Neutral Citation: [2017] IEHC 639

THE HIGH COURT

Record No. 2016/94R

BETWEEN/

MICHAEL GLADNEY

Plaintiff

– and –

JAMES FARRELL

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 25th October, 2017.

I. Overview

1. This is a claim by way of summary proceedings, brought by the Collector General, pursuant to a settlement agreement, in respect of a debt arising from unpaid taxes. The tax liabilities which inform the settlement agreement arise on foot of returns made by Mr Farrell for the periods ending 31st December 2003, 2005, 2006, 2007, 2009, and for value-added-tax for the period Jan-Feb 2007. Those are Mr Farrell's own returns of tax executed with the advice and assistance of a firm of chartered accountants, signed by his agent, and for which he is responsible. Mr Farrell has accepted his liability for the debt outstanding in a 'Formal Agreement as a Result of a Revenue Audit' that was signed by him on 1st March, 2016, in which, acting with the benefit of professional advice, Mr O'Farrell states himself to *"acknowledge and accept"* his liability for the monies now claimed.

II. The 'Accountable Person'

2. Notwithstanding that Mr Farrell, in correspondence of 12th April, 2016, with the Revenue Commissioners, at a time when he had the benefit of professional accountancy advice, unequivocally accepts liability for the debt that is the subject-matter of the within proceedings, Mr Farrell has since averred, *inter alia*, that the Capital Gains Tax liability for 2006 is a liability of AIB Banks plc as the 'accountable person' under s.571 of the Taxes Consolidation Act 1997, as amended. Section 571 applies in circumstances where a liquidator, receiver or security-holder disposes of property. Notably, however, s.571(9) provides that "…[N]*othing in this section shall affect the amount of chargeable gains on which (a) the debtor is chargeable to capital gains tax…".* In other words, a debtor (Mr Farrell in the within proceedings) remains chargeable in respect of such disposal regardless of whether a liquidator, receiver or security-holder is the accountable person for the purposes of s.571. Not that this last point truly matters: the sale in 2005 which gave rise to the relevant Capital Gains Tax liability was in any event a sale effected by Mr Farrell and his wife in a personal capacity, as evidenced by the contract of sale (which has been furnished in evidence).

III. Irrevocable Undertaking by Solicitor

3. When this matter initially came before the court, Mr Farrell sought an adjournment of several months to allow him to sell lands to deal with his liabilities. The Collector General consented to this on foot of an undertaking received from Mr Farrell's then solicitor that he would hold the proceeds of any sale. Prior to the matter coming before the court again in October 2016, Mr Farrell's solicitor wrote to the solicitors for the Revenue Commissioners stating that:

> *"Our client has indicated that he is instructing new specialist tax Solicitors to act in this case….Consequently he has advised he is withdrawing his irrevocable authorisation to act in the sale of the farms despite his undertaking [sic] being stated to be irrevocable."*

4. The undertaking was from the solicitor, not from Mr Farrell. It was Mr Farrell's authority to provide the undertaking that had been understood, from the letter of Mr Farrell's solicitor dated 26th July, 2016 (advising the solicitors for the Revenue Commissioners of his irrevocable undertaking) to be an irrevocable authority. That letter stated as follows:

> *"I [Mr Farrell's solicitor] undertake to forward the net proceeds of both sales, following receipt by me thereof and following deduction of professional costs and outlay in relation to same of the two pieces of land owned by my client…. [Lands identified]. I have my client's irrevocable authority to provide this undertaking."*

5. Obviously irrevocable undertakings would very quickly become worthless if they could be avoided through the expedient of a client ignoring his irrevocable authority to the solicitor who gave the irrevocable undertaking and simply proceeding to instruct a new firm of solicitors. *The Law Society's Guide to Good Conduct for Professional Solicitor*s, 3rd ed., addresses this precise issue in the following terms, at 60:

> *"Undertakings furnished by first solicitor*
>
> *On the transfer of a file to a new firm, the first solicitor should be released from undertakings furnished to third parties. This will be subject to the consent of the recipient of the undertaking. In a situation where a client wishes to transfer their business from one solicitor to another, and the first solicitor has given an undertaking to a third party, the law of principal and agent provides that in this instance, because the first solicitor has undertaken a personal liability on behalf of the client, the client cannot determine the retainer without the first solicitor's consent. The solicitor may decide to consent to the determination of his retainer, subject to a formal release of the undertaking by the recipient of the undertaking. No solicitor should co-operate with a client who seeks to leave a solicitor with an outstanding undertaking."*

6. So rival solicitors who, even in a competitive market for legal services, remain members of a shared profession, need to do a little teamwork when such a situation presents. The first solicitor needs to remind her or his client of certain truths, specifically that (thanks to the outstanding undertaking) the client cannot determine his retainer without that solicitor's consent, which consent will not be forthcoming unless the recipient of the undertaking consents to the release of the undertaking. And any second solicitor asked or intending to come on record should decline to do so if s/he knows that will leave the first solicitor with an outstanding undertaking. What cannot be allowed to happen is what happened here, with the beneficiaries of a solicitor's undertaking effectively been sent on what, to borrow a colloquialism, might perhaps be described as a 'merry-go-round' of law firms, with the solicitors for the Revenue Commissioners being compelled to write out to a second firm of solicitors requesting, but not certain of receiving, an alternative undertaking that would cure the difficulty that was now presenting for the Revenue Commissioners. That said, the court makes no criticism of the solicitors who acted for Mr Farrell: it appears from the evidence before the court that he was, to borrow another

colloquialism, as much 'playing ducks and drakes' with them as he has sought to do with the Revenue Commissioners when it comes to making good on his acknowledged indebtedness.

IV. Demand for Payment

7. In their letter of 30th June, 2016, the Revenue Commissioners note that a settlement offer made by Mr Farrell (who acted at all times with the benefit of professional advice) has been accepted by them and that "*subject to payment of the debt*" the audit process is concluded. There is no statutory or other requirement that there be a further demand made by the Revenue Commissioners pursuant to the agreement that arose at this point between them and Mr Farrell. Due payment was thereafter awaited by the Revenue Commissioners and when it was not made it was open to the Revenue Commissioners to sue upon the settlement agreement without further a-do. This they have done.

V. A Procedural Point Raised

8. Mr Farrell's counsel contends "*that tax can't be recovered on foot of the extant proceedings. The sole legal basis on which tax can be recovered in proceedings is by way of assessments."* This, with respect, seems rather to ignore the fact that a settlement offer was made by Mr Farrell (who acted at all times with the benefit of professional advice) was accepted by the Revenue Commissioners for good consideration and that the ensuing settlement agreement can be sued upon like any contract. It may be that what falls to be recovered pursuant to the settlement agreement is not tax *per se*, but rather a separate debt owing under a free-standing settlement agreement reached in the context of a tax liability; however, the precise character of the debt arising is not relevant to its recoverability by way of the within proceedings.

VI. Some Case Law

(i) Referring Matters to Plenary Hearing.

9. Mr Farrell has argued that the within proceedings ought to be sent to plenary hearing. The hurdle that he must cross to succeed in having matters sent to plenary hearing is notably low. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

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

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…*
>
> *(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*
>
> *(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."*

(ii) Grehan, Keogh and O'Callaghan.

11. Counsel for Mr Farrell sought at the hearing of the within proceedings to pray in aid the decision of the High Court in *Gladney v. Grehan* [2016] IEHC 561 and the decisions of the Supreme Court in *Keogh v Criminal Assets Bureau* [2004] IESC 32 and *O'Callaghan v. District Judge Clifford* [1993] 3 I.R. 603. But, with respect, none of those cases is of avail to Mr Farrell because none of them was concerned with what faces the court here, *viz*. a summary civil proceeding for recovery of a debt (rooted ultimately in a tax liability) pursuant to a settlement agreement made between the Revenue Commissioners and an individual who acted with the benefit of advice when he elected to enter into that agreement.

VII. Conclusion

12. Notwithstanding the low threshold set in *Aer Rianta*, and mindful, *inter alia*, of that "*discernible caution*" which, to borrow from the judgment of McKechnie J. in *Harrisrange*, falls to be exercised by the court when it comes to the power to grant summary judgment, the court does not consider that Mr Farrell has advanced any argument that would justify the within matter being sent to plenary hearing. The court will therefore grant the summary judgment sought.