Neutral Citation [2015] IEHC 670

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 399 JR]

BETWEEN

BRIAN MURPHY

APPLICANT

AND

THE REVENUE COMMISSIONERS

AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 4th day of November 2015.

Introduction

1. In these proceedings, the applicant seeks:-

> 1. An order of prohibition restraining the respondents from prosecuting the applicant for a number of revenue offences contained in a summons dated the 18th of February, 2014;
>
> 2. An order restraining the first respondent from making a publication in respect of the applicant pursuant to s. 1086 of the Taxes Consolidation Act 1997 ("the TCA");
>
> 3. An order of *certiorari* quashing the decision of the first respondent to refuse to allow the applicant to make a qualifying disclosure.

Backgound facts

2. The applicant is an accountant and was at the material time an audit partner in Deloitte, an accountancy firm. He was also a director of a company then called Securemed Ltd which carried on the business of recruitment. It also appears that the applicant was a shareholder in Securemed although these shares may have been held in trust for another party. The applicant was also the tax agent for Securemed.

3. In April, 2011, Securemed, being a company registered for VAT purposes, submitted a VAT return to the first respondent ("the Revenue") dated the 31st of March, 2011, and signed by the applicant in which it claimed a refund of VAT in the sum of €105,280. In an affidavit sworn by William Hayes, a higher executive officer in the audit/compliance section of the Revenue, Mr. Hayes avers that, on receipt of this VAT return, he decided that a verification check, being a form of non-audit intervention, ought to take place. An analysis of the VAT claim and supporting documents were requested from the applicant who submitted three invoices in support of the claim. The first of these was an invoice from Rose Building and Construction Company Ltd ("Rose Construction") in the sum of €302,500 which included a VAT element of €52,500. The second invoice was a request for payment of fees from Deloitte in the sum of €181,500 which included a VAT element of €31,500. The third was an invoice from Mr. Bernard Murphy solicitor in the sum of €121,000 which included a VAT element of €21,000. Mr. Bernard Murphy was also the secretary of Securemed.

4. Mr. Hayes avers that these three documents gave rise to concerns on a number of fronts. He says that first, the document from Deloitte was not in fact a VAT invoice but rather a request for payment and as such did not contain the information required to be contained in a VAT invoice. Secondly, he says that the question arose as to why Securemed, a newly incorporated company which was leasing its premises would spend the sum shown on the Rose Construction invoice on renovation work on that premises. Thirdly it was noted that Mr. Bernard Murphy had not remitted to Revenue the VAT shown on his invoice to Securemed.

5. Mr. Hayes avers that as the verification checks were continuing, he was minded to allow part only of the VAT repayment claim and a sum of €54,600 was issued from the Collector General to Securemed on the 1st of June, 2011.

6. The applicant resigned as a director of Securemed with effect from the 31st of August, 2011, but he continued to be involved in the company's affairs and remained as tax agent.

7. It would appear that as a result of continuing Revenue concern about the veracity of the documents supporting the VAT repayment claim by Securemed, Revenue had a meeting with Deloitte following which a partner in that firm, Brian McDonald, wrote to Revenue on the 19th of December 2011, stating:

> "Dear Philomena
>
> I refer to our recent meeting and, in particular, to the three documents which you gave to me at that meeting, copies of which are enclosed for ease of reference.
>
> I have checked the position and these documents were not drawn up or issued by Deloitte, nor did we receive any fees purported to have been paid.

Yours sincerely etc."

8. The three documents referred to in the Deloitte letter included the request for payment document seeking a sum of €181,500 which had been submitted by the applicant in support of Securemed's VAT return.

9. Arising out of the foregoing, on the 10th of January, 2012, Mr. Hayes issued a formal written Revenue audit notification to Securemed addressed to the company secretary, Mr. Bernard Murphy, in the following terms:

"Re: Securemed Ltd – VAT 2011

Dear Mr. Murphy

I wish to advise you that I propose to call to your company on Tuesday the 24th of January 2012 at 10.30 am to examine the VAT compliance of the company for 2011.

Please have all records, including purchase invoices, sales invoices, bank records etc available on the day.

Should the date and/or time not suit please contact me at the above number.

This visit will be conducted in accordance with the Code of Practice for Revenue audit.

Yours faithfully

Willy Hayes

For District Manager

c.c. Deloitte and Touche"

10. Although this letter was copied to Deloitte and Touche, in addition the applicant was written to separately by Mr. Hayes on the same date attaching a copy of the letter to "your client" for information. It is not in dispute that the applicant received this letter.

11. Thereafter, and over the course of the next year, the applicant continued to engage with the Revenue in relation to Securemed's VAT compliance for 2011. A letter dated the 19th of April, 2012, was sent by Securemed to the Revenue which purported to be signed by the company secretary, Mr. Bernard Murphy but which appears to have been in fact signed by the applicant. Whilst this letter purports to make certain disclosure in relation to Securemed's VAT affairs, it did not deal with the incorrect VAT return or the incorrect repayment claim arising from it. Accordingly Mr. Hayes replied to this letter pointing out that it could not be regarded as a qualifying disclosure in accordance with para. 2.7 of the Code of Practice for Revenue Audits as it did not include a declaration and a payment of the tax and interest on late payment of the tax. Mr. Hayes further notified the company that he would be carrying out an examination of the relevant records at the company's office on the 18th of May, 2012.

12. The Revenue's enquiries continued throughout 2012. Further correspondence passed between the applicant and the Revenue. In December 2012, Mr. Hayes visited the offices of Rose Construction where he avers that he was unable to locate any records, statements or payments to support work done on behalf of that firm for Securemed. Rose Construction had, it appeared, carried out construction work building the home of the applicant in 2011.

13. On the 15th of January, 2013, the Revenue wrote to the applicant informing him that an investigation had commenced into his tax affairs and as a result, he would be unable to make a qualifying disclosure. On the 11th of June, 2013, the applicant wrote to the Revenue in the following terms:-

"Dear Ms. O'Connell

Re: Securemed/Pro Choice Recruit

I am enclosing amount of €102,000 in respect of outstanding liabilities due by this company.

The company has no funds itself, but rather than seeking to avail of limited liability of company law, I am settling the company liability myself in the clear hope that this will assist in finalising matters. The amount is as set out in my earlier correspondence to you.

I have borrowed this money from AIB, and as you may appreciate, I can only repay the loan if I can continue in my current employment.

I am hoping that you might consider the current course of action being taken in light of this repayment and the means by which I have obtained it.

Yours sincerely

Brian Murphy"

14. On the 18th of February, 2014, a summons was issued against the applicant charging him with eleven offences under the TCA as amended by the Finance Act 1999.

Relevant Statutory Provisions

15. Section 1077E of the TCA, as inserted by the Finance (No. 2) Act 2008, makes provision, inter alia, for penalties for the making of false tax returns. The parts of the section that are relevant to these proceedings are as follows:-

"(1) In this section – …

'prompted qualifying disclosure ', in relation to a person, means a qualifying disclosure that has been made to the Revenue Commissioners or to a Revenue officer in the period between –

(a) the date on which the person is notified by a Revenue officer of the date on which an investigation or inquiry into any matter occasioning a liability to tax of that person will start, and

(b) the date that the investigation or inquiry starts;

'qualifying disclosure ', in relation to a person, means –

(a) in relation to a penalty referred to in subsection (4), a disclosure that the Revenue Commissioners are satisfied is a disclosure of complete information in relation to, and full particulars of, all matters occasioning a liability to tax that gives rise to a penalty referred to in subsection (4), and full particulars of all matters occasioning any liability to tax or duty that gives rise to a penalty referred to in section 27A(4) of the Value-Added Tax Act 1972 , section 134A(2) of the Stamp Duties Consolidation Act 1999 and the application of subsection (4) to the Capital Acquisitions Tax Consolidation Act 2003 , and

(b) in relation to a penalty referred to in subsection (7), a disclosure that the Revenue Commissioners are satisfied is a disclosure of complete information in relation to, and full particulars of, all matters occasioning a liability to tax that gives rise to a penalty referred to in subsection (7) for the relevant period under whichever of the Acts the disclosure relates to,

made in writing to the Revenue Commissioners or to a Revenue officer and signed by or on behalf of that person and that is accompanied by –

(i) a declaration, to the best of that person's knowledge, information and belief, made in writing that all matters contained in the disclosure are correct and complete, and

(ii) a payment of either or both of the tax and duty payable in respect of any matter contained in the disclosure and the interest on late payment of that tax and duty….

'unprompted qualifying disclosure' , in relation to a person, means a qualifying disclosure that the Revenue Commissioners are satisfied has been voluntarily furnished to them –

(a) before an investigation or inquiry had been started by them or by a Revenue officer into any matter occasioning a liability to tax of that person, or

(b) where the person is notified by a Revenue officer of the date on which an investigation or inquiry into any matter occasioning a liability to tax of that person will start, before that notification.

(2) Where any person –

(a) delivers any incorrect return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29 which contains a deliberate understatement of income, profits or gains or a deliberately false or overstated claim in connection with any allowance, deduction, relief or credit,

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction, relief or credit and does so deliberately, or

(c) submits to the Revenue Commissioners, the Appeal Commissioners or a Revenue officer any incorrect accounts which contain a deliberate understatement of income, profits or gains or a deliberate overstatement of any claim in connection with any allowance, deduction, relief or credit,

that person shall be liable to a penalty.

(3) Where any person deliberately fails to comply with a requirement to deliver a return or statement of a kind mentioned in any of the provisions specified in column 1 of Schedule 29, that person shall be liable to a penalty.

(4) The penalty referred to –

(a) in subsection (2), shall be the amount specified in subsection (11), and

(b) in subsection (3), shall be the amount specified in subsection (12),

reduced, where the person liable to the penalty cooperated fully with any investigation or inquiry started by the Revenue Commissioners or by a Revenue officer into any matter occasioning a liability to tax of that person, to –

(i) 75 per cent of that amount where subparagraph (ii) or (iii) does not apply,

(ii) 50 per cent of that amount where a prompted qualifying disclosure is made by that person, or

(iii) 10 per cent of that amount where an unprompted qualifying disclosure is made by that person…

(11) The amount referred to in paragraph (a) of subsection (4) and in paragraph (a)(i) of subsection (7) shall be the difference between –

(a) the amount of tax that would have been payable for the relevant periods by the person concerned (including any amount deducted at source and not repayable) if that tax had been computed in accordance with the incorrect or false return, statement, declaration or accounts as actually made or submitted by or on behalf of that person for those periods, and

(b) the amount of tax that would have been payable for the relevant periods by the person concerned (including

any amount deducted at source and not repayable) if that tax had been computed in accordance with the true and correct return, statement, declaration or accounts that should have been made or submitted by or on behalf of that person for those periods….

(15) A disclosure in relation to a person shall not be a qualifying disclosure where –

(a) before the disclosure is made, a Revenue officer had started an inquiry or investigation into any matter contained in that disclosure and had contacted or notified that person, or a person representing that person, in this regard, or

(b) matters contained in the disclosure are matters—

(i) that have become known, or are about to become known, to the Revenue Commissioners through their own investigations or through an investigation conducted by a statutory body or agency,

(ii) that are within the scope of an inquiry being carried out wholly or partly in public, or

(iii) to which the person who made the disclosure is linked, or about to be linked, publicly."

Code of Practice for Revenue Audit

16. With effect from the 1st of October, 2010, the Revenue published a document entitled "Code of Practice for Revenue Audit" which is in the nature of a guide for tax payers and their advisers as to the manner in which the Revenue carry out audits. Certain of its provisions are central to the case that the applicant makes herein as is its legal status. It is common case that this document was operative at all times material to the issues that arise herein. Some of the relevant paragraphs are as follows:-

"Introduction….

Revenue audits can be a burden to people and may cause some disruption to their business. It is, therefore, essential that audits be conducted in an efficient, courteous and professional manner. Auditors will adopt an even-handed and professional approach in speech and behaviour during the audit process." [page 1]

"Non-Audit Interventions

Each Revenue intervention is intended to be in the form which is most efficient in terms of time and resources, and which imposes the least cost on the taxpayer, whilst addressing the perceived risk. Consequently, not all Revenue interventions take the form of formal audits. Revenue carries out the following non-audit interventions:

- Profile interviews
- Assurance checks (including aspect queries)
- Pursuit of returns from non-filers
- Sectoral reviews
- Joint Investigation Unit (JIU) visits involving other agencies, including

National Employment Rights Authority (NERA) and Department of

Social Protection (DSP)

- Site Visits." [page 2].

"1.2 Definition of Revenue Audit

A Revenue audit is an examination of:

- A tax return
- A declaration of liability or a repayment claim
- A statement of liability to Stamp Duty
- The compliance of a business with tax and duty legislation….

1.6 Revenue Investigations

An investigation is an examination of a customer's affairs where Revenue has

strong concerns of serious tax offences having occurred….

A customer who receives an investigation letter may make a disclosure but will no longer be able to benefit from the following:

- The opportunity to make a qualifying disclosure
- The avoidance of publication if the final settlement meets the publication criteria of Section 1086 TCA
- Assurance from Revenue that the case will not be investigated with a

view to referral for criminal prosecution.

1.7 Notification of a Revenue Audit or Investigation

a) Notification of a Revenue Audit

Twenty one days notice of a Revenue audit is generally given to both the taxpayer and his or her agent.

All letters issued to a taxpayer or agent will clearly indicate the nature of the Revenue intervention. The scope of the intervention will also be set out, and will range from a single issue for a specific period or year to a comprehensive audit for a number of years.

Where a Revenue audit is to be scheduled, the letter issued will include

the wording: "Notification of a Revenue Audit"

As and from the date of issue of a "Notification of a Revenue Audit" letter (that is the date shown on the letter) to the taxpayer or agent, the opportunity to make an 'unprompted qualifying disclosure' is no longer available. The taxpayer can however make a 'prompted qualifying disclosure' before the examination of the books and records begins.

If tax defaults arise in a director-owned company, it is usually for the benefit of one or more of the directors. Consequently, an audit of a director-owned company includes an audit of the directors' tax affairs. In such situations, all parties subject to the audit will receive a notification of a Revenue audit.

b) Notification of a Revenue Investigation

Where a Revenue investigation is being notified, the letter issued will

include the wording: "Notification of a Revenue Investigation"

As and from the date of a "Notification of a Revenue Investigation" letter (that is the date shown on the letter) to the taxpayer or agent, the opportunity to make any type of 'qualifying disclosure' is no longer available….

c) Other Revenue Interventions

In all other circumstances where a letter is issued to the taxpayer or

agent, the Revenue intervention to be carried out is neither an audit nor

investigation and consequently does not restrict the taxpayer's right to

make an unprompted qualifying disclosure…

2.6 Qualifying Disclosure….

A taxpayer who makes a qualifying disclosure will not be investigated with a view to prosecution and will not have his or her tax settlement published in the list of tax defaulters in accordance with Section 1086 of the TCA." (My emphasis).

17. Subsequent paragraphs of the Code of Practice provide definitions of "qualifying disclosure" "prompted qualifying disclosure", "unprompted qualifying disclosure" and disclosure not regarded as a qualifying disclosure broadly in line with the provisions of s. 1077E above. As will be seen from the foregoing, the principle advantage to the tax payer of making a qualifying disclosure is the avoidance of publication and potential prosecution. The distinction between a prompted and unprompted qualifying disclosure relates primarily to the quantum of the penalty, it being higher in the case of a prompted disclosure.

The Applicant's Case

18. The applicant's case turns on the provisions of the part of paragraph 1.7 a) of the Code of Practice highlighted above. The applicant says that the Revenue letter of the 10th of January, 2012, to Securemed was notice of a Revenue audit of a director owned company. Since the Code of Practice states that such an audit includes an audit of the directors' tax affairs and all parties subject to the audit will receive a notification of same, the Revenue were obliged to serve notification of a Revenue audit on the applicant. He contends that the failure to serve the notification of an audit on him deprived him of the opportunity of making a prompted qualifying disclosure. Had he been afforded that opportunity and availed of it, the Revenue would not have been entitled to pursue the prosecution currently being brought by the second named respondent. Once he was served with notice of a formal Revenue investigation a year later, he was no longer permitted to make a qualifying disclosure. Consequently he contends that the current prosecution is brought unlawfully.

The Arguments

19. Mr. McDonagh S.C. on behalf of the applicant essentially bases his case on the doctrine of legitimate expectation. Although the Code of Practice does not have the force of law, nonetheless his client is entitled to rely on it and the Revenue are obliged to comply with it. He relies on the well known judgment of Fennelly J. in *Glencar Exploration v. Mayo County Council* [2002] 1 I.R. 84 in that regard. He also cited *Lett and Company v. Wexford Borough Council and Another* [2012] 2 I.R. 198 in which Clarke J. carries out an extensive analysis of the doctrine. He further referred to *Keogh v. Criminal Assets Bureau and the Revenue Commissioners* [2004] 2 I.R. 159 in support of his argument, where the Supreme Court considered in detail a document prepared by the Revenue Commissioners called the "Tax Payer's Charter of Rights". In summary, he submitted that the Revenue's failure to adhere to its own

Code of Practice constituted a breach of his client's legitimate expectation that he would receive notice of audit and his right to make a prompted qualifying disclosure would thereby be triggered. The failure to afford to the applicant that opportunity rendered his subsequent prosecution unlawful.

20. Mr. Collins S.C. for the respondents argued that the applicant's position was entirely devoid of merit. The applicant was, at the material time, an audit partner in a leading accountancy firm, himself expert in matters of taxation. He was intimately involved in the preparation and presentation of what the Revenue viewed as a bogus claim based on false documentation for a repayment of over €100,000. He submitted that the applicant must be taken to have been well aware of his right throughout to make an unprompted qualifying disclosure at any time up to the commencement of the investigation, subject always to s. 1077E (15).

21. He argued that there was in reality no prejudice or unfairness of any kind to the applicant, particularly in circumstances where he was in fact aware of notice of audit having been given to Securemed by virtue of him being copied with same as Securemed's tax agent. It was entirely artificial to suggest that he had been prejudiced because he did not receive the notice in his capacity as a director or former director of the company. He contended that the reality of the applicant's case is that he was arguing that he had a legitimate expectation that he would be subject to a Revenue audit and clearly the doctrine could have no application in such circumstances. The applicant was not in fact subject to any audit in his personal capacity and it seemed unreal therefore to complain of not receiving notice of something that was never to occur. The respondents also drew attention to the fact that up to the commencement of the trial, the applicant had made the case throughout on affidavit that he had in fact made a qualifying disclosure by virtue of the correspondence previously referred to. However, that case had now been abandoned.

22. It was further submitted on behalf of the respondents that the applicant was in any event not a party "subject" to the audit as envisaged by para. 1.7 a) of the Code of Practice and accordingly there was no obligation to notify him of one. Furthermore, at no time did the applicant complain that he had been deprived of the opportunity of making a prompted qualifying disclosure. Rather his case throughout was that he had in fact made such a disclosure but the Revenue had refused to accept it. In that regard, Mr. Collins said that the applicant either was, or was not, entitled to make a prompted qualifying disclosure under the terms of s. 1077E and the Revenue enjoyed no discretion with regard to how it treated a disclosure. He referred in that regard to the judgment of Dunne J. in *Gaffney v. The Revenue Commissioners* [2013] IEHC 651.

Discussion

23. At the heart of the applicant's case is reliance on the doctrine of legitimate expectation. In *Glencar*, Fennelly J. in an oft quoted passage said, at pp. 162-163:-

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. 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."

24. The applicant placed significant reliance on *Keogh*, also a case concerning a document issued by the Revenue, in that case described as the "Tax Payer's Charter of Rights". That document provided that in their dealings with the Revenue, tax payers are entitled to expect that every reasonable effort will be made to give them access to full, accurate and timely information about Revenue law and their entitlements and obligations under it. The head note summarises one of the conclusions reached by the Supreme Court which is relevant to this case, the court holding:

> "That, having acknowledged by a specific undertaking in the Taxpayer's Charter of Rights that fair procedures required full, timely and accurate information as to the provisions of revenue law, which was a notoriously opaque and difficult code, to all taxpayers with whom they had dealings, the respondents failed to observe those requirements in the case of the applicant by failing to inform him of his statutory right of appeal to the Appeal Commissioners and it was not necessary to decide whether this approach was properly regarded as an application of the doctrine of legitimate expectation in circumstances where the applicant was unaware of the content of the charter or simply the recognition of a duty on the respondents to observe the procedures they had undertaken to apply."

25. The court clearly came to the view that there was a patent unfairness to the applicant, who was not professionally represented, arising from the failure of the Revenue to inform him of his right of appeal and consequent prejudice to his interests. In this respect, Keane C.J. in delivering the unanimous judgment of the court, observed at p. 176:

> "While it is manifestly not the function of the second respondents or their inspectors to give gratuitous advice in all circumstances to members of the public as to their legal position, it was not asking too much of them in the present case not to respond to a letter such as that from the applicant in a manner which they must have known could have left him in the dark as to his rights. That would seem to me to be at variance with both the letter and the spirit of the undertaking in the charter. In the result, I am satisfied that the fair procedures which it was reasonable to suppose the respondents would observe were not applied in his case and that, in the light of the authorities to which I have referred, the applicant was entitled to be placed in the same position as if they had been met."

26. It is clear from all the authorities on the doctrine of legitimate expectation that the doctrine is concerned with the denial of some tangible benefit to the party relying on it in circumstances where an injustice arises by virtue of that denial. In the present case, the benefit identified by the applicant is the opportunity of making a prompted qualifying disclosure. The injustice is said to arise from the failure to serve a notice on him as a director of Securemed that his personal tax affairs were to be audited. The applicant says, as he must, that he had a legitimate expectation therefore that he would receive such notice as this is what the Code promises. However if it can be said that the applicant had a legitimate expectation of receiving notice of an audit, it must necessarily follow that he equally had a legitimate expectation that he would in fact be subject to such audit. It would clearly be absurd to suggest that a party is entitled to be notified of the happening of an event which is not to happen.

27. I cannot conceive of any circumstance in which the applicant could argue, nor does he seek to do so, that being subject to a Revenue audit confers a benefit on him. Even the Revenue's own Code of Practice at the outset recognises that "Revenue audits can

be a burden to people and may cause some disruption to their business." Nor can it be asserted by the applicant that the failure of Revenue to audit his own tax affairs has resulted in any injustice to him. In those circumstances, I cannot see how the doctrine of legitimate expectation can have any application to the facts of this case.

28. In any event, it seems to me that the suggestion that the applicant was in some way deprived of an opportunity to benefit by the alleged failure to serve notice of an audit on him does not stand up to scrutiny. From the outset of the Revenue's enquiries into the allegedly bogus VAT return, the applicant was free to make an unprompted disclosure and his right to do so continued unimpaired up to the time in January, 2013, that he was served with notice of a formal Revenue investigation into his affairs. Of course whether such unprompted disclosure would have amounted to a qualifying disclosure was at all times subject to s. 1077E (15), as would equally have been the case in the event of a prompted disclosure.

29. Thus while the applicant complains of being deprived of the opportunity of making a prompted disclosure, he continued to enjoy the right to make an unprompted disclosure, a right he would have lost if notice of an audit had been served on him. Of course such notice was in fact served on him, albeit not in his capacity as a director, thus paradoxically preserving his right to make an unprompted disclosure. It might thus be said that far from being prejudiced, the applicant continued to enjoy the best of both worlds.

Conclusion
30. In my view therefore, no prejudice or injustice of any kind has been demonstrated by the applicant in this case. There is no unfairness of the kind that arose in *Keogh* here.

31. For these reasons, I must dismiss this application.