is that set out by the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 where McGuinness J. endorsed the test set down by Murphy J. in *First National Commercial Bank Plc. v. Anglin* [1996] 1 I.R. 95. There, the task of the Court was described as:

"to decide whether … the defence set out in the affidavits … is credible, or in other words whether there is a fair or reasonable probability of the defendant having a real or bona fide defence."

In the same case Hardiman J. said:-

"The fundamental question to be posed on an application such as this remains: 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?"

The threshold which has to be surmounted by the defendants in order to have the matter adjourned to plenary hearing and summary judgment refused is a low one. Notwithstanding that, the plaintiff contends that no arguable defence has been demonstrated by the defendants and I must now turn to a consideration of that issue.

Disobedience to the precept
It is common case that the precepts issued by the Appeal Commissioner on the 15th July, 2008 were not complied with by the 21st September, 2008 or at all. The plaintiff contends that having regard to certain statutory provisions which I will examine in a moment, the effect of such failure is to render the assessments raised on the defendants final and binding.

Section 933 of the Taxes Consolidation Act 1997 deals with appeals against assessment.

Section 933(1)(a) provides that a person who is aggrieved by any assessment shall be entitled to appeal to the Appeal Commissioners provided that the appeal is taken within 30 days after the date of the notice of assessment. That is the procedure which was followed by the defendants in the instant case.

Under s. 933(6)(a) it is provided that in default of notice of appeal the assessment made "shall be final and conclusive".

Under s. 933(6)(c)(ii)(II)(C) it is provided that where on the hearing of an appeal against an assessment the terms of a precept issued by the Appeal Commissioners under s. 935 have not been complied with by the appellant, the Appeal Commissioners *"shall make an order dismissing the appeal against the assessment and thereupon the assessment shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given".*

Given the admitted failure to comply with the terms of the precepts, the plaintiff argues that the effect of the provisions of s. 933(6) is clear. The defendants' failure to comply with the terms of the precepts puts them in the same position as if no notice of appeal had been given. Thus, pursuant to s. 933(6)(a), the assessments are final and conclusive.

The only thing to be said against this is the fact that when the Appeal Commissioner sat on the 25th February, 2009, he did not, in fact, make an order dismissing the appeals, having been informed of the letter dated the preceding day from Mr. Madden indicating that the defendants were not proceeding with the appeals.

The plaintiff argues that the Appeal Commissioner had no discretion other than to dismiss the appeal having regard to the mandatory statutory language which is contained in s. 933(6)(c)(ii)(II)(C). That is correct. The failure to make a formal order dismissing the appeals given the letter of the preceding day from Mr. Madden is understandable but is a matter of form and not substance. To put it another way, if Mr. Madden had not written the letter, the Commissioner would have had to dismiss the appeals.

Under sub-paragraph 6(c)(e) of s. 933, the only discretion given to the Appeal Commission was to dis-apply subs. (c) if on the hearing of the appeal he was satisfied that sufficient information had been furnished by or on behalf of the defendants to enable the Commissioner to determine the appeal at that hearing. Manifestly that did not occur since no information directed in the precept was provided.

In these circumstances, I am satisfied that although no formal order was made by the Appeal Commissioner dismissing the appeal, he had no jurisdiction but to do other than follow the prescription of the statute and dismiss the appeals of the defendants. Accordingly, there is no scope for the appeals to be revived before the Appeal Commissioner as the defendants wish. He has no further function in the substance of the matter. Such being the case, the assessments have the same force and effect as if they were assessments in respect of which no notice of appeal had been given. They are, therefore, final and conclusive. Lest I am wrong on this issue, I will now consider a second argument raised.

The withdrawal of the appeals
Section 933(3) applies to "any assessment in respect of which notice of appeal has been given, not being an assessment the appeal against which has been determined by the Appeal Commissioners or which has become final and conclusive under subs.(6)".

Section 933(3)(b) provides:-

> *"Where, in relation to an assessment to which this subsection applies, the inspector or other officer and the appellant come to an agreement, whether in writing or otherwise, that the assessment is to stand, is to be amended in a particular manner or is to be discharged or cancelled, the inspector or other officer shall give effect to the agreement and thereupon, if the agreement is that the assessment is to stand or is to be amended, the assessment or the amended assessment, as the case may be, shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given."*

Section 933(3)(d) provides:

> *"Where an appellant desires not to proceed with the appeal against an assessment to which this subsection applies and gives notice in writing to that effect to the inspector or other officer, paragraph (b) shall apply as if the appellant and the inspector or other officer had, on the appellant's notice being received, come to an agreement in writing that the assessment should stand.*

The net effect of these two sub-sections in the instant case is that upon receipt of the notice contained in Mr. Madden's letter of the 24th February, 2009, there was deemed to be an agreement in writing that the assessments made upon the defendants should stand.

Section 933(3)(e) copper fastens the position in relation to Mr. Madden. That sub-section provides as follows:

> *"References in this subsection to an agreement being come to with an appellant and the giving of notice to or by an appellant include references to an agreement being come to with, and the giving of notice to or by, a person acting on behalf of the appellant in relation to the appeal."*

There can be no doubt but that Mr. Madden was *"a person acting on behalf of"* the defendants who were appellants before the Appeal Commissioners.

Two English cases are cited by the defendants to suggest that the agreement deemed to come into effect where a notice not to proceed with an appeal is given under subs. (3)(d) of s. 933 is one which is subject to the ordinary law of contract. The English cases are *R. v. Inspector of Taxes ex parte Bass Holdings Limited,* a decision Popplewell J. reported at [1993] STC 122 and a decision of Neuberger J. (as he then was) in *Schuddenfrei v. Hilton (Inspector of Taxes)* [1998] STC 404.

These cases are easily distinguishable from the present case on their facts. Both deal with cases of mistakes being made in the context of negotiations taking place leading ultimately to what was perceived to be a binding settlement. Neither case deals with the factual position which obtains in the instant case where an actual notice of withdrawal of appeals was furnished with the statutory consequences which are spelled out in Section 933. Furthermore, the statutory provisions are not identical. These cases do not appear to me to have any relevance to the facts of the present case.

There remains, of course, the issue raised late in the day in the most recently sworn affidavits of the defendants to the effect that Mr. Madden was not authorised to withdraw their appeal. Even if this contention is correct it appears to me not to affect the position as far as the plaintiff's claims are concerned. I come to that conclusion having regard to the legal position which obtains.

The defendants accept that a solicitor retained in an action has ostensible authority to compromise the suit provided that the compromise does not involve extraneous subject matter. They accept the correctness of the decision of the Court of Appeal in *Waugh v. H.B. Clifford & Sons Limited* [1982] 1 All E.R. 1095. There Brightman L.J. said:-

> *"The law thus has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority subject to the same limitation..."*

Normally, it is not necessary for the advisers for the other side in a dispute to question the extent of the actual authority of their opposite number when a settlement proposal is discussed.

The actual relationship between an opposing party and his legal adviser in relation to settlement discussions is of no consequence to the other party. The remedy for a client, should his legal adviser agree something in excess of his authority is ordinarily an action against the legal adviser.

The defendants submit that whilst they accept the decision of the Court of Appeal in *Waugh's* case, it is strictly confined to court proceedings and not to proceedings before the Appeal Commissioners. No authority was cited in support of that proposition.

I am unable to see any reason either in logic or commonsense as to why different rules should be applicable in the case of a legal adviser compromising an action in the ordinary courts and one compromising an appeal of a tax assessment before an Appeal Commissioner. There are of course the special statutory provisions contained in s. 933 which I have alluded to earlier in this judgment but none of them trench upon the question of ostensible authority save insofar as it might be said that the provisions of s. 933(3)(e) contain a statutory formula supportive of the notion of a legal adviser having full ostensible authority to do as Mr. Madden did here.

It follows that even if I am incorrect in the views which I have formed concerning the first legal issue, the defendants have not demonstrated an arguable defence on the second one either.

Disposal
If follows from the above that I take the view that the defendants have not demonstrated a triable issue or arguable defence to the claim for summary judgment. I have come to that conclusion without having to enter into any consideration of whether the case which they now make concerning Mr. Madden's actual authority is well founded or not. In fairness to him (and he has not had an opportunity to deal with this other than by way of letter) he asserts that he did nothing other than act upon the instructions of the defendants when he withdrew the appeals before the Appeal Commissioner.

There will be judgment for the full amounts claimed as against each of the defendants.