



THE COURT OF APPEAL
CIVIL

[2022 No. 173]

The President
McCarthy J.
Kennedy J.

Neutral Citation Number [2023] IECA 110

BETWEEN

BRIAN MURPHY

APPELLANT

AND

**THE REVENUE COMMISSIONERS AND THE DIRECTOR OF PUBLIC
PROSECUTIONS (DPP)**

RESPONDENTS

JUDGMENT of the President delivered on the 5th day of May 2023 by Birmingham P.

Introduction

1. The appellant is facing prosecution on indictment relating to a number of charges which are in the nature of revenue offences. He has commenced judicial review proceedings seeking to halt the prosecutions, and in circumstances where that application failed in the High Court, has now appealed to this Court. In broad terms, the appellant says that the terms of a settlement agreement into which he entered with the Revenue Commissioners in the context of civil proceedings, which were in relation to a particular sum claimed by the Revenue Commissioners to be owing and due by him, prevents his prosecution on quite separate matters not directly connected to the debt at issue in those civil proceedings. He contends that the prosecutions should not be permitted to proceed notwithstanding that it is not suggested that the Director had any involvement in the civil proceedings. Having failed in

the High Court (judgment of Simons J., 5th May 2022, [2022] IEHC 228), he has now appealed to this Court. Throughout this judgment, I will refer to the appellant as the “taxpayer”, as was the case in the High Court judgment.

2. The settlement agreement the subject of the application for judicial review was entered into between the taxpayer and the Revenue Commissioners on 31st August 2015. Relevant to the application for judicial review are the discussions, negotiations and interactions that took place between the taxpayer and solicitors for the Revenue Commissioners resulting in the written settlement agreement of 31st August 2015.

Background

3. To provide context for the arguments made in relation to the settlement agreement of 31st August 2015, it is necessary to go back a little further in time. On 18th February 2014, the Director issued a summons against the taxpayer. The alleged offences contained therein concerned the making of a claim for a refund of VAT, the refund claim having been made on behalf of a company of which the taxpayer had been a director and, possibly, also a shareholder *via* a trust.

4. The taxpayer’s response to the fact that a criminal summons had been issued against him was to commence judicial review proceedings. Ultimately, this first set of judicial review proceedings were dismissed by the High Court (Noonan J.) by order of 18th November 2015, a reserved judgment having been delivered on 4th November 2015 ([2015] IEHC 670).

5. Before the first judicial review proceedings came on for hearing, on 15th June 2015, the taxpayer put forward a proposal to the Revenue Commissioners designed to deal with his situation in relation to certain unrelated arrears of tax. The proposal related to arrears in respect of income tax for the tax year 2013 and for VAT arrears for the two-month period of January to February 2015.

6. It is important to appreciate that the prosecution that had been initiated in February 2014, and a further prosecution which had issued in October 2015, did not relate to the income tax from 2013 nor the VAT for the period January to February 2015, which were the subject of proposals in respect of which an agreement would eventually be entered into.

7. In addressing his situation in relation to the income tax for the tax year 2013 and the VAT for the January to February 2015 period, the taxpayer sought an assurance from the Revenue Commissioners that no prosecution against him would proceed. He indicated that addressing his liabilities in respect of the tax year 2013 and the VAT for the January to February 2015 period would see him taking on a heavy burden in terms of a payment schedule, and that his ability to make payments was dependent on his ability to continue to work as an accountant. The taxpayer is a chartered accountant, and indeed at one stage, was a partner in one of the large accountancy firms, though it is understood that he no longer occupies such a role. The Revenue Commissioners, directly, through Piers Fitzgibbon Solicitors acting for them in debt collecting proceedings, responded by making it clear that, so far as they were concerned, the arrangement under discussion related only to the tax and interest liability for income tax for the year ending 31st December 2013, and that if an agreement was entered into, it was without prejudice to any other enforcement action or prosecution action in being or yet to be initiated. The taxpayer's desire for an assurance that there would be no prosecution, and the Revenue Commissioners' response thereto that the discussions were confined to a particular sum of arrears and that the agreement was without prejudice to any other enforcement action or prosecution action, were maintained. Both sides were quite consistent throughout.

8. The judicial review proceedings that had been commenced in respect of the February 2014 summons came on for hearing on 2nd and 3rd July 2015. Judgment was reserved.

9. Later, on 22nd July 2015, a summary summons entitled *Gladney (Inspector of Taxes) v. Murphy*, bearing the High Court record number 2015 No. 195 R, issued in respect of arrears of income tax for the tax year 2013 and for VAT in respect of the January to February 2015 period. The summons was served on the taxpayer on 17th August 2015.

10. Further summonses were issued on the criminal side on 12th October 2015 which alleged that a number of revenue offences, relating to income tax returns for the years 2008, 2009, 2010, 2011 and 2012, had been committed. The taxpayer's position was that the issuing of these new criminal summonses breached the terms of the settlement agreement that had been entered into on 31st August 2015. He sought, by way of judicial review, an order of prohibition restraining the respondents from prosecuting the taxpayer in respect of revenue offences contained in summonses dated 18th February 2014 and 12th October 2015. By order of the High Court (Murphy J.) leave to apply for judicial review was granted.

11. The grounds on which relief was sought and for which leave was granted are paraphrased as:

1. The taxpayer and the Revenue Commissioners entered into terms of settlement including a payment schedule on the basis that enforcement action would not be initiated, existing prosecutions would not continue and no new prosecutions would be initiated, and the respondents have contravened same.
2. It would be unjust and inequitable to permit the prosecutions proceed given the agreement between the taxpayer and the Revenue Commissioners.
3. The respondents have a duty to adhere to the agreements of the Revenue Commissioners compromising revenue liabilities, which the respondents have failed to do.
4. The Revenue Commissioners represented and/or adopted a position, such as amounted to promises or representations, express or implied, not to take

enforcement action, that prosecution in being would not continue and that prosecutions would not be initiated, addressed to the taxpayer, which formed part of a transaction or a series of transactions definitively entered into, or a relationship between the taxpayer and the Revenue Commissioners, such as created an expectation, as was intended by the Revenue Commissioners, reasonably entertained by the taxpayer, that the respondents, and each of them, would abide by the said representations and promises and of such an extent that it is unjust to permit the respondents to resile from the same. The taxpayer has a legitimate expectation that enforcement action would not be initiated, existing prosecutions would not continue, and no new prosecutions would be initiated, which expectation has been contravened.

5. The Code of Practice for Revenue Audit and the Revenue Customer Charter establish a clear, fair and equitable set of guidelines to be followed by the first respondent. The taxpayer has a legitimate expectation that the Revenue Commissioners will adhere to the said Code and Charter when dealing with the taxpayer. Without prejudice to the generality of the foregoing, under the Code the Revenue Commissioners have a duty to:

- (i) provide the necessary information and all reasonable assistance to enable the applicant to clearly understand his obligations and entitlements;
- (ii) administer the law fairly, reasonably and consistently;
- (iii) fairly administer tax law recognising certain basic rights;
- (iv) collect taxes and duties efficiently

which have been contravened.

6. The Revenue Commissioners have failed to act transparently and clearly in its dealings with the taxpayer.
7. The Revenue Commissioners have, with regard to the taxpayer, exercised its discretionary powers inconsistently, unfairly and capriciously, such that it would be unjust and inequitable to permit the prosecutions to proceed.

The Settlement Agreement

12. On 31st August 2015, the taxpayer signed a settlement agreement in relation to the sums at issue in the summary proceedings *Gladney (Inspector of Taxes) v. Murphy*. July 2015 saw an exchange of correspondence, involving correspondence from the solicitors acting for the Revenue Commissioners. The correspondence was issued either by a partner in the firm, and more usually, by Ms. Anna Lynch, a legal executive in the firm. Her job description, as the trial judge pointed out in the course of his judgment, was that of “manager” of the Revenue Department within Pierse Fitzgibbon. It will be necessary to refer to the exchange of correspondence which took place in July 2015, and it is also appropriate to note at this stage that there is some dispute between the parties as to what occurred in the days running up to 31st August 2015. At this juncture, it appears convenient to set out in full the terms of the settlement agreement of 31st August 2015, which is as follows:

“VIA EMAIL

Brian M. Murphy

[Address redacted from judgment]

Michael Gladney	V.	Brian M Murphy
Record No		2015/195 R
Income tax		1.1.2013 – 31.12.2013
VAT		1.1.15 28.2.15

Registration Number

[Redacted from judgment]

Dear Sir

We refer to the above matter and to previous correspondence herein. Our clients are prepared to suspend the legal proceedings in relation to the above-mentioned taxes on the following basis:

Agreement to these terms must be signified by signing the bottom of this letter and returning it to us within 14 days.

The following are the terms of the agreement:—

2015 payments:

Costs of €568.93 to be paid

Monthly payments of €4000.00 per month August–December 2015 €20,000.

Payment of €4000.00 August 2015 already received.

Lump sum payment of €75,697.26 to be paid by 30.10.2015

Annual bullet payment of €20,000 to be paid by 15/12/2015

Tax and interest outstanding at 31/12/2015 €225,960.05

2016 payments:

Monthly payments of €4000 per month from Jan-Dec 2016 = €48,000

Annual bullet payment of €20,000 to be paid by 15/12/2016

Tax and interest outstanding at 31/12/2016 €157,960.05

2017 payments:

Monthly payment of €4,000 per month from Jan-Dec 2017 = €48,000

Annual bullet payment of €20,000 to be paid by 15/12/2017

Tax and interest outstanding at 31/12/2017 €89,960.05

2018 payments:

€4,000 monthly payments from Jan-Dec 2018 = €48,000

This leaves a Tax and interest balance outstanding of

€41,960.05 – this to be paid by 15/12/2018

Current taxes to be maintained going forward (including the Income Tax 2014 liability)

In the event of the arrangement breaking down proceedings will be resumed immediately.”

The taxpayer signed and dated the settlement agreement that had been submitted to him on 31st August 2015 and returned the signed version to the Revenue Commissioners’ solicitors by post. There are a number of aspects of the agreement that might be noted. It is headed “Michael Gladney V. Brian Murphy”. There is a reference to the High Court record number of the proceedings (2015/195 R). There is a reference to income tax for 1st January 2013 to 31st December 2013, and to VAT from 1st January 2015 to 28th February 2015. It should also be noted that, while the offer letter states, “in the event of the arrangement breaking down proceedings will be resumed immediately”, the document is entirely silent on the question of prosecutions or other enforcement proceedings. The taxpayer signed the document that had been submitted to him, dated it, and returned to the Revenue Commissioners.

The Statement of Opposition

13. The statement of opposition delivered by the solicitor for the Revenue Commissioners on behalf of the respondents pleads that the taxpayer’s statement of grounds discloses no

grounds on which the Court could properly grant the reliefs sought, or any relief, by way of judicial review. It was pleaded that the criminal proceedings commenced against the taxpayer in October 2015 do not relate to the tax liabilities the subject of the above settlement agreement offered by the Revenue Commissioners on 31st August 2015, and subsequently purportedly accepted by the taxpayer, but rather, these criminal proceedings relate to the taxpayer's income tax for the years 2008 to 2012. It was noted that the separate criminal proceedings that had already been commenced against the taxpayer in 2014 relate to wholly separate VAT liabilities. It was pointed out that the taxpayer unsuccessfully sought to prohibit the 2014 prosecution in a separate judicial review. It was pleaded that there is no relationship between the proceedings in respect of which Pierse Fitzgibbon Solicitors were instructed by the Revenue, or the settlement agreement upon which the taxpayer seeks to rely in support of this application for judicial review, and the impugned prosecutions in respect of summonses dated 18th February 2014 and 12th October 2015. It was specifically denied that the taxpayer and the Revenue Commissioners entered into settlement terms, including a payment schedule, on the basis that enforcement action would not be initiated, existing prosecutions would not continue and that no new prosecutions would be initiated. It was pleaded that no such agreement was ever made by the Revenue Commissioners and no representation to that effect was made to the taxpayer by the Revenue Commissioners or on their behalf, and that no such agreement or representation is disclosed or identified in the taxpayer's statement of grounds or in the verifying affidavit sworn by him.

14. It was further pleaded that, at all times, it was made clear to the taxpayer, and at all times, the taxpayer was aware or ought to have been aware that any settlement agreement entered into in relation to the proceedings in being was without prejudice to, and did not affect, any other enforcement action by the Revenue Commissioners and/or prosecution in relation to the taxpayer. The statement of opposition goes on to plead that it is denied that the

taxpayer had the alleged or any legitimate expectation that enforcement action would not be initiated, existing prosecutions would not continue and that no new prosecutions would be initiated. Insofar as the taxpayer had any such expectation, and it is denied that he had, it was not a reasonable one and it did not derive from any representation made to him. It was pleaded that, in the course of negotiations culminating in the taxpayer's acceptance of the arrangement, set out in the letter of 31st August 2015, the taxpayer had sought, as part of any arrangements that might be agreed, the inclusion of some conditions, assurance or agreement from the Revenue Commissioners that they would not continue any existing prosecution and would not commence any new prosecution or enforcement action against him. On multiple occasions throughout June and July 2015, the taxpayer's requests for such a condition or representation were rejected unequivocally by the Revenue Commissioners. It was pleaded that the Revenue Commissioners' final position on these requests were set out in an email of 16th July 2015 from Pierse Fitzgibbon Solicitors which stated clearly that the "Revenue [Commissioners] cannot agree to the exclusion of the non prosecution clause in the terms and conditions of the instalment arrangement." It was then further pleaded that the taxpayer did not seek to challenge or question the Revenue Commissioners' position as so stated at any time up to and including his acceptance of the instalment arrangements set out in the letter of 31st August 2015.

The "Non-Prosecution" Clause

15. Both in the High Court, and to a somewhat lesser extent, in this Court, there has been much reference to a "non-prosecution" clause, and in particular, the fact that no such clause appeared in the settlement agreement that was signed. However much and however widely used that phrase was, in my view, it is a complete misnomer. Its origin is to be found in the fact that the solicitors acting on behalf of the Revenue Commissioners, Pierse Fitzgibbon,

had, on a number of occasions, been explicit in stating that any settlement would be without prejudice to another enforcement action in being or yet to be initiated. Such phraseology, rather than being described as a “non-prosecution” clause, might better be described as “freedom to prosecute” or a “without prejudice to prosecution” clause.

16. In the High Court, the parties were in dispute as to what had occurred in the period immediately prior to 31st August 2015. The taxpayer, both in an affidavit and in the course of oral evidence, stated that in the course of a telephone call on 26th August 2015 with Ms. Lynch, he had told her he would not sign any agreement containing a “without prejudice to prosecution” clause, and that in response, Ms. Lynch said she would revise the agreement to remove the clause, but that the agreement as modified by the removal of the clause would need to be approved by the Revenue Commissioners before it issued. Ms. Lynch has a significantly different recollection. She says the taxpayer was repeatedly told that signing an agreement in relation to the civil debt proceedings would not prejudice the Revenue Commissioners from pursuing criminal prosecutions.

17. On 31st August 2015, the taxpayer was sent a letter of offer setting out the terms of a written settlement agreement which did not contain an explicit “without prejudice to prosecution” clause. The taxpayer signed the document and returned it to the Revenue Commissioners. In the High Court, the trial judge regarded the conduct of the taxpayer in the period after signing the agreement document as significant. When the document was issued to the taxpayer for signature and was signed by him, the first set of judicial review proceedings had been heard and judgment was reserved. The taxpayer did not take any steps to discontinue these proceedings or to inform the High Court judge that the subject of judicial review had become moot or had been overtaken by events. The result is that judgment was delivered in the High Court on 4th November 2015 ([2015] IEHC 670) and that judgment resulted in the application for judicial review being dismissed.

The High Court

18. The High Court judge was of the view that the settlement agreement was confined to the specific legal proceedings referenced in the heading, namely, *Gladney (Inspector of Taxes) v. Murphy* bearing High Court record number 2015 No. 195R. He commented that a “settlement agreement, perhaps more than any other type of contract, falls to be interpreted objectively”, and that there was a “strong public interest in favour of the amicable resolution of legal proceedings, without the necessity for a full court hearing with the attendant delay and cost.” That public interest would be undermined if “the meaning and effect of a settlement agreement was to turn on the *subjective* intention of one of the contracting parties.” (emphasis that of Simons J.) He felt that the settlement agreement of 31st August 2015 could not, “on any objective interpretation, be construed as precluding” the Director from pursuing criminal proceedings against the taxpayer. The fact that the Director was not a party to the settlement agreement was referenced. It was pointed out that at the time of the settlement agreement, there were in fact criminal proceedings already in being. Against the factual matrix which existed, and against the background of the precise terms of the settlement agreement, the judge felt the agreement could not be “construed as intended to capture either the criminal proceedings or the first judicial review proceedings.” If it had been intended to preclude ongoing criminal proceedings, the judge felt it was “inconceivable” that this would not have been expressly stated in its terms.

19. The High Court judge felt that the taxpayer’s case set out in the statement of grounds was one involving an alleged breach of agreement on the part of the Revenue Commissioners. In relation to that aspect, the judge felt there were two obvious and insurmountable difficulties with the asserted claim for breach of agreement, the first being that the Director was not a party to the settlement agreement, and the second being that the

settlement agreement did not purport to preclude criminal prosecutions. He observed that, in an attempt to overcome those difficulties, the taxpayer had “sought to reorient his case at the hearing to one alleging breach of legitimate expectation.”

20. Proceeding to an analysis of the statement of grounds, the judge was of the view that the sole representation identified was the entering into the terms of the settlement, and that accordingly, the case as pleaded had to stand or fall on how the settlement agreement would be understood by an objective reader. In that regard, he felt that there was “no sensible basis for reading the settlement agreement as involving anything other than the compromise of the extant High Court debt collection proceedings explicitly referenced in the agreement.” The taxpayer had thus failed to establish the existence of the first of the preconditions for a claim for legitimate expectation, namely, the making of an unambiguous and unequivocal representation by the public authority concerned. For that reason, he felt the claim for legitimate expectation, as pleaded in the statement of grounds, had to be dismissed. However, that was not the end of the matter because he felt what was essentially a new case had been advanced at trial, which he went on to consider *de bene esse*.

Arguments Raised before this Court

21. In the course of this appeal hearing, through his counsel, the taxpayer has been critical of the approach taken by the High Court judge. It is said that the judge misunderstood the case being made by the taxpayer under the heading of legitimate expectation. The High Court judge’s approach was to proceed on the basis that the legitimate expectation case referred to in the statement of grounds was confined to a reliance on the written document of 31st August 2015 provided by the Revenue Commissioners to the taxpayer. It is said the judge fell into error in coming to the view that the applicant was seeking to reorient the case made at the hearing into something different from had been originally pleaded, characterising the case as

based on the document submitted for signature, along with a statement attributed to a person acting on behalf of the Revenue Commissioners – it appears this person is Ms. Lynch – to take out the controversial clause, subject to obtaining approval for that course of action.

22. The taxpayer draws attention to a decision of this Court ([2020] IECA 36) given in the context of a discovery application which it is said establishes that there could never be any doubt about the scope of the challenge mounted. It is said the High Court judge fell into error in conflating the law relating to legitimate expectation with contract law.

Discussion

23. I approach this appeal on the basis that the taxpayer's case was always one grounded on legitimate expectation. While that is so, it is not possible to lose sight of the fact that a contract was entered into with the classic elements of offer and acceptance, the offer being what was presented by the Revenue Commissioners to the taxpayer for acceptance or otherwise, and the acceptance being provided when he appended his signature to the document and dated it.

24. It is accepted, from the perspective of interpreting the contract, that regard cannot be had to the position taken up by the parties in pre-contract discussions or negotiations, but the taxpayer says the situation is different when seen from a legitimate expectation perspective. It is clear that, in advance of 31st August 2015, there was a difference to approach between the parties and the parties had different ambitions. The taxpayer was willing, and indeed anxious, to enter into a settlement in relation to the civil debt proceedings. He was anxious that the settlement, if there was to be one, would be a comprehensive one, and specifically, that he would not continue to face criminal prosecutions. In interacting with the Revenue Commissioners, he put his position on the basis that he was taking on a significant financial burden if he was to agree settlement terms, and his ability to fulfil the settlement terms and to

make payments in accordance with the terms, was dependent on his ability to earn as a chartered accountant. It seems reasonable to infer that, apart from the anxiety to be in a position to deliver on foot of any settlement that he would enter into, and I have no reason to doubt that anxiety was genuine, if the entry into a settlement could remove the threat of prosecution, either in the form of the criminal proceedings which had already been instituted, or any further criminal proceedings, from his perspective, that would be a highly desirable objective. On the other hand, the position of the Revenue Commissioners was that they were not going to commit themselves to non-prosecution or to preclude other means of enforcement, nor were they prepared to offer any degree of comfort in that regard. However, if anything, their position went somewhat further than that. The Revenue Commissioners' position, articulated clearly by Mr. Aidan Duffy, was that not only would any settlement agreement be without prejudice to any other enforcement action or prosecution action in being, or yet to be initiated, but this position should be clearly stated throughout the document and should appear in any settlement agreement.

25. We know that the draft agreement furnished to the taxpayer did not contain a without prejudice to prosecution or enforcement clause. It was silent on the issue. The question arises whether the absence of such a clause, where, on the basis of the attitude previously taken by the Revenue Commissioners, it might have been expected to be found, amounts to a representation by the Revenue Commissioners that there would be no prosecution. I am quite unable to conclude that the absence of a without prejudice to prosecution or enforcement clause amounts to an unambiguous and unequivocal representation, to the effect that there would be no prosecutions. There are a number of factors that lead me to that conclusion. While I acknowledge that the draft settlement agreement furnished to the taxpayer for approval and signature came against a background of discussions and negotiations, nonetheless, it is the case that those negotiations and discussions gave rise to the creation of a

legal document by the Revenue Commissioners which was submitted for signature and was actually signed. It is just not possible to ignore the fact that the document submitted for signature and signed is headed “Michael Gladney V. Brian M Murphy”, it refers to the record number “2015/195 R”, covers income tax from 1st January 2013 to 31st December 2013, and VAT from 1st January 2015 to 28th February 2015. I am also influenced by the factual background to the prosecutions. The High Court proceedings *Gladney (Inspector of Taxes) v. Murphy*, with record number 2015/195 R related to income tax for 2013 and VAT for one VAT period in 2015. However, the prosecution commenced by the summons of 18th February 2014 had nothing to do with the sums alleged to be due in respect of the 2013 income tax and the single VAT payment from 2015. The prosecution related to a matter that was entirely separate and distinct.

26. I am also influenced by the fact, and I think this was a matter that also weighed with the High Court judge, that there were criminal proceedings already in being, which had been instituted and were the subject of judicial review proceedings, which had been heard by that stage with judgment reserved. This was not a case of proceedings which might hypothetically or theoretically be instituted. These were proceedings already in being. By the time of the settlement of the civil debt proceedings, the taxpayer had also been informed that he was to be interviewed under caution in relation to other possible tax offences and that a decision to prosecute would be a matter for the solicitor for the Revenue Commissioners and the Director. I do not have the date of that cautioned interview, but it appears from a chronology with which we have been provided, that a completed investigation and prosecution file, which would give rise to the October 2015 summons, was referred to the office of the solicitors for the Revenue Commissioners on 12th May 2015.

27. The clause which the Revenue Commissioners had wanted to see included preserved their position in relation to other enforcement methods and prosecution. If the taxpayer’s

position was correct, the effect of the absence of such a clause from the document submitted for signature would be that the prosecution, which had already been launched, would be halted, that the investigation which, by that point, was at an advanced if not completed stage, would be halted, but also that there would be a prohibition on prosecution in the future, no matter what evidence of previously unknown criminality came to light. In addition, it would have meant that even if underpayment of tax during other years, or other irregularities came to light, enforcement in that regard would be prohibited. I am bound to say I regard this as an extraordinary proposition. I cannot believe there was any representation to that effect, and most certainly I cannot believe there was any representation that was unambiguous and unequivocal to that effect by the Revenue Commissioners. I cannot believe that a reasonable person in receipt of a document that was silent as to the entitlement of the Revenue Commissioners to pursue other enforcement methods or to continue prosecutions or to mount further prosecutions, would believe that by reason of the silence of the document that the Revenue Commissioners had committed themselves, had represented, and had done so in clear and unambiguous terms, to not continuing a prosecution or mounting other prosecutions or pursuing other enforcement strategies.

28. While the focus has to be on how a reasonable recipient of the document which was silent as to a preservation of rights by the Revenue Commissioners would interpret the situation, for my part, and here I agree with the High Court judge, I do not believe that the behaviour of the taxpayer in the aftermath of the signature of the document on 31st August 2015 was what was to be expected of someone who believed he had achieved a situation where ongoing prosecutions were brought to a close and the possibility of further prosecutions being initiated was precluded. Nobody who was facing a prosecution and then found that threat lifted would allow the appearance of the threat remain in place for a day longer than necessary. If the taxpayer believed he had achieved a situation where the

proceedings arising from the February 2014 summonses had been brought to an end, he would have moved immediately to have those proceedings struck out. That would have been so if there were never any judicial review proceedings, but in a situation where there were judicial review proceedings in being and where judgment had been reserved, that must be doubly so. Not moving to end the judicial review proceedings and to inform the judge of what had developed gave rise to the risk that judgment would be delivered which might be adverse to the taxpayer, as was subsequently the case, giving rise to the prospect of an adverse order in relation to costs. However, were the taxpayer to take steps to inform the judge that the proceedings were now at an end, because they were effectively rendered moot, this would have considerably strengthened his hand when it came to the costs of the original judicial review proceedings.

29. As he put it, for completeness, and to ensure that all the issues raised had been addressed by the court of trial, the High Court judge set out his findings on disputed issues of fact. The findings were based on his assessment of the oral evidence of the taxpayer and of Ms. Lynch, the legal executive in Pierse Fitzgibbon. The judge was not satisfied that, on the balance of probabilities, Ms. Lynch “made a statement to the effect that she would seek approval for a settlement agreement which would preclude criminal prosecution” of the taxpayer. The judge expressly stated that he found Ms. Lynch to be a credible witness who “gave her evidence carefully, without exaggeration and with appropriate concessions.” He drew a “marked contrast” to the taxpayer’s demeanour in the witness box. The taxpayer sought to “parry difficult questions,” and, according to the judge, when pressed, was often unable to provide any cogent explanations for the inconsistencies in his conduct. In particular, the judge drew attention to the fact that the taxpayer was unable to explain his failure to make any reference to the alleged telephone conversation of 26th August 2015 in his affidavit grounding the application for leave to seek judicial review. It was the view of the

High Court judge that Ms. Lynch's version of events was corroborated by the contemporaneous documentary evidence. He felt that the documentation pointed to a "constant and unwavering position" on the part of the Revenue Commissioners, that any settlement had to be without prejudice to any other enforcement action or prosecution action in being or yet to be initiated.

30. Unlike the High Court judge, we have not had the advantage of hearing Ms. Lynch and Mr. Murphy give their evidence. We are confined to the pages of the transcript, and it seems to be beyond doubt that there was material before the judge on which he could reach the conclusion that he did. In those circumstances, the *Hay v. O'Grady* [1992] 1 IR 210 line of authority would suggest we are bound by his findings of fact.

Decision

31. For my part, I am in no doubt that the trial judge properly assessed the case presented to him and in no doubt that he was fully entitled to reject the claim, whether formulated in terms of legitimate expectation, or contract, or some cross between the two.

32. I would dismiss the appeal.