Neutral Citation No. [2007] IEHC 250

THE HIGH COURT

COMMERCIAL

[2006 No. 2306P]
[2006 No. 66 COM]

BETWEEN

LORRAINE KINSELLA

PLAINTIFF

AND

THE REVENUE COMMISSIONERS

DEFENDANTS

Judgment of Mr. Justice Kelly delivered the 31st day of July, 2007

Issues

1. This case arises from tax avoidance measures taken by the plaintiff who is a member, by marriage, of the Ryan (of Ryanair) family. The particular tax sought to be avoided was capital gains tax (CGT).

2. In order for the avoidance measures to work it was essential that the Double Taxation Agreement (the Convention) signed between Ireland and Italy on 11th June, 1971 should apply to CGT. There is disagreement between the parties on that topic and it is the first issue which I must decide.

3. The second matter for decision is the meaning of the term "day" as set forth in Article 3.1(e) of the Convention.

4. If I decide these issues in a manner unfavourable to the plaintiff I will then have to consider whether she has an enforceable legitimate expectation that the defendants would treat the Convention as applying to CGT and/or would interpret the term "day" in accordance with the Irish domestic law in force at the time of the transaction. If the plaintiff has such an enforceable legitimate expectation the defendants will be obliged to deal with her in a manner inconsistent with my decisions on the first and/or second questions.

5. The first two issues involve questions of construction and interpretation. They are largely, if not exclusively, questions of law. To deal with them, an outline recitation of the facts is all that is necessary. If the issue of legitimate expectation has to be decided, a much fuller treatment of the evidence and the inferences to be drawn from it will be required.

Background

6. In 2002, Mr. Shane Ryan owned a substantial shareholding in Ryanair Holdings plc. In the early part of that year the plaintiff, who was not then Mr. Ryan's wife, and he, in considering an overall investment strategy, decided to dispose of many of those shares.

7. Accordingly in March, 2002, the plaintiff and Mr. Ryan through the agency of Mr. Anthony Carragher the then finance director of Irelandia Investments Limited, an investment vehicle of the Ryan family, contacted the well known accountancy firm of KPMG in connection with the matter.

8. Contact was made with Mr. Terry McGowan a tax director in that firm. He was told there was a programme of share disposal that had been going on for several years and that there would be more such disposals. He was asked to advise on what opportunities there were to avoid tax in relation to those share disposals.

9. On the 16th July, 2002, the plaintiff, contracted marriage with Mr. Shane Ryan. In fairness to the plaintiff, I ought to record that although robust criticism was directed at her by counsel for the defendants on aspects of the transaction in suit the Revenue Commissioners have not and do not make the case that the marriage to Mr. Ryan was part of the tax avoidance scheme.

10. Throughout 2002 and into 2003, Mr. McGowan and his colleague Mr. Muddiman provided advice to the plaintiff and Mr. Ryan in relation to the proposed disposal of shares. A first draft report was produced in November, 2002 and a final version of it was issued in September, 2003.

11. In September, 2002 KPMG wrote to the Revenue Commissioners asking whether in the opinion of the Commissioners the Convention applied to Irish CGT. On the 12th September, 2002 the Revenue Commissioners confirmed that they considered that Irish CGT was covered under the provisions of Article 2 of the Convention.

12. On the 9th November, 2002 KPMG wrote to the Tax Residence section of the Revenue Commissioners seeking their interpretation of the word "day" for the purposes of Articles 3.1 (d) and 3.1 (e) of the Convention.

13. On the 3rd December, 2002 the Revenue Commissioners responded confirming that for the purposes of Article 3.1(e)(ii)(bb) of the Convention, presence in Ireland for a day has the meaning defined in s. 819(4) of the Taxes Consolidation Act, 1997 (the 1997 Act).

14. The advice of KPMG went through a number of different drafts. Initially the proposal was that Mr. Ryan should become an Italian tax resident and dispose of the shares whilst resident in that country.

15. A second draft in November, 2002 suggested that both Mr. Ryan and the plaintiff should become Italian residents and dispose of the shares whilst resident in that jurisdiction.

16. The final version of KPMG's advice is dated September, 2003. That report states the facts upon which it is based as follows:-

> "STR (Mr. Ryan) is Irish resident, ordinarily resident and domiciled (see appendix 1 attached) and he will not spend more than 183 days in Italy in 2003.
>
> Over the last few months LK (the plaintiff) has spent time in Italy and has taken a lease on an apartment over there. In consequence of taking up the apartment, she has also registered on the anagrafe della popolazione residente (register on the resident population) as at 23 June, 2003.

LK will spend more than 30 days but less than 91 days in Ireland this tax year; and we are presuming spent more than 250 days in Ireland in 2002.

STR and LK are living together as husband and wife.

STR is not registered on the anagrafe della popolazione residente (register of the resident population)."

17. The proposal is described in the report as follows.

"STR wishes to sell shares to LK. He will provide a loan to LK which is secured on the shares.

The proposed transactions have been documented by way of draft share sale agreement and draft loan agreement, both of which we have reviewed.

STR wishes to know the tax implications of this proposal and also any further implications of LK subsequently selling the shares to a third party."

18. It is clear that in order to become tax resident in Italy for the purposes of the Convention the plaintiff

a. had to become resident in that country and

b. in accordance with Article 3.1 (e)(ii)(bb) of the Convention had to demonstrate that she had not been present in Ireland for more than 91 days in the fiscal year.

19. The fiscal year in question was from the 1st January, 2003 to the 31st December, 2003.

20. The plaintiff obtained a permesso di soggiorno in Rome on the 13th June, 2003. On the 21st June, 2003 she entered into a letting agreement for a tiny apartment in that city. She was registered on the Anagrafe.

21. On the 25th September, 2003 she purchased shares in Ryanair Holdings Plc from her husband for a sum in excess of €18 million. In fact no monies changed hands because the purchase was funded by a loan from Mr. Ryan secured upon the shares. Because it was a sales transaction between spouses there was no liability to CGT.

22. On the 10th October, 2003 the plaintiff sold the shares to a third party for a sum in excess of €19 million. She filed a tax return in Italy declaring a gain of €314,638 giving rise to a tax liability in that country of less than €40,000. That tax was paid by her.

23. If the plaintiff is correct on the two issues of construction which I have to decide and if the transaction was carried out *bona fide* and in accordance with the advice given and in turn that advice was correct then the plaintiff and her husband will have succeeded in avoiding the substantial liability to CGT which would be payable to the Irish Exchequer.

24. It is clear from the various drafts of the advice furnished to the plaintiff that KPMG were very much alive as to the two issues which I must now consider. Throughout the drafts of their advice they pointed out that there was an uncertainty on the question of the Convention applying to CGT. They did however draw comfort from the fact that they had confirmation in writing from the defendants in that regard. They also pointed out the possibility of the defendants ultimately taking a different view on that topic.

25. KPMG also pointed out the different approaches of the Irish and Italian authorities to the question of the meaning of "day". They pointed out that in Italy any part of a day spent in that country is regarded as a full day spent there. Thus, the Italian authorities would ignore part of the same day spent in Ireland. They pointed out that in Irish domestic law an individual is resident in Ireland if present at mid-night. Thus, arguably, the two authorities might claim ownership of the same day.

26. These uncertainties are probably best characterised in a letter of 25th September, 2003 issued by KPMG to Mr. Carragher which *inter alia* stated:

"Tax law can be ambiguous and open to more than one interpretation, and many areas of law are not the subject matter of clarification by decisions of the Irish courts. Accordingly there is always some risk that the courts might, and on future occasion, disagree with our interpretation of the legislation. In addition, the Revenue Commissioners are given power by TCA 1997 Section 811 to recharacterise transactions which in their opinion constitute tax avoidance transactions to deny to the tax payer the expected benefits of those transactions.

While we shall satisfy ourselves and make our best endeavours to ensure that our advice is correct and reasonably based, we cannot be responsible for Revenue and/or the courts taking opposite interpretations of our advice, involving Section 811 or any future tax legislation".

27. Following the carrying into effect of the transaction which I have briefly described, KPMG prepared the plaintiff's tax return which was submitted to the defendants on the 30th August, 2004. That return represented that the plaintiff's main residence was the tiny flat in Rome upon which a letting had been taken. The return was accompanied by an expression of doubt. That is a procedure which is provided for under s. 955 of the 1997 Act. The doubt was expressed in a letter from KPMG of the 30th August, 2004 which, insofar as it is relevant, read as follows:

"In November, 2003 Mrs. Ryan sold 3,000,000 shares in Ryanair Holdings plc.

For the year ended 31st December, 2003:

Mrs. Ryan was an Italian resident under Italian legislation;

did not spend more than 90 days in Ireland;

was present for more than 91 days in Italy.

Based on the foregoing facts and on our interpretation of the Irish-Italian Double Taxation Agreement, she is a resident of Italy for 2003.

Accordingly, in our view the profit on the sale of these shares is, by reason of Article 12 of the aforementioned Agreement, subject to Italian tax only. An Italian tax return has been prepared in this respect and the Italian tax paid.

Mrs. Ryan had acquired the shares from her husband earlier in 2003, which acquisition was a non chargeable transaction for Irish Capital Gains Tax purposes under S1028 TCA 1997."

28. The defendants have in correspondence made it clear that they do not accept that the scheme is effective to avoid CGT but have deferred raising an assessment to tax in that regard pending the determination of this action.

29. Having set out that sketch of the factual background I now turn to the issues of interpretation of the Convention.

The Convention
30. The Convention is described as a "Convention between Ireland and Italy for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income". The Convention was signed at Dublin on 11th June, 1971. It was subsequently incorporated into Irish law by the Double Taxation Relief (Taxes on Income) (Italy) Order 1973 (SI 64 of 1973). That instrument was made on 13th March, 1973 pursuant to s. 361(1) of the Income Tax Act, 1967 which enabled the Government to declare by order that an agreement of the type covered by the Convention should have the force of law.

31. Article 1 provides that the Convention is to apply to persons who are residents of one or both of the Contracting States.

32. Article 2 of the Convention which is headed "Taxes Covered" reads as follows:

"1. This Convention shall apply to taxes on income imposed by each Contracting State, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income or on elements of income, including taxes on gains from the alienation of movable or immovable property.

3. The existing taxes to which the Convention shall apply are

"(a) In Ireland (and hereinafter referred to as "Irish tax"):

I - The income tax (including sur-tax);

II - The corporation profits tax.

(b) In Italy (and hereinafter referred to as "Italian tax"):

I - The tax on income from land (imposta sul reddito dei terreni);

II - The tax on income from buildings (imposta sul reddito dei fabbricati);

III - The tax on income from movable wealth (imposta sui redditi di ricchezza mobile);

IV - The tax on agricultural income (imposta sul ` reddito agrario);

V - The complementary tax (imposta complementare progressiva sul reddito);

VI - The tax on companies (imposta sulle societa) in so far as the tax is charged on income and not on capital;

VII - The tax on dividends (imposta sui dividendi).

4. The Convention shall also apply to any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes. At the end of each year, the competent authorities of the Contracting States shall notify to each other any changes which have been made in their respective taxation laws."

33. Article 3 contains a number of general definitions some of which have a relevance for this case. Unless the context otherwise requires, under the provisions of Article 3(1)(d) of the Convention the term "resident of Ireland" means

"(i) any company whose

+business is effectively managed and controlled in Ireland;

(ii) any other person who is resident in Ireland for the purposes of Irish tax and either

(aa) not resident in Italy for the purposes of Italian tax, or

(bb) present in Italy for a period or periods not exceeding in the aggregate 91 days in the fiscal year."

34. The term "resident of Italy", means, pursuant to Article 3.1(e), as follows:

"(i) any company whose business is effectively managed and controlled in Italy;

(ii) any other person who is resident in Italy for the purposes of Italian tax and either

(aa) not resident in Ireland for the purposes of Irish tax, or (bb) if resident in Ireland is present therein for a period or periods not exceeding in the aggregate 91 days in the fiscal year."

35. Article 3.2 provides

> "As regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are subject of the Convention."

36. Article 12 of the Convention is headed "Capital Gains". It reads:

> "1. Gains from the alienation of immovable property, as defined in paragraph 2 of Article 5, may be taxed in the Contracting State in which such property is situated.
>
> 2. Gains from the alienation of movable property shall be taxable only in the Contracting State of which the alienator is a resident.
>
> 3. The provisions of paragraph 2 shall not apply if the alienator, being a resident of a Contracting State, has in the other Contracting State a permanent establishment or a fixed base, and the movable property is attributable to that permanent establishment or to that fixed base. In that case, gains from the alienation of such movable property may be taxed in that other Contracting State according to its own law…"

37. Article 20 which is headed "Income not expressly mentioned" reads:

> "Items of income arising in one or other of the Contracting States to a resident of a Contracting State which are not expressly mentioned in the foregoing Articles of this Convention shall be taxable only in the latter State."

Capital Gain Tax

38. CGT was introduced in Ireland for the first time by the Capital Gains Tax Act 1975 (the 1975 Act). Thus, Ireland did not have CGT at the time of execution of the Convention.

39. Italy did not have CGT as such either at the time of the Convention. However it did exact taxes from certain gains which could be described as capital gains on the basis that they constituted income.

40. Although introduced by the 1975 Act, CGT is now covered by parts 19 to 21 of the 1997 Act as amended. The 1997 Act contains all of the provisions related to direct taxes such as income tax and corporation tax.

41. CGT is charged in respect of chargeable gains accruing to a tax payer on the disposal of an asset. It is not a tax on the asset itself. The tax only arises where the asset is disposed of and profit or gain arises on that alienation. It clearly is not a tax on capital but rather a tax on profit or gains.

42. It is interesting to look at the 1975 Act in its historical context. Within a short time of its enactment the National Parliament enacted the Wealth Tax Act of 1975. That Act imposed a tax on the net market value of the taxable wealth of assessable persons. The tax was levied at an annual rate of 1%. It was abolished by the Finance Act of 1978. However, the fact that a wealth tax was created almost contemporaneously with CGT is supportive of the notion that CGT is not a tax on capital but rather on income. CGT taxed the income derived from the disposal of an asset whilst the Wealth Tax taxed the asset itself.

Principles of Interpretation

43. This State acceded to the Vienna Convention on the Law of Treaties with effect from the 6th September, 2006. Even before that event it is clear from the decision of Barrington J. in *McGimpsey v. Ireland* [1988] I.R. 567 that in interpreting an international treaty the court ought to have regard to the general principles of international law and in particular the rules of interpretation of such treaties as set out in Articles 31 and 32 of the Vienna Convention.

The Vienna Convention

44. Article 31 of this Convention provides as follows:

> "Article 31: General Rule of interpretation.
>
> > 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> >
> > 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> >
> > > a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> > >
> > > b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> >
> > 3. There shall be taken into account, together with the context:
> >
> > > a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> > >
> > > b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> > >
> > > c. any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

45. Article 32 is headed "Supplementary means of interpretation". It reads as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> a. leaves the meaning ambiguous or obscure; or
>
> b. leads to a result which is manifestly absurd or unreasonable."

46. In accordance with what is prescribed by the Vienna Convention, I must therefore interpret the Convention in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Convention's object and purpose. Where such an interpretation leaves the meaning of the Convention ambiguous or obscure or leads to a manifestly absurd or unreasonable result then recourse can be had to supplementary means of interpretation. These means of interpretation could, in an appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon. This has been done in a number of cases such as *Thiel v. Federal Commissioner of Taxation* [1990] 171 C.L.R. 338 and *Sun Life Assurance Company of Canada v. Pearson* (HMIT) [1986] S.T.C. 335.

47. In interpreting the Convention I must have regard to the words used in it. I will interpret them in good faith in accordance with the ordinary meaning to be given to the terms of the Convention in their context and in the light of the Convention's object and purpose.

Does the Convention apply to CGT?

48. CGT did not exist at the time when the Convention was negotiated. Thus it could not have been enumerated as an existing Irish tax in Article 2.3 of the Convention.

49. Article 2.1 states the general principle that the Convention applies to taxes on income "imposed by each Contracting State irrespective of the manner in which they are levied".

50. Article 2.2 is in my view highly significant because it specifies taxes which are to be regarded as taxes on income. They are "all taxes imposed on total income or on elements of income, including taxes on gains from the alienation of movable or immovable property".

51. Article 2.3 has little relevance for the reason which I have already alluded to, namely, that CGT did not exist at the time of the Convention's execution.

52. Article 2.4 makes it clear that the Convention is to apply to taxes subsequently imposed in either Contracting State whether such taxes are in addition to or in place of existing taxes. The Convention has prospective effect and is to apply to any "identical or substantially similar taxes" to those which existed at the time of its execution.

Article 2.2

53. Had the Convention been intended to apply only to taxes which were in existence at the time that it was negotiated there would have been no need to include Article 2.2. It would have been sufficient to have Article 2.3. Indeed the fact that Article 2.3 speaks of existing taxes to which the Convention applies when read in conjunction with the remainder of Article 2 makes it clear that the Convention was designed to have prospective effect.

54. Coming to the wording of Article 2.2 I am of the opinion that it demonstrates a clear intention that the Convention was designed to cover *inter alia* taxes on gains from the alienation of movable or immovable property. Such taxes are to be regarded as taxes on income. The wording is unusual in including gains from the alienation of such property as being within the scope of the definition of income. The researches of counsel have not been able to uncover any other pre 1975 Convention or Treaty entered into by this State which contains such a wording.

55. On the plain wording of Article 2.2 I am of opinion that CGT is captured under the terms of the Convention.

56. I am fortified in this view by the existence of Article 12. As I have already pointed out it is headed "capital gains". It sets out the rules that are to apply to gains from the alienation of movable and immovable property. The existence of Article 12 is supportive of the notion that the Convention envisaged taxes on capital gains as constituting taxes on income and as such CGT is covered by the Convention. For the purpose of the Convention taxes on gains from the alienation of movable property are deemed to be and are treated as taxes on income whether or not they are so regarded by the Contracting State. Thus, irrespective of whether Ireland's domestic revenue law regards CGT as something other than a tax on income, it is regarded as such for the purposes of the Convention.

57. I do not accept the argument which suggests that Article 12 is confined in its application to Italian taxes. Its wording makes it clear that it is to have application to taxes on capital gains applicable in either of the Contracting States.

58. I further fortified in the view which I have formed by reference to the Model Convention and the commentaries thereon. The provisions of the Convention are clearly based on the Model Convention. Earlier in the judgment I referred to a number of instances where, as an aid to interpretation, reliance was placed upon the Model Convention and its commentaries. (See *Thiel's* case and *Sunlife Assurance Company of Canada's* case).

59. Reliance on the Model Convention and its commentaries can be had in circumstances of ambiguity. I do not find any ambiguity on the wording of Article 2.2. Lest however I am wrong in that view I will consider briefly if there is support for the construction which I have placed on Article 2.2 by reference to the Model Convention and the commentaries upon it. In so doing I am of course conscious of the observations of Carroll J. in *Travers v. O'Siochain* [1994] 3 I.R. 199. In that case she had to consider whether a health board in Northern Ireland constituted a "local authority" for the purposes of Article 18 of the Northern Ireland – U.K. Double Taxation Agreement. She said:

> "While the model treaties are intended to be used between a wide range of countries, nevertheless it finally comes down to a bi-lateral Treaty. In my opinion the language must be interpreted not in any global sense, which might be appropriate

for a multilateral treaty, but rather as it would be interpreted in each of the jurisdictions involved. Therefore in Art. 18 sub Art. 1 "local authority" must be given the legal meaning it has in Ireland and in Art. 18, sub Art. 2 "local authority" must be given the legal meaning it has in the United Kingdom. I am reinforced in this view by Art. 3, sub Art. 2 of the Convention which provides:-

> 'As regards the application of this Convention by a contracting State any term not otherwise defined shall unless the context otherwise requires have the meaning which it has under the laws of that contracting State relating to the taxes which are the subject of this Convention.'

As far as I am aware the term "local authorities" does not have any particular meaning relating to taxes, therefore it seems to me that the ordinary meaning in each jurisdiction applies."

60. I have no difficulty with that approach. In my view Carroll J. was not excluding reliance on the Model Convention and its commentaries as an interpretative aid. Rather she was saying that little assistance can be obtained from the Convention and its commentaries in respect of the interpretation of a non tax related term particularly in circumstances where that term has an established legal meaning in each Contracting State.

61. Article 2 is largely based on the similarly numbered article of the Model Convention. The commentary on that says that the Article is intended to widen as much as possible the field of application of the Convention and to avoid the necessity of concluding a new one whenever the Contracting States' domestic laws are modified. Thus, an expansive rather than restrictive interpretation is justified.

62. If, therefore, it were necessary, I would be entitled to have regard to the Model Convention and its commentaries. They support my interpretation. However as the wording of Article 2.2 is in my view clear and unambiguous there is no need to have recourse to these interpretative aids.

Article 2.4
63. The wording of Article 2.4 has prospective effect. The Convention is to apply to any identical or substantially similar taxes which are subsequently imposed in addition to or in place of the existing taxes.

64. The issue here is whether CGT is an identical or a substantially similar tax to the existing taxes as defined in Article 2.3. In the case of Ireland they are income tax and corporation profits tax (Article 2.3(a)). In the case of Italy they are the taxes which are set forth in Article 2.3(b). Thus, if Ireland, subsequent to the Convention, introduced a tax substantially similar to one of the enumerated taxes, such new tax would be captured by the Convention. The new tax has to be identical or substantially similar to an existing tax whether that existing tax is Irish or Italian. Such an approach is consistent with the reciprocal nature of the Convention. It is also supported by the obligation of annual notification of tax changes by the contracting States.

65. CGT is, in my view, a substantially similar tax to the Italian taxes listed in Article 2.3 and of course is specifically covered in Article 12. I do not however rest my decision upon that proposition. Rather do I take the view that CGT is a substantially similar tax to the Irish taxes which are mentioned in Article 2.3. I do so for the following reasons.

66. As I have already pointed out CGT is a tax on gains or profits rather than a tax on capital wealth. Although introduced in 1975 it is now dealt with by the 1997 Act. That Act contains all of the provisions related to other direct taxes such as corporation tax and income tax. The rules for computing CGT are included in that legislation. True it is that the capital gains are taxed in a different way from other forms of income but the tax legislation regards the two as being very closely related. Section 4 of the Income Tax Act, 1967 which is now contained in S. 12 of the 1997 Act provides that income tax is to be charged in respect of all property, profits or gains respectively described in the schedules contained in the sections which are enumerated. Thus, although it is calculated in a different way from income tax, CGT is substantially similar.

67. The question might be asked as to why capital gains are not taxed under the ordinary income tax legislation. I can see good logistical reasons why the two taxes although similar in concept fall to be dealt with differently. CGT becomes payable when the gain is realised by the tax payer not when the gain accrues. To tax the gain as it accrues on, say, an annual basis would be extraordinarily difficult.

68. In concluding as I do that CGT is a substantially similar tax to the existing Irish taxes specifically mentioned in the Convention I am conscious of the fact that at first sight that view is not shared by Haccius and O'Brien in their text book "Double Tax Agreements". In the 5th edition of that book they state their opinion that:

> "In general, CGT is not a substantially similar tax unless there are particular and unusual provisions in an older treaty which support such a construction."

69. They do however accept that the provisions of Article 2.2, which do not appear in any other pre 1975 Irish Double Taxation Agreement are unusual. Whilst this is a view that is more referable to Article 2.2 the authors do not carry out any extensive examination of the matter and conclude by referring to what they believe to be the defendants acceptance that the Convention extends to CGT because of the combined language or Article 2.2 and Article 2.4. It seems to me that Article 2.2 is an unusual provision and thus the authors' general views are not applicable in this instance. The fact that they record the then view of the defendants as they do is further support for the construction which I accept.

70. My view appears to be in keeping with that of Klaus Vogel in his book on Double Taxation Conventions (3rd edition 1998). He opines that new capital gains taxes will normally be considered as substantially similar to income tax. He says:

> "What is necessary is a comprehensive comparison of the tax laws' constituent elements. In such a comparison, the new tax under review, rather than being compared merely with a solitary older one (to which it will always be similar in some respects and different in others), should be considered with reference to all types of taxes historically developed within the State in question – and of States with related legal systems – in order to determine which of such traditional taxes comes closest to the new tax law….Whether a tax is "substantially similar" to another can, consequently, not be decided otherwise than against the background of the entire tax system…"

71. Later he says:

> "Taxation of capital gains is normally dealt with in income tax laws, though in some instances separate legislation is

> devoted to that subject (see the National Reports of LX1BCDF 1129FF [1976]. Consequently, any new capital gains tax will, for Treaty purposes normally have to be considered as being at least similar to income taxes; the Danish Landskattereten (Danish Tax Court) 26 ET114 [1986]: DTC Denmark/France, differs, however."

72. I have briefly carried out the exercise which he suggests, namely to consider all types of taxes historically developed within the State and I have reached a conclusion similar to his namely, that for the purposes of this Convention, CGT falls within the wording of Article 2.4.

74. Some further support can be found, I believe, by reference to the enabling legislation under which the Convention became part of the domestic law. SI 64 of 1973 was made pursuant to the provisions s. 361 (1) of the Income Tax Act, 1967. That section reads:

> "If the Government by order declare that arrangements specified in the order have been made with the government of any territory outside the State in relation to affording relief from double taxation in respect of income tax, sur-tax or corporation profits tax and any taxes of a similar character, imposed by the laws of the State or by the laws of that territory, and that it is expedient that those arrangements should have the force of law, then, subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have the force of law."

75. Section 38 of the Capital Gains Tax Act, 1975 provided for double taxation relief in respect of CGT pursuant to s. 361. Section 38(2) appeared to recognise that relief might be available for CGT under s. 361 and then excluded the amount of any tax from relief under s. 38 if the tax was relieved under s. 361. Thus in 1975 the legislature appeared to regard the Convention which then had the force of law as applying to CGT.

Conclusions on the first Issue
76. I am of opinion that CGT is included within the ambit of the Convention. I believe it falls within the ambit of Article 2.2. If I am wrong in that I believe that it falls within the ambit Article 2.4. I thus answer the first question in favour of the plaintiff.

Second Issue– A Day
77. The plaintiff contends that her gain falls to be taxed under Italian rather than Irish law. One of the elements which she has to prove in order to achieve such a result is the spending by her during the relevant fiscal year of a requisite number of days in Italy. I heard evidence from her in that regard but for reasons which I will give towards the conclusion of this judgment I do not propose to make any finding on that topic.

78. The legal issue which needs to be clarified is this. What is the meaning of the word "day" in Article 3.1(e)(bb) of the Convention?

79. Article 3.1 (e) defines the term "resident of Italy". For the purposes of this litigation it is the definition which is contained at sub paragraph (bb) of Article 3.1(e) which is relevant. There the term "resident of Italy" is defined as a resident in Ireland who is present for a period or periods not exceeding in the aggregate 91 days in the fiscal year.

80. All of this calls for a consideration of what is meant by presence in Ireland for a day.

81. It is to be noted that there is no definition of "day", "days present" or "present for a day" in the Convention.

82. It is clear from the evidence and submissions that there are two different approaches which one may have to the notion of "presence for a day" in the context of tax law.

83. One test which is known as "the midnight test" is that which is encompassed in s. 819(4) of the 1997 Act. By that test a person is regarded as being present in Ireland only if physically present at the end of the day i.e. at midnight.

84. The other test is to include as a full days residence every day in which the individual is present, even if only so for part of that day.

85. I should record that it is accepted by the plaintiff that if one applies this latter test then she was present in Ireland for greater than 91 days in 2003 and consequently is not a resident of Italy for the purposes of the Convention.

86. If on the other hand the midnight test applies, then the plaintiff contends that she was not present in Ireland for greater than 91 days and consequently is a resident of Italy for the purposes of the Convention.

87. In these circumstances it is hardly surprising that the plaintiff contends that the midnight test is the appropriate one and that she is therefore a resident of Italy for the purposes of the Convention. This approach is not accepted by the defendants.

88. In order to try and resolve this dispute I must direct my attention in the first instance to the wording of Article 3 itself.

Article 3
89. The Article deals with general definitions. As I have already pointed out it defines both the terms "resident of Ireland" and "resident of Italy." A person is a resident of Italy, if resident in that State for the purposes of Italian tax and either not resident in Ireland for the purposes of Irish tax or if resident in Ireland is present therein for a period or periods not exceeding in the aggregate 91 days in the fiscal year. This latter 91 day provision was described during the hearing as a "tie breaker". It is the provision which determines the tax rules which are applicable to a person who is resident in both Contracting States for the purposes of tax under the respective domestic laws. Without it the Convention would achieve very little insofar as a dual resident would be concerned.

90. The plaintiff's first submission is that on the construction to be given to Article 3.1(e) on its own, the meaning of "days" and "fiscal year" where it occurs in sub paragraph (bb) must refer to the meaning of those terms as determined by Irish tax law. The reason for this is that there are clear references to Irish law in Article 3.1(e)(aa) where it speaks of "not resident in Ireland for the purposes of Irish tax" and so it must follow that the use of the term "days" and "fiscal year" in (bb) must also be for the purpose of and determined by Irish domestic law.

91. I am of opinion that there is much to support this proposition. It seems to me that Article 3 gives an indication that questions concerning the residence of natural persons fall to be determined by the national law of the Contracting State. If it were not otherwise one would have expected terms such as "day" and "fiscal year" to be the subject of specific definition in the Convention. They are not.

92. Both Articles 3.1(d) and 3.1(e) provide that residence in a Contracting State for Convention purposes is dependent on residence in that State for the purposes of its own tax laws combined with either non residence in the other State or non presence in the other State for more than 91 days in the fiscal year. In each case it seems to me that both the basic residence condition and the first of the alternative non residence conditions are explicitly stated to be determined by reference to the tax laws of that State. This is a strong indication that when one is dealing with the second alternative condition of residence not exceeding 91 days aggregate in the fiscal year, the computation of such days falls to be determined in accordance with the domestic law of the State in question.

93. Whatever doubt one might have about the approach which I have just outlined it seems to me that when one goes on to consider Article 3.2 of the Convention all such doubts are dissipated.

Article 3.2
94. I have already set out the terms of this Article earlier in this judgment. In short, it provides that as regards the application of the Convention by a Contracting State any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting State relating to the taxes which are the subject of the Convention.

95. Neither the terms "is present therein", "91 days" or "fiscal year" are defined in the Convention. Such being so they must have the meaning which they are given under the laws of Ireland unless the context otherwise requires. I cannot see that the context does otherwise require.

96. In many ways the problem that I am confronted with is not dissimilar to that which was dealt with by Carroll J. in the *Travers* case. There she defined a term which was not itself defined in a Treaty in accordance with its ordinary meaning under the law of the relevant jurisdiction.

97. It is also to be borne in mind that Article 3.2 concerns itself with the application of the Convention by a Contracting State. In this case the Convention falls to be applied by Ireland. In so doing, a term not otherwise defined in the Convention should have the meaning which it is given under the laws of this State.

98. I believe that this approach is supported by Vogel's commentary on the current Model Convention. The current Convention is slightly different from the wording of the 1963 Model Convention but in my view not in any material way. Vogel says by reference to Article 3.2 that it requires the following order of reference for interpreting terms used in such Conventions:

> "1. First, special treaty definitions, if any, or treaty rules of interpretation will be applied.
>
> 2. If no such special rules are applicable, the question to be asked is whether the law of the State applying the treaty (lex fori) attaches a special meaning to the term to the extent that it relates to the taxes covered by the treaty. For members of the European Union, the law of the State applying the treaty also includes the domestically applicable EU laws.
>
> 3. If the law of the State applying the treaty uses the term, the term's meaning needs to be ascertained, in order to ask whether the context suggests a different interpretation and, in the light of the weight to be given to alternative interpretations, whether the context requires a different interpretation. Any reasons for adopting an interpretation deviating from domestic law have additional weight on the level of the distributive rules…in particular where the question involves determination of the type of income, profit or capital to which the distributive rule applies or involves the relevant tax base. This additional weight derives from the fact that in cases of interpretation by recourse to domestic law, the latter is particularly apt to lead to inappropriate results."

99. In my view therefore the term "day" where it appears in Article 3.1(e)(bb) has the meaning which that term has in domestic legislation. That is to be found at present in s. 819 (4) of the 1997 Act. That section provides that "for the purpose of this section, an individual shall be deemed to be present in the State for a day if the individual is present in the State at the end of the day."

100. Subsection 1 of section 819 makes it clear that the provisions of the section govern the definition of residence for the purpose of the Acts. The Acts are defined in s. 818 of the 1997 Act as meaning the Tax Acts, (which covers income tax and corporation tax), the Capital Gains Tax Acts, the Capital Acquisition Tax Consolidation Act, 2003 and any instruments made thereunder.

101. The defendants first contend that the 1997 Act has no application because it was not enacted when the Convention was concluded. I do not think that there is any substance in this point and it runs entirely contrary to the tenor of the Convention which clearly has prospective effect.

102. The defendants also contend that the section can have no application because it only operates for the purposes of the Acts listed in s. 818 of the 1997 Act and does not have general application. They contend that although the Convention was incorporated into Irish law by S.I. 64 of 1973 it is not an Instrument made under the Tax Acts within the meaning of s. 818 and therefore s. 819(4) does not apply. I do not accept that this is a correct proposition.

103. It was s. 150 of the Finance Act of 1994 which for the first time defined "residence" for the purposes of the Finance Acts. Section 150(3) of that Act provided that an individual was to be deemed to be present in the State for a day if he was present in the State at the end of the day. Thus the midnight test was enacted.

104. S. 150 was re-enacted in s. 819 (4) of the 1997 Act. Section 2(1) of the 1997 Act provides that "resident" and "ordinary resident" in relation to an individual shall be construed for the purposes of the Tax Acts and the 1975 Act in accordance with part 34 which contains sections 818 and 819. It follows, it seems to me, that the definition given to "resident" which incorporates the midnight test is a definition of general application for taxing statutes. I am of the view that the definition contained in s. 818 includes SI 64 of 1973 being the instrument under which the Convention was adopted into Irish law. It follows that the term "day" in the Convention has to be interpreted in accordance with s. 819.

105. In these circumstances I have come to the conclusion that the plaintiff also succeeds on the second issue of interpretation. There will be an appropriate declaration to this effect.

Legitimate Expectation
106. A good deal of evidence was lead before me and much of the legal argument turned on the question of legitimate expectation. In view of the plaintiff's success on the questions of interpretation I am not required to deal with this topic.

107. It is my normal practice in the course of a judgment to try and address all issues in the case even though a decision on some may not be necessary in order to dispose of the litigation. I have decided not to follow that course in the present case for a number of reasons.

108. Apart from the lack of necessity to do so, it is, I believe, undesirable that I should engage in a detailed analysis of the evidence and make findings of fact and draw inferences therefrom in circumstances where the plaintiff's liability to Irish CGT, if any, will not be determined by these proceedings.

109. Secondly, the concept of legitimate expectation is one which, I believe, can be said to be in a state of development. I do not wish to add to that area of the law by obiter dicta. They add little but could confuse.

110. Thirdly, and of greatest importance, I am very conscious of the strong criticism that was made by the defendants of the plaintiff and this tax avoidance scheme in the course of the trial. On the final day of the hearing it was accepted by both sides that the court would not be concerned with any question of tax collection. Rather, dependent upon the outcome of the issues which I identified at the beginning of this judgment, it will be a matter for the Revenue Commissioners to decide whether or not to raise an assessment to CGT upon the plaintiff. Thereafter there is a statutory machinery available to deal with a tax payers liability on foot of such an assessment. In that regard, counsel for the plaintiff made it clear that they were not seeking the order which is contained at paragraph 9 of the prayer of the statement of claim to restrain the defendants from assessing the plaintiff to CGT. In such circumstances, I think it would be inappropriate that I should make findings of fact or draw inferences from evidence tendered which may touch upon issues which may properly fall to be decided in other proceedings should the defendants decide to proceed to make an assessment against the plaintiff.

111. I am also aware from the defendant's discovered documents of an anxiety on the part of the Revenue Commissioners that the scheme used in this case has also been utilised by other wealthy individuals. The efficacy of such a scheme should be decided upon by the use of the appropriate statutory machinery. I do not wish to trespass in any way on that by findings or comments made obiter in this litigation.

112. Finally, I think it is inappropriate that I should express views on matters which were canvassed in evidence or submissions and which might trench upon the entitlement or ability of the Revenue Commissioners to invoke the provisions of s. 811 of the 1997 Act. The defendants are therefore at large as to what steps, if any, they take in respect of the plaintiff's activities pertinent to the tax avoidance scheme subject only to the two issues of interpretation which have been decided in her favour. This judgment is confined to these two questions of interpretation and no more.

Conclusion
113. The plaintiff succeeds on both issues of interpretation. There will therefore be a declaration that the Convention between Ireland and Italy for the avoidance of double taxation and the prevention of fiscal evasion which respect to the taxes on income which was signed in Dublin on the 11th June, 1971 and incorporated into Irish law by the provisions of Statutory Instrument 64 of 1973 applies to Irish Capital Gains Tax pursuant to the provisions of Article 2 of the Convention.

114. There will also be a declaration that for the purposes of Article 3.1(e)(ii)(bb) of the aforesaid convention presence in Ireland for the purpose of computing the period or periods of days in the relevant fiscal year is to be determined in accordance with s. 819(4) of the Taxes Consolidation Act, 1997 namely that an individual is deemed to be present in the State for a day if that individual is present in the State at the end of the day.