Neutral Citation: [2014] IEHC 686

**THE HIGH COURT**

**REVENUE.**

**[2013 No. 56 MCA]**

**BETWEEN**

**GEORGE ROSS**

**APPLICANT**

**AND**

**MAURICE COHALAN**

**RESPONDENT**

**JUDGMENT delivered by Mr. Justice Michael White on the 15th day of May, 2014**

1. The applicant an officer of the Revenue Commissioners has applied by originating notice of motion for an order pursuant to s. 1077B(3) of the Taxes Consolidation Act 1997, to determine whether the respondent is liable to a penalty under the Taxes Consolidation Act 1997, by reason of having negligently submitted an incorrect and incomplete voluntary disclosure to the Revenue Commissioners Offshore Assets Group in relation to the respondent's Bank of Ireland Treasury Trust and/or in the alternative to the Revenue Commissioner's underlying tax (insurance products) project. The applicant seeks to have the amount of penalty determined if the respondent is so liable. The application was heard on 12th and 13th February, 2014, and judgment was reserved.

2. The respondent is a business man and was liable to make returns to the Revenue Commissioners in respect of income.

3. The court has already ruled in the course of the hearing that the applicant was entitled in his affidavits to exhibit various correspondence and extracts from the respondent's file and to do so did not breach the rule against hearsay.

4. The evidence for the most part is undisputed. The respondent's financial advisers, Price Waterhouse Coopers wrote to the Inspector of Taxes on 30th May, 2003, notifying the inspector that having been made aware by the Bank of Ireland Trust Company (Jersey) Limited of the voluntary disclosure provisions in the Revenue Audit Code of Practice 2002, that they wished to make a qualifying disclosure on any outstanding tax liabilities arising on behalf of Mr. Cohalan inaccurately referred to in the letter as Coughlan. This related to the operation of the Glenbrook Trust.

5. By further letter of 29th September, 2003, Price Waterhouse Coopers on behalf of the respondent acknowledged that funds introduced into the trust were untaxed professional earnings, apart from I.R£40,000. The total liability was calculated including a penalty of 5% at €289,996 of which €70,000 had already been paid and a cheque for the balance of €219,996, was forwarded to discharge the balance.

6. Subsequently on the 16th August 2004, the respondent signed a declaration that to the best of his knowledge, information and belief that all statements he made in this disclosure were correct and complete.

7. On 20th May, 2005, Myles C. Ronan and Associates, Accountants, wrote to the Revenue Commissioners indicating notice of intention to make a qualifying disclosure relating to a life assurance product. A notice of intention to make a qualifying disclosure of a tax default relating to a life assurance product was signed by the respondent on 19th May, 2005.

8. By letter of 22nd July, 2005, Myles C. Ronan and Associates, wrote to the Revenue Commissioners enclosing a cheque for €157,865, stating that this payment was made in full and final settlement of their client's liabilities for tax interest and penalties consequent upon the assurances given in relation to investments in single premium insurance products and on the basis that their client received the full benefit of the voluntary disclosure in respect of the mitigation of penalties, non-disclosure and non-prosecution.

9. The letter further stated:-

> "The payment is made on the basis that it is accepted in full and final settlement of all tax interest and penalties arising by reason of our client's investment in the said products and on the basis that there is to be no publication pursuant to s. 1086 of the Taxes Consolidation Act 1997 and that no prosecution will arise."

10. The respondent prepared a disclosure and statement of amounts due. The statements set out the particulars of the life assurance products held.

11. The cheque for the sum of €157,865, was cashed by the Revenue Commissioners.

12. The respondent did not receive any response to the letter from his advisers, until 18th January, 2007, when J. Fitzpatrick Principal Officer, wrote to them referring to the correspondence of 21st July, 2005, and queried the calculations.

13. Myles C. Ronan and Associates replied on 23rd January, 2007, explaining the nature of the investment by the respondent. This was followed by a further letter from Myles C. Ronan and Associates setting out each policy.

14. It transpires that under the scheme which was titled "Voluntary Disclosure of Undisclosed Funds Invested in Life Assurance Products" that there were certain conditions which had to be satisfied to allow a tax payer to be eligible.

15. The eligibility conditions were that:-

> "• the treatment of disclosure and payment set out in Part II of this disclosure scheme will apply where the person making the disclosure and payment is not currently under Revenue Investigation;
>
> • has fulfilled not later than 22nd July, 2005, the calculation, disclosure and payment conditions set out in this leaflet;

and

• does not come within the excluded categories of holders of bogus non-resident accounts, Ansbacher and NIB/CMI inquiry cases and persons previously required to make a disclosure relating to an offshore financial product."

16. By letter of 9th March, 2007, the office of the Revenue Commissioners wrote to Myles C. Ronan and Associates, noting that the respondent had previously made a settlement under the offshore assets campaign which now appeared to be incomplete as it did not include figures subsequently declared in the single premium investment products investigations. The letter noted that accordingly, there were increased penalties due totalling €166,098. It was also noted that as the terms for both campaigns were not met publication would also arise. Myles C. Ronan and Associates replied on 26th April, 2007, stating

> "Having cashed the cheques, it is not open to the Revenue now to seek additional interest, penalties or impose publication or seek to prosecute our clients."

17. Pursuant to s. 1077B of the Taxes Consolidation Act 1997, when there is no agreement on a penalty, there is a responsibility on the Revenue Officer to issue an opinion as to liability to a penalty.

18. Subsequent to the letter of 26th April, 2007, to the Revenue Commissioners disputing the request for a penalty, there was no further correspondence until the relevant opinions were issued on 14th May, 2010. There was an opinion in respect of the original voluntary disclosure scheme and a separate opinion in respect of the single premium investments scheme.

19. The respondent instructed solicitors Barry C. Galvin and Son who wrote to the applicant on 6th August, 2010, indicating the respondents wished to appeal on the grounds that the basis of the decision was both factually incorrect and contrary to the provisions of the Taxes Consolidation Act 1997, as amended, and in addition the amounts claimed are excessive and incorrect.

20. An amended opinion pursuant to s. 1077B of the Taxes Consolidation Act 1997, was sent to the respondent on 13th December, 2012.

21. By letter of 14th January, 2013, Galvin and Son wrote to the Revenue Commissioners notifying them that the respondent appealed the opinion and the grounds stated were:-

> (i) In the circumstances of this case, the Commissioners are not entitled to impose the penalty in respect of which the opinion is made, or at all, having regard to the circumstances of the disclosures made by Mr. Cohalan originally and in combination.
>
> (ii) If (which is denied) the amount set out in the opinion is justifiable by way of penalty, the said penalty can only be admitted subsequent to a taxpayer's voluntary disclosure, in circumstances where there would be no publication of same.
>
> (iii) Such further and other grounds as may be appropriate when further information comes to the attention of the taxpayer.

22. Subsequently, the applicant issued the originating notice of motion which is before the court for consideration. This motion was issued on 4th March, 2013.

23. The respondent submits that

> (i) When the Revenue Commissioners accepted and cashed the cheque of €157,865, sent by letter of 22nd July, 2005, they were bound by the conditions of that letter.
>
> (ii) There has been inordinate and inexcusable delay by the applicant on the following occasions
>
> (a) failing to reply to the letter of 22nd July, 2005, until 1st February, 2007;
>
> (b) failing to issue an opinion pursuant to s. 1077B of the Taxes Consolidation Act 1997 until 14th May, 2010; and
>
> (c) serving a further notice of amended opinion on 13th December, 2012.

24. The respondent also submits that the failure to reply to the letter of 22nd July, 2005, gave rise to a legitimate expectation on the part of the respondent that he had settled his tax liabilities.

25. On delay, the respondent submits that the delay goes beyond March 2007, to the date of issue of the proceedings, and further notes that the delay has not been explained, and that it was inordinate and inexcusable. .

26. Furthermore the delay has had a significant impact on his economic circumstances as his financial circumstances in 2014 are very different from those in 2005. He also has a mentally handicapped daughter.

27. The applicant submits that the respondent cannot benefit from a scheme that he was not entitled to benefit from, and that he was at all relevant times advised by financial experts.

28. The applicant further submits that the scheme was adequately explained as there was an explanatory leaflet issued in April 2005, headed "Voluntary Disclosure of Undisclosed Funds Invested in Life Assurance Products" which explained that a person who previously was required to make a disclosure relating to an offshore financial product was not entitled to qualify under the scheme, and in addition the Revenue Commissioners prepared a tax briefing for financial advisors to whom it would be obvious that the respondent would have been excluded from this scheme.

29. The applicant denies that the delay was inordinate and inexcusable and submits that delay should only be considered up to the letter from the Revenue Commissioner of 9th March, 2007, to Ronan and Associates.

30. The applicant further submits that the Revenue Commissioners cannot enter into an agreement which would oblige them to act *ultra vires* and relies on the case of *Wiley v. Revenue Commissioners* [1994] I.R. 160. The applicant contends that the respondent

had to know or at least ought to have known that making the voluntary disclosure in 2005 when not entitled to was a negligent act and the respondent relies on the case of *Tobin v. Foley* [2011] IEHC 432 at paragraph 30 in this regard.

**Offer and Acceptance**
31. The respondent submits that there is an agreement that his tax affairs in respect of the voluntary disclosure on the life assurance products has been settled by reason of the failure to reply to the letter of 22nd July, 2005, and cashing the cheque.

32. The respondent relies on *Stour Valley Builders v. Stuart* [2003] TCLR 8, where Lloyd L.J. stated:-

> "As with any other bilateral contract what matters is not what the creditor himself contends but what by his words and conduct he has led the other party as a reasonable person…to believe."

33. Lloyd L.J. further in his judgment stated:-

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

34. The respondent also relies on *Bracken v. Billinghurst* [2003] EWHC 1333, where it was held:-

> "By presenting and cashing a cheque from ABT (a third party) which cheque had been offered in full and final settlement of the disputes, the claimant's actions constituted the clearest acceptance of that offer of compromise. Accordingly the application for summary judgment was dismissed."

35. The applicant relies on the case of *Mespil Limited v. Capaldi*, judgment of the Supreme Court of 11th February, 1987, where at p. 7 of the unreported judgment it states:-

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

36. The court approaches the matter from a different perspective. The respondent had a statutory responsibility to file accurate tax returns. He did not do so in respect of two separate financial amounts, the first being his investment in Glenbrook Trust Limited which was dealt with by disclosure in September 2003 and when the total liability including penalty was €289,996. The second being the disclosure of 22nd July, 2005 when the respondent forwarded a cheque for €157,865.

37. The Revenue Commissioners have the statutory power to put in place schemes, to ensure tax compliance and to offer certain incentives to ensure that compliance takes place. A unilateral offer and calculation of taxes under such scheme even when a cheque received on foot of such an offer is cashed by the Revenue Commissioners is not a contract. The fact that the Revenue Commissioner did not respond in an appropriate time to that voluntary disclosure, does not bind them to an agreement as to the contents of the disclosure and statement of amounts. The respondent was not entitled to benefit from the scheme to disclose underlying tax (insurance) products. There was no contract.

38. In *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, Fennelly J. outlined the three criteria to be satisfied in order to establish legitimate expectation at pp. 162 – 163:-

> "Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

39. I cannot see how the doctrine of legitimate expectation could arise. The respondent was not entitled to avail of the scheme. The Revenue Commissioners did not communicate with him initially offering him the facility to participate in the scheme. He decided to participate. As I have already stated, the Revenue Commissioners took steps to publish details of the scheme including eligibility conditions. The respondent was not positively misled. He himself drew the inference that as the Revenue Commissioners had cashed the cheque and failed to reply to his agent's letter, the sum tendered was accepted in full and final settlement of his tax liabilities.

**Delay**
40. The principles were stated by the Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and so far as pertinent to the issues raised here, can be paraphrased as follows:-

> (1) the courts have an inherent jurisdiction to dismiss a claim when the interests of justice so require
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> (2) the party seeking to have a claim dismissed on the grounds of delay must establish that the delay has been inordinate and inexcusable;
>
> (3) even where the delay is both inordinate and inexcusable the court must exercise a judgment as to whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding further;
>
> (4) when weighing the balance of justice between the parties, the court has regard to, *inter alia*, the following considerations:-

(a) the implied constitutional principles of basic fairness of procedures,

(b) whether the delay and consequent prejudice in the special facts of the case were such that made it unfair to the defendant to allow the action to proceed and made it just to strike it out,

(c) any delay on the part of the defendant, because litigation was a two party operation and the conduct of both parties should be looked at,

(d) whether any delay or conduct of the defendant amounted to acquiescence on the plaintiff's delay,

(e) whether the delay had given rise to a substantial risk that it would not be possible to have a fair trial or was likely to cause or had caused serious prejudice to the defendant,

(f) the fact that the prejudice to the defendant might arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business.

41. The respondent has argued that Article 6 of the European Convention of Human Rights as adopted into Irish law by the Human Rights Act 2003 applies to these proceedings, and relies on a decision of the European Court of Human Rights sitting as the Grand Chamber in the case *Jussila v. Finland* (Application No. 73053/01) Strasbourg 23rd November, 2006. The court decided that Article 6 applied under its criminal head notwithstanding the minor nature of the tax surcharge.

42. That contradicts the dicta in *Fortune v. Revenue Commissioners*, the judgment of O'Neill J. of 23rd July, 2009, when at p. 30 he stated:-

> "Article 6 of the European Convention on Human Rights guarantees due process in civil and criminal cases. It provides, inter alia, that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. However, it has long been accepted by the European Court of Human Rights that Article 6 has no application whatsoever in respect of proceedings relating to the assessment or imposition of tax. Article 6(1) applies to determinations of 'civil rights and obligations or of any criminal charge'. Public law matters, such as tax matters, are excluded, as was confirmed by the European Court of Human Rights in *Ferrazzini v. Italy* [2002] 34 E.H.R.R. 45. Accordingly, the applicant's argument under Article 6 must fail."

43. This Court does not have to decide if Article 6 applies to the imposition of a penalty pursuant to s. 1077B of the Taxes Consolidation Act 1997, as notwithstanding the European Convention on Human Rights Act 2003, the Supreme Court has reaffirmed that the test in *Primor* and *Rainsford* is still the applicable law.

44. In *McBrearty v. NWHB* [2010] IESC at para. 27, Geoghegan J. stated:-

> "There is one other aspect of the law with which I should briefly deal. It is suggested that in the context of dicta by Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 that *Rainsford* and *Primor* need either revision or what Clarke J. characterised in another case as 'recalibration' the general effect of which would be to make the courts much stricter about delay than they would formerly have been. The High Court judgments in which these views have been expressed derive in the main from *Gilroy v. Flynn* which in turn derives from the European Convention of Human Rights Act, 2003 with particular reference to judgments on delay by the European Court of Human Rights. What is important to reiterate is that the well-established jurisprudence deriving from Rainsford (a High Court decision approved of by this court) and Primor a decision of this court remain the law. They have stood the test of time. As far as I am aware and as far as counsel in this case appear to have been aware there is no decision of the Court of Human Rights on any principles to be applied in striking out proceedings on grounds of delay. It is, of course, true that it is important that courts take to heart the old adage 'delay defeats justice' and be vigilant about culpable delay especially having regard to the Convention. There is a discretion vested in the judge that may legitimately be exercised in different ways. But there would appear to be no justification for any major departure from the established and well tried principles. That is simply a footnote to the views already expressed and the orders which I have advocated."

45. I further note that delay in the commencement of proceedings may be relied on in a motion for dismissal. *Domhnaill v. Merrick* [1984] I.R. 151 and *Toal v. Duignan (No. 2)* [1991] ILRM 135.

46. I do not accept the applicant's submissions that the delay in this case should only be considered from 22nd July, 2005 to 18th January, 2007.

47. There were two separate opportunities for the applicant to deal with the issue of delay, if there had been some breakdown in administration. Subsequent to the letter from the respondent's advisers on 26th April, 2007, refusing to discharge the penalty, the applicant had an opportunity to deal with the issue. Subsequently, on the issue of the opinions on 14th May, 2010, a further opportunity arose. What is of concern to the court are three separate periods of delay.

48. There is no explanation of the delay between 22nd July, 2005 and 19th January, 2007, a period of eighteen months.

49. The only explanation for the delay between 26th April, 2007 and 14th May, 2010, a period of three years and one month is set out in para. 31 of the affidavit of the applicant of 22nd February, 2013, wherein he stated:-

> "Notwithstanding subsequent exchanges of correspondence and meetings between the respondents, tax agents and solicitor and Revenue, it is proved impossible to reach agreement with the respondent as to whether or not he is liable to penalties or increased penalties".

50. This correspondence was not exhibited.

51. There has been no explanation for the delay between 6th August, 2010 and 13th December, 2012, a period of two years and four months.

52. The total period of delay is from 22nd July, 2005, to 4th March, 2013, the date of issue of the originating notice of motion, a total period of seven years and seven months. The relevant tax year under consideration was the year end of 2000.

53. The delay is inordinate and no reasonable excuses have been provided to the court by the applicant and thus the delay is inexcusable.

54. I will approach the balance of justice criteria as follows:-

> (a) the delay has been unfair to the respondent;
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> (b) there has been no delay in the litigation by the respondent that can be relied on by the applicant;
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> (c) the respondent has not acquiesced in the delay;
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> (d) the court accepts that there is no risk to a fair trial as witnesses were not required and a decision can be made based on the written material;
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> (e) there has been no actual prejudice; and
>
> (f) prejudice has arisen in other ways.

55. The very different economic circumstances between 2005 and 2013, is relevant and the respondent did make a voluntary disclosure and paid 10% of the penalty due.

56. The court is conscious of the statutory provisions in the Taxes Consolidation Act 1997.

57. Section 1063 states:-

> "Proceedings for the recovery of any fine or penalty incurred under the Tax Acts in relation to or in connection with income tax or corporation tax may, subject to section 1060, be begun at any time within 6 years after the date on which such fine or penalty was incurred."

58. Section 1053 states:-

> "Where any person fraudulently or negligently makes an incorrect return that person shall be liable to penalty."

59. Section 1053(4) states proceedings for the recovery of any penalty under subs. (1) and (2) shall not be out of time because they are commenced after the time allowed by s. 1063.

60. The court accepts there is no statute of limitations applicable where negligence arises and the behaviour of the respondent comes within the definition of negligence as set out by Peart J. in his judgment of *Tobin v. Foley* of 22nd November, 2011, where at para. 30 he stated:-

> "Negligence in the context of this legislation means that a person having a duty to make a tax return truthfully and honestly fails to make all appropriate inquiries in order to ensure that the details contained in the return were complete, accurate and truthful. A person completing such a return must be expected to make appropriate enquiries if she herself does not have the necessary facts and information in order to complete the return. If she has to rely on others for information, she is under an obligation to ensure as far as reasonably possible that the information given is correct and truthful."

61. The court accepts that it is finely balanced, but assesses that the balance of justice favours the respondent on the issue of delay thus the relief is refused.