Neutral Citation [2012] IEHC 500

THE HIGH COURT

JUDICIAL REVIEW

COMMERICAL

[2012 No. 51 J.R.]

BETWEEN

RONAN MCNAMEE

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 27th day of November 2012

1. In these proceedings, the applicant seeks an order of *certiorari* quashing a notice of opinion dated 24th August, 2011, and the opinion therein referred to which was issued by the respondent to the applicant pursuant to s. 811 of Taxes Consolidation Act 1997 (as amended) ("the Act"). The applicant also seeks further ancillary relief.

2. Section 811 of the Act bears the title "*Transactions to Avoid Liability to Tax*". As the title suggests, the section give the Revenue Commissioners certain powers in relation to tax avoidance schemes or transactions. The section, which is to be construed with s. 811A, enables the respondent (subject to appeal) to reverse, or set at nought, the effect of certain tax arrangements.

3. Before s. 811 can be considered for a particular transaction, the Revenue Commissioners must be satisfied that a challenge does not arise under any other provisions of the Taxes Acts. This has been confirmed by the Supreme Court in *Revenue Commissioners v. O'Flynn Construction Ltd*. [2011] IESC 47. To come within the ambit of s. 811, the following tests should be applied:

> (i) Is there a tax advantage?
>
> (ii) Is the primary purpose of the transaction to obtain a tax advantage?
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> (iii) Is the avoidance transaction one which would result directly or indirectly in a misuse of the provisions of the Taxes Acts, having regard to the purposes for which those were provided?

4. In applying the criteria set out in s. 811, the Revenue is obliged to have regard not only to the form and substance of the transaction, but also the substance of any other transaction which could reasonably be considered to be directly or indirectly related thereto, and the final outcome and result of that transaction and any combination of those transactions.

5. Before getting to the point of issuing a notice of opinion under s. 811, it is necessary to identify a transaction as one which may be in nature one of avoidance. Apart from s. 811, there are other provisions within the tax code that the Revenue can rely on to challenge tax avoidance transactions. Section 811 comes into play where the Revenue's investigation reveals a transaction that may constitute a tax avoidance scheme which is not susceptible to challenge under specific legislation. In that event, the Revenue may carry out an investigation and an Inspector of Taxes will prepare a detailed report for the purpose of making a recommendation to a Nominated Officer who is then appointed pursuant to s. 811(12) to consider a particular transaction in the context of the section. The Nominated Officer is the only official within the Revenue that discharges its functions within section 811. He is not involved in the investigation of a transaction that may be sent for his consideration. Thus, he will only become aware of the specific details of a transaction when the investigation process is complete and the Revenue has obtained an understanding of the transaction through information and documentation. The report on the investigation of a transaction is sent to the Nominated Officer and not to the Revenue Commissioners.

6. Once the Nominated Officer receives a completed report, together with supporting documentation, he is obliged, in forming an opinion pursuant to s. 811, to consider the transaction in detail, the results of the transaction, its use as a means of achieving those results, any other means of achieving those results, any tax advantage, the primary purpose and the business purpose of the transaction, whether the transaction constitutes a misuse or abuse of a relief, together with the substance of the transaction and other issues. If the Nominated Officer forms an opinion that a transaction is a tax avoidance transaction within the meaning of s. 811, he is required to give notice to the relevant taxpayer that the Revenue has formed an opinion that the transaction is a tax avoidance transaction and set out specific details in any such notice.

7. On 24th August, 2011, a s. 811 notice issued to the applicant in respect of a tax avoidance scheme, which will be referred to in greater detail later in this judgment. In the notice, the Nominated Officer informed the applicant that he had formed the opinion that a particular number of transactions entered into by the applicant and his wife, together constituted a "*tax avoidance transaction*" for the purposes of section 811. As a consequence, he had determined that the "*tax advantage*" to be withdrawn from the applicant amounted to €5,121,107.60 in 2007, together with a surcharge of €1,121,007.66 ,being 10% of the Capital Gains Tax payable in 2007 (€11,210,076.60), giving a total tax advantage of € 6,242,115.26. This arose out of the disallowance of Capital Gains losses claimed by the applicant and his wife. The amount of relief from double taxation was calculated as nil.

8. Although the applicant lodged an appeal under the tax legislation against the notice of opinion under s. 811, he did not pursue the appeal because he claims that it only provided him with limited relief. He decided to pursue his grievance with the decision by way of this judicial review application.

Issues Arising in the Judicial Review Application
9. The applicant claims that the respondent formed the opinion that the transactions in question were tax avoidance transactions far in advance of 24th August, 2011. Therefore, by serving on the applicant the notice of opinion dated 24th August, 2011, the respondent failed to comply with the requirement under s. 811(6) that on formation of such an opinion, notice of such opinion be given immediately to any persons affected.

10. The applicant claims that the respondent treated him and the 25 other taxpayers who had entered into similar-type transactions as a group. This group of 26 cases are referred to as the "*Schroders Ready-Made 26*". Therefore, once the respondent formed the necessary opinion on the nature of the transaction in relation to all or any of the group of26, they were obliged to (but failed to) immediately give notice of such opinion to the applicant and the 25 other members of the similar schemes because the schemes were substantially the same and had been treated by the respondent internally as a single group.

11. As the respondent had formed the relevant opinion much earlier than 24th August, 2011, the opinion purportedly formulated by the Nominated Officer on behalf of the respondent was tainted by pre-judgment and apparent bias.

12. The applicant claims that the role played by one Revenue Commissioner (Mr. Michael O'Grady) in the investigation of these transactions (and drafting amending legislation to prevent similar transactions) within the Revenue Commissioners, and the role played by the Nominated Officer (Mr. Peter Mullen) appears to have been such that, while the respondent claims that it only formed the relevant opinion on 24th August, 2011, such opinion and the resulting adverse determination to the applicant is tainted by either actual or apparent (objective) bias.

13. It is claimed that the refusal of the respondent to furnish to the applicant a copy of the report prepared for the Nominated Officer was a breach of natural and constitutional justice in that the applicant was not in a position to make submissions to the respondent on the report prior to the respondent purportedly forming the relevant opinion and making the determination adverse to the applicant. The applicant claims that this was not a fair and reasonable exercise of the respondent's power.

14. The Court is required to determine when did the respondent form the opinion that the transactions in question were tax avoidance transactions and, in particular, did it form this opinion some time well in advance of 24th August, 2011, so that the notice of opinion was not given immediately to the applicant, as a person affected by the s. 811 notice of opinion?

The Straddle Transaction
15. The s. 811 notice refers to certain transactions entered into by the applicant and his wife in 2007. The nature of the transactions was investigated by the respondent and, because of their complicated nature, required advice from experts. This advice was required in order to understand the complex underlying mathematical formulae used in the scheme and to assist in understanding the real reason underlying the transactions.

16. In or around 2007, the applicant and his wife jointly entered into a foreign exchange Straddle Contract ("FESC") and a Gilt Foreword Contract ("GFC") using Irish Government gilts. These transactions were collectively known as "the Straddle Transaction". The counterparty to the FESC and the GFC was Schroders & Co. Ltd., a London merchant bank The Straddle Transaction (which, in its implementation, comprised a significant number of separate steps and transactions, and required the utilisation of complex formulae and mathematical calculations involving what was known as the "Black-Scholes Model") was organised, implemented and overseen by Schroders on behalf of the applicant. The applicant and his wife bought Irish Government gilts for €25,539,148.77 on 26th September, 2007, for value on 26th September, 2007, and sold the same Irish Government gilts to Schroders on the same day for €50,974,122.42. On 27th September, 2007, the applicant and his wife bought US$28,991,321.56 for JPY3,307,616,424.00 plus a premium of €25,750,000 from Schroders giving rise to a foreign exchange loss of €25,684,955.41.

17. When the Straddle Transaction was implemented, the two limbs of the transaction produced the following results: the FESC resulted in a total loss of €25.6 million and the GFC resulted in a total gain of €25.4 million. Accordingly, as a result of entering into the Straddle Transaction, the applicant and his wife incurred a monetary loss of under €250,000.

18. The implementation of the Straddle Transaction took place between July and September 2007, all limbs of the Transaction being settled on the same day. Separately, the applicant and his wife had, earlier in 2007, made a number of disposals giving rise to gains of approximately €29.5 million attributed to the applicant and in excess of €28.3 million in gains attributable to Mrs. McNamee (total gains of €57,872,636.00). By virtue of s. 607 of the Act, Government gilts are not chargeable to Capital Gains Tax and, therefore, Capital Gains Tax was not payable on the gain of €25.4 million made from the GFC. Accordingly, the overall tax effect of the Straddle Transaction was to generate an allowable loss of €25.6 million, even though the monetary loss actually incurred by the applicant and his wife was under €250,000. The losses incurred on the FESC were, accordingly, available to be set off against the gains made on the earlier disposals.

19. The tax advantage of the Straddle Transaction to the applicant and Mrs. McNamee was that they avoided paying Capital Gains Tax in the amount of €5,121,107.60.

The Nature of the Inquiry by Revenue Commissioners
20. Evidence was given by Ms. Danielle Cunniffe of the respondent as to the steps undertaken by the respondent when reviewing and assessing transactions which come to its notice, in particular, aggressive tax avoidance schemes and transactions. The respondent seeks to understand the nature of the transactions and the tax implications arising therefrom with a view to taking appropriate steps to deal with aggressive tax avoidance schemes and the unintended uses of the tax code which threaten the tax yield or undermine the perceived fairness of the Irish tax system. Such analysis can lead to a number of potential consequences, including:

> (a) challenging individual transactions based on non-compliance with specific legislation;
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> (b) challenging individual transactions based on factual errors in the structure of the transaction or otherwise;
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> (c) where appropriate, consideration of the use of the general anti avoidance provisions in s. 811, in particular cases of potential tax avoidance, but only after (a) and (b) have been analysed; and
>
> (d) consideration of amending legislation to close down perceived or potential loopholes where a particular form of transaction constitutes a potential threat to the Exchequer.

21. In cases where a Revenue investigation reveals a transaction that may constitute a tax avoidance scheme but the transaction is not susceptible to challenge under specific legislation, one option available to the Revenue is to initiate the s. 811 procedure. As part

of this procedure, an Inspector of Taxes will prepare a detailed report for the purpose of making a recommendation to a Nominated Officer. The Nominated Officer is appointed pursuant to s. 811(12) and is the only official within the respondent that discharges its functions within section 811. In this case, the Nominated Officer for the purpose of s. 811(12) was Mr. Peter F. Mullen. Ms. Cunniffe of the Revenue stated that the Nominated Officer is not involved in the investigation of a transaction that may be sent for his consideration and only becomes aware of the specific details of a transaction when the investigation process is complete and the Revenue have obtained an understanding of the transaction through information and documentation. When this stage is reached, a report on the investigation of a transaction is sent to the Nominated Officer but not to the Revenue Commissioners.

22. A report sent to a Nominated Officer sets out the facts of the case, the tax implications and includes expert opinion, if appropriate, together with details of the work undertaken in the investigation. Once the Nominated Officer receives a complete report, together with supporting documentation, he is obliged, in forming an opinion pursuant to s. 811, to consider the transaction in detail, the results of the transaction, its use as means of achieving those results, any other means of achieving those results, any tax advantage, the primary purpose and business purpose of the transaction, whether the transaction constitutes a misuse or abuse of a relief, together with the substance of the transaction and other issues. All these relevant criteria are prescribed in section 811.

23. Where the Nominated Officer forms an opinion that a transaction is a tax avoidance transaction within the meaning of s. 811, he is required to give notice to the relevant taxpayer and this notice should be given immediately (s. 811(6)(a)).

Was the Notice of Opinion given Immediately?

24. The applicant drew the court's attention to information obtained, partly from documents in the public domain and partly from documents obtained under Freedom of Information requests. On the basis of this information, the applicant argues that it is clear the respondent had formed the opinion that the Schroders Ready-Made 26 schemes were tax avoidance transactions long before the notice of opinion issued on 24th August, 2011. The evidence outlined by the applicant includes the following:-

- In an email of 81h December, 2009, Ms. Breda Ruddle (a person with overall responsibility for the High Net Worth Individuals Unit in the Revenue Commissioners) told other Revenue officers dealing with the group of 26 that if they could not successfully challenge the transactions, they intended to prepare a report for submission to the Nominated Officer with a recommendation that a s. 811 notice be issued to each individual in respect of the transaction in which they were involved.

- In an email of 23rd December, 2009, Commissioner O'Grady discussed the 26 cases as an example of a common scheme of tax avoidance which was being challenged by the Revenue and discussed the possibility of introducing proposed statutory amendments to deal with such schemes.

- Revenue emails in late 2009 and 2010 confirm that the respondent will aggressively challenge the schemes used by the group of 26, utilising the general anti-avoidance rule of s. 811 and discuss possible statutory amendments to counteract the effects of such schemes.

- Internal Revenue correspondence concerning draft statutory amendments, which ultimately emerged as sections 59 and 60 of the Finance Act 2010, speak of the purpose of the amendments to counter an artificial capital loss generation scheme, and the sections specifically target the Schroders Ready-Made 26 schemes.

- The background notes and speaking notes prepared for the Minister for Finance identify the scheme being used by the group of 26 as a tax avoidance scheme, and in the course of the second stage debate on the Finance Bill 2010, the Minister stated on 10th February, 2010, that *"artificial losses are already being challenged by the Revenue under the general anti avoidance provisions contained in section 811 ...."*

- On 7th January, 2007, Commissioner O'Grady gave a Powerpoint presentation to the Chartered Tax Consultants Programme of The Chartered Accountants Ireland in which he cited tax avoidance schemes similar to that used by the Schroders Ready-Made 26 schemes.

- At a conference in March, 2010 and a Revenue briefing on mandatory disclosure on 7th April, 2011, Mr. Peter F. Mullen, the Nominated Officer, made statements which show that the respondent was aware of the widespread use of an unacceptable tax avoidance plan involving Capital Gains Tax losses.

- On 27th July, 2011, Mr. Mullen, in his role as Nominated Officer, issued notices of opinion under s. 811 to two members of the Schroders Ready-Made 26 group, namely, Mr. John Punch and Mr. Martin Punch, in terms which the applicant says are in all material respects identical to the notice of opinion of 24th August, 2011, sent to the applicant. On 16th August, 2011, a similar s. 811 notice of opinion was sent to another member of the Group of 26, Mr. Derek Whelan, which the applicant also says was in all material respects identical to the notice issued to the applicant on 24th August, 2011.

- The Revenue reports sent to the Nominated Officer in the case of Mr. John Punch and Mr. Martin Punch are identical in certain parts to the report of the Nominated Officer for the purpose of forming the opinion in the applicant's case and which identifies the applicant as belonging to a group of 26 similar cases where "*the total losses generated in the 26 cases are in the region of £550 million with a potential reduction in Capital Gains Tax liabilities of approximately £110 million*". The applicant maintains there is clear evidence that all the members of the Schroders Ready-Made 26 schemes were treated as part of an overall scheme.

25. The applicant claims that the effect of this information is that the Schroders Ready-Made 26 schemes were being treated as one, and that the evidence clearly points to a decision having been made long before 24th August, 2011, that they should be dealt with under s. 811 of the Act. Accordingly, the notice given to the applicant on that date was well outside the time allowed under s. 811(6), not having been given "*... immediately on forming such an opinion...*"

26. While there were similarities in the Schroders Ready-Made 26 schemes, they were not all identical. Although each of the 26 taxpayers engaged Schroders and Schroders was the counterparty to the transactions, the factual circumstances of each of the 26 taxpayers were different.

27. The wording of s. 811 makes it clear that each transaction must be considered independently in order to ascertain the different facts relating to each transaction and how it affects that taxpayer, and also the tax advantage which flowed, the primary purpose of the transaction, and whether the same constituted a misuse or abuse of a relief. In addition, sub-section (6)(a) requires the Nominated Officer to specify or describe particular information in a notice under s. 811 to a taxpayer, including a description of the

tax avoidance transaction, the tax advantage and the tax consequences arising to that taxpayer.

28. The Revenue argues that as a result of the factual differences between the 26 taxpayers in the group and the detailed legislative requirements, it would not have been appropriate for the respondent to come to a particular opinion in relation to one of the 26 cases and apply that to all of the others. Each individual case had to be considered on its own facts and a cumulative opinion was not or could not have been formed. If the applicant is correct in his complaint, then the respondent would have to serve a notice of opinion under s. 811 on all members of the group once one of their number had been served, even in circumstances where the respondent had not concluded its investigation in respect of each of the other members. It seems to me that this is a rather sweeping proposition.

29. The various parties that made up the Schroders Ready-Made 26 group may have adopted tax avoidance measures which were broadly similar. But s. 811 requires the respondent to consider each case individually. Section 811(6) provides that notice in writing of an opinion be served immediately on a relevant person "*where, pursuant to sub-sections (2) and (4), the Revenue Commissioners form the opinion that a transaction is a tax avoidance transaction...".* The notice is required to specify or describe the transaction, the tax advantage which would be withdrawn from or denied to the person to whom the notice is given, the tax consequences of the transaction insofar as they would refer to the person, and the amount of any relief from double taxation calculated by the respondent which they would propose to give to the person in accordance with sub-section (5)(c). It is difficult to see how these requirements could be fulfilled without the particular facts and circumstances of each case within the group of26 being considered separately.

30. The respondent has given evidence as to the nature of the steps it took in examining the scheme operated by the plaintiff and his wife. Their scheme, like the others in the Group of 26, was complicated in nature and required expert analysis in order to enable it to be properly understood.

31. Extensive evidence was given on behalf of the respondent illustrating its approach to issues such as tax avoidance schemes, and in particular, the Schroders Ready-Made 26 schemes, and the scheme which was operated by the applicant and his wife. Ms. Danielle Cunniffe, a Principal Officer of the Revenue Commissioners, set out in an affidavit of23rd March, 2012, the general approach of the Revenue Commissioners. The respondent has internal information technology systems which it uses to collate data and identify possible tax avoidance schemes. In looking at various schemes, the respondent will carry out detailed technical considerations which involve examining existing legislation and reviewing its effectiveness for dealing with schemes under consideration. Consideration will be given as to whether or not an amendment to legislation is appropriate in order to support government policy to protect the Exchequer from tax avoidance transactions. A final decision on how to challenge any particular case cannot be made until detailed information has been sought from the taxpayer or his tax agent and the investigation has been completed. Within the respondent organisation, the Revenue Legislation Services ("RLS") performs the task of providing technical advice and also producing legislation. RLS not only has its legislative role to play in relation to responding to the legislative demands of government, but also fulfils the function of advancing the performance and integrity of the taxation system in general. The High Wealth Individuals and Professional Business Unit and/or the Anti-Avoidance Unit will communicate with RLS if a potential tax avoidance scheme is identified and it is considered amending legislation should be introduced in order to close down any perceived or potential loophole in the existing legislation, thereby protecting the Exchequer. This will be done in a general way and will not be specific to any particular taxpayer.

32. Where an investigation of any particular transaction is carried out, it is done by the Inspector of Taxes and neither the Commissioners themselves nor the Nominated Officer are involved in this work. In investigating a transaction, the Inspector of Taxes will have extensive correspondence with the taxpayer and his or her advisors which is aimed at obtaining all available documentation and explanations required to facilitate the Inspector's assessment of the particular transaction. Sometimes several Inspectors of Taxes will be involved if there are a number of participants in similar transactions in different tax districts involving different tax advisors on behalf of the taxpayers concerned. In these cases a coordinated approach and management is required.

33. On completion of an investigation, if it is considered by the Inspector of Taxes that a transaction may constitute a tax avoidance transaction for the purpose of s. 811, and that a challenge under that section is the appropriate method of dealing with the transaction, the Inspector of Taxes will prepare a detailed report for the purpose of making a recommendation to the Nominated Officer who has been appointed to the role in accordance with s. 811(12). This report will only be completed after the conduct of the investigation has come to an end and will set out the relevant facts and details of the transaction which will be supported by all relevant documentation. When a report is completed, it is reviewed by the Principal Officer and transmitted to the Nominated Officer for consideration. This will be the first time that the Nominated Officer will become aware of the specific details regarding the transaction and will be the first time he will see the relevant documentation. The report is not sent to the Commissioners themselves for their consideration.

34. On 22nd August, 2011, Ms. Danielle Cunniffe, submitted a report to Mr. Peter Mullen, the Nominated Officer, for his consideration. He gave evidence that having carefully considered the report submitted by Ms. Cunniffe, on 24th August, 2011, he formed an opinion that the transaction involving the plaintiff and his wife constituted an avoidance transaction within in section 811. Immediately on forming the opinion he prepared a notice of opinion of the same date and arranged for the notice to issue to the applicant and for a copy to be issued to his tax advisers on 24th August, 2011.

35. I accept the evidence of the respondent that in relation to the applicant's tax avoidance scheme, the s. 811 notice of opinion was formed by the Nominated Officer on 24th August, 2011, having received a report two days earlier from Ms. Cunniffe. In issuing the notice of opinion under s. 811 on that date, the respondent complied with the provisions ofs. 811(6)(a) of the Act.

Was the opinion formed by the nominated officer tainted by pre-judgment and apparent bias?

36. I am satisfied that Mr. Michael O'Grady who was a Revenue Commissioner from 2002 until his retirement in December 2011, did not have detailed knowledge of the transactions entered into by the applicant and his wife. He was aware, in a general way, of the use of a capital loss scheme involving Irish Government gilts and foreign exchange finance instruments which was under review within the Revenue. The information received by him was primarily in the context of considering possible counteracting legislation in respect of the Finance Bill 2010. The actual investigative work in the applicant's case was carried out by two tax inspectors who reported to their principal officer, Ms. Ruddle and later Ms. Cunniffe. A reference in Commissioner O'Grady's PowerPoint presentation to certain Chartered Accountant students in which he referred to capital loss schemes, copying UK mismatched schemes was but one example of types of avoidance schemes which were a problem for the Revenue at that time. There is no evidence that the Nominated Officer, Mr. Mullen, formed his opinion earlier that 24th August, 2011 and he is the only official within the Revenue who discharges the relevant functions under section 811. Further, there is no evidence that there was pre-judgment on the part of the Nominated Officer or that his notice of opinion was tainted by actual or apparent (objective) bias.

Was there a breach of natural or constitutional justice?

37. The applicant argues that he did not have sufficient opportunity to make representations to the Revenue concerning the grounds

or reasons for the proposed decision and/or to make representations as to why the Revenue should not form the opinion in question and should not allow the claimed capital gain tax losses and, separately, as to why this was not an appropriate case for the Revenue to invoke section 811. The applicant relies *on Dellway Investment v. NAMA* [2011] IESC 14; *Treasury Holdings v. NAMA* [2012] IEHC 297; and *Gammell v. Dublin County Council* [1983] I.L.R.M. 413.

38. The respondent argues that these decisions do not support the applicant's case for two reasons:

> (i) On 27th June, 2011, the inspector of taxes wrote to the applicant's tax agent, stating that the review of the Straddle Transaction had been completed and that the inspector of taxes intended to prepare a report for a submission to the Nominated Officer under s. 811, and inviting a submission to be made by July, 2011. Although the applicant engaged in correspondence seeking, *inter alia*, a copy of the intended report before making representations, he ultimately decided not to make representations.
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> (ii) Once the notice of opinion issued there was an appeal process available to the applicant under section 811(7). The applicant availed of his appeal rights but did not pursue them on the basis that he claims that he could not have obtained adequate relief by taking that course.

39. The information contained in the s. 811 report submitted to the Nominating Officer is predominantly gleaned from the applicant's tax returns and responses provided by the applicant's tax agent to queries raised by the Revenue. This includes relevant documents executed by the applicant in the course of the Straddle Transaction. It must be assumed that the applicant (or at least his advisers) understood the nature of the scheme of which the Straddle Transaction was an integral part. Section 811 set out a number of issues that had to be considered in detail by the Nominated Officer prior to forming the opinion that the Straddle Transaction was a tax avoidance transaction within the meaning of the section. Of particular relevance is s. 811(3)(i)(1) which features in the examination as to whether the transaction "*was undertaken or arranged by a person with a view, directly or indirectly, to the realisation of profits in the course of the business activities of a business carried on by the person ...* ". This involves an examination as to whether or not the transaction was a genuine commercial transaction or one which had been entered into purely to avoid tax. All of this is material which would have been known to the applicant and his advisers.

40. In *Dellway*, the plaintiff claimed that he did not expect his loans to be brought under the control of NAMA and did not consider that the acquisition of his loans was justified or appropriate. He said that his property rights were infringed by the failure ofNAMA to allow him make representations before the acquisition decision was made. The decision to acquire the loans was made without the applicant being put on notice that it was intended to make such a decision nor was he invited to make representations as to why such a decision should not be made. The High Court held that it was "*clear on the facts that Mr. McKillen [applicant] was not afforded any opportunity to be heard*". The Supreme Court ruled that a borrower had the right to make representations to NAMA prior to the acquisition of related loans.

41. In *Treasury Holdings*, NAMA made a decision to appoint receivers to the applicant companies some four weeks prior to the applicants being notified that the decision had been made. In judicial review proceedings, the applicants argued that they had been unaware that the question of moving to "*enforcement*" of the loans was even under consideration. After the loans had been acquired, the applicant submitted a business plan to NAMA and was involved in an ongoing process of discussion with a view to reaching an agreement whereby NAMA would restructure the applicants' lending facilities and thereafter engage with the applicant companies in an agreed timetable of disposition of various assets which were security for the loans. After some time, NAMA became dissatisfied with the applicant companies attempts to comply with six pre-conditions which NAMA had specified would have to be met before terms would be agreed. NAMA made the decision to appoint receivers on 8th December, 2011, without notifying the applicants such a decision was in contemplation. In the High Court, Finlay Geoghegan J. held that the applicants had a right to be notified that the decision was being contemplated and because there had been no such notification the decision of 8th December, 2011, there was breach of fair procedures.

42. In *Dellway*, the State argued that the applicant was entitled to no participation whatsoever in the NAMA decision. This was rejected by the Supreme Court who held that some degree of participation must be permitted by persons who will be affected by the making of official decisions. The court did not hold that persons affected are entitled to full participation but expressed the view that much depends on the circumstances. In the course of his judgment at para. 111, Fennelly J. endorsed the following passage from De Smith's *Judicial Review*, 6th Ed. (London 2007) at p. 377:-

> *"The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject-matter. The requirements necessary to achieve fairness range from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully fledged hearing with most of the characteristics of a judicial trial at the other extreme. What is required in any particular case is incapable of definition in abstract terms. "*

43. In Dellway, Hardiman J. stated at the conclusion of this judgment:-

> *"It is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears. He is also, very probably, entitled to reasons for the decision taken, if any. "*

But he went on to emphasise that the extent of any right to make representations is limited:-

> *"I do not see in the circumstances of the present case a positive need for an oral hearing, though NAMA 's obligations may of course be met in that way. I would not otherwise prescribe the nature of the hearing, which will ultimately depend on the circumstances of the individual case. "*

44. Similarly in *Treasury Holdings*, Finlay Geoghegan J. at para. 112 considered it " *... unnecessary, on the facts herein, to consider the level of detailed information which it might be necessary for the decision maker to give*".

45. An important factor in determining whether a right to make representation exists at all is whether a person affected by a decision has a right of appeal. In *Dellway*, Macken J. stated, after a discussion of "fairness of procedures", that:-

> *"If anything, the scale of the NAMA statutory discretion and its statutory powers, and the fact that there is no appeal from its decision to acquire eligible assets referred to above, emphasises the importance of scrupulous adherence to the*

rules of natural justice. "

46. A key factor may be that a decision does not come into effect until the appeal has been heard or, if no appeal is taken, until the period for appeal has elapsed. Section 811(7) provides that any person aggrieved may, by notice in writing within 30 days of the date of the notice of opinion, appeal to the Appeal Commissioners. The opinion of the Nominated Officer under s. 811 is not final or conclusive until the appeal process has been exhausted or if there is no appeal to the Appeal Commissioners, until after the period of appealing has elapsed (s. 811(5)(e)(i)). Section 811(7) provides that any fact or matter, which was not known at the time the Nominated Officer formed his opinion, can be taken into account by the Appeal Commissioners on the hearing of the appeal. Furthermore, if the taxpayer is dissatisfied with the outcome of the hearing of the appeal before the Appeal Commissioners, he has a right to a further appeal by way of rehearing to the Circuit Court. The taxpayer also has a right to appeal on a point of law (by way of Case Stated) to the High Court from any decision of the Appeal Commissioners, or of the Circuit Court.

47. *In Gammell v. Dublin County Council* [1983] I.L.R.M. 413, the court was dealing with an order prohibiting the erection of temporary dwellings which had been made under the Local Government (Sanitary) Services Act 1948. Referring to the right of aggrieved persons to apply to the Minister for the Environment within fourteen days concerning such a notice, Carroll J. held that this sufficed for compliance *with the audi alteram partem* rule. At p. 417, she stated:-

> *"There is machinery set up under the section whereby an aggrieved party can make representations why the order should not come into operation. If successful, the order is annulled by the Minister and it never becomes operative. This is very different to the Ingle case and the Moran case where the revocation of the licence became operative immediately and of necessity there had to be a time lag between the revocation and the determination of an appeal in the District Court."*

Preliminary Objections

48. The respondent raises two preliminary objections to the applicant's claim. The first is on the basis of delay and the second is that the applicant failed to exhaust alternative remedies.

49. The notice of opinion under s. 811 was dated 24th August, 2011. The applicant sought, and was granted, leave to apply for judicial review on 19th December, 2011, in respect of certain grounds but only obtained leave on the grounds set out in paras. 5(c) and 5(d) of the revised statement of grounds of 6th March, 2012. I am satisfied that the grounds raised in paras. 5(c) and 5(d) of the revised statement of grounds were sufficiently closely connected with the other grounds raised that the respondent could not have been materially prejudiced by them. In the circumstances, it seems to me that there is good reason for extending the period within which an application containing those grounds can be made.

50. So far as the failure to exhaust alternative remedies is concerned, I am of the view that the appeal procedures provided for in s. 811 provided an effective alternative remedy to the applicant.

Conclusions

51. Having reviewed the evidence and the submissions made on behalf of the parties, I have come to the conclusion that the notice of opinion given on 24th August, 2011, was given immediately after the Nominated Officer formed the opinion that the transactions in question were tax avoidance transactions. The notice of opinion therefore complied with the requirements of s. 811(6) of the Act.

52. While the Revenue looked at the Schroders Ready-Made 26 group as a whole in order to establish if there was a pattern of activity leading to possible tax avoidance which required further investigation by the Revenue, there is no evidence that the respondent treated the members of the Group of 26 as one single group. I am satisfied that they would not have been permitted to do so under the legislation and that the respondent could not make a decision on how to challenge any particular scheme until detailed information had been sought from the relevant taxpayer or his tax agent. The Nominated Officer had to consider all the relevant criteria prescribed ins. 811 and which are set out at para. 22 of this judgment. I find no evidence that the necessary opinion required under s. 811 had been formed, or could be formed, in respect of the Schroders Ready-Made 26 group as a whole.

53. For the reasons outlined earlier in this judgment, I find no evidence that the opinion formulated by the Nominated Officer was tainted by pre-judgment or apparent bias nor do I find that the roles played by Commissioner O'Grady or by the Nominated Officer were tainted by actual or apparent (objective) bias.

54. Furthermore, for the reasons set out earlier in this judgment, I hold that there was no breach of natural or constitutional justice. The applicant had at all times an effective alternative remedy, which he has not pursued other than by initiating an appeal.

55. In the circumstances, the applicant is not entitled to the reliefs claimed.