

THE HIGH COURT**REVENUE****2007 619 R****BETWEEN****THE CRIMINAL ASSETS BUREAU****PLAINTIFF****AND****J. McN.****DEFENDANT****Judgment of Mr. Justice Feeney delivered on the 14th day of September, 2009.**

1.1 The proceedings in this case were commenced by summary summons dated the 3rd October, 2007. In those proceedings the plaintiff claimed €3,313,990.15 tax and interest as being due by the defendant to the Minister for Finance. The special endorsement of claim set out "short particulars" of the sum due for income tax and interest thereon for the period from the 1st November, 2000 up to the 27th September, 2007. The total amount of tax identified as being due was €1,791,168.75 and the total interest claimed up to the 27th September, 2007 was €1,522,821.40 which together amounted to the claimed figure of €3,313,990.15.

1.2 Summary judgment was granted by the Master in the sum claimed on the 7th March, 2008 and the defendant appealed that judgment to the High Court.

1.3 The defendant raised a preliminary issue before this Court which was based upon a claim that he had identified a sufficient conflict of fact on affidavit, sufficient to render the case as a "contested" case and thus deprive the Master of jurisdiction, under the Rules of the Superior Courts, to grant a summary judgment. Having heard arguments in relation to this matter, the Court rejected the defendant's contention and held that the defendant had not shown cause by affidavit before the Master and that the Master had, therefore, jurisdiction to grant summary judgment.

1.4 The defendant contended in written submission at that time that he had not only an arguable defence but in the alternative even if he did not have an arguable defence, there was an arguable case that the Courts and Court Officers Acts and/or the Rules of the Superior Courts are unconstitutional and/or *ultra vires* insofar as they purport to grant the Master power to make the order in question. It was argued that even if there was no arguable defence under the Taxes Consolidation Act 1997, the defendant had an arguable case that the Act is unconstitutional and/or contrary to the European Convention on Human Rights to the extent that it precluded the defendant having an appeal in the present case. These were the grounds expressly relied upon by the defendant in his written skeleton argument to the Court dated the 18th December, 2008.

1.5 The Court dealt with the first of those three issues in an earlier decision given by this Court. The second and third grounds which were initially identified and which were set out in the defendant's written submission were not pursued. At a later date the defendant raised a number of entirely new and separate points which had neither been argued before the Master nor included in the original written submissions to Court.

2.1 The Chief Bureau Officer of the plaintiff swore an affidavit grounding the application for judgment on the 27th November, 2007. In that affidavit he averred that "the plaintiff is an Officer of the Revenue Commissioners nominated by the Revenue Commissioners to exercise any of the powers and functions of the Collector General and that he is also a Bureau Officer appointed to the Criminal Assets Bureau pursuant to s. 8 of the Criminal Assets Bureau Act 1996". He also averred that he swore the grounding affidavit on behalf of the plaintiff, that is, the Criminal Assets Bureau. In that affidavit a certificate was exhibited. The certificate exhibited was headed as being "pursuant to ss. 966(5) and 1080(4) of the Taxes Consolidation Act 1997, both as amended by s. 236 of the Finance Act 2001". That certificate certified that before the institution of these proceedings that a sum of €1,791,168.75 for income tax became due and payable by the defendant herein under assessments which had become final and conclusive and that before the institution of these proceedings payment of the said sum was duly demanded from the defendant and that the sum remains due and payable. The certificate also stated that an amount of €1,522,821.40 for interest is due and payable up to the date of the certificate which was the 27th November, 2007. The certificate was signed "Criminal Assets Bureau". The affidavit of John O'Mahoney went on to aver that the sum claimed was lawfully due by the defendant and that the defendant had no *bona fide* defence at law or on the merits and that the defendant had paid no sum on account since the commencement of the proceedings.

2.2 An affidavit in reply was sworn by Danny McNamee, the defendant's solicitor, on the 14th February, 2008. In that affidavit it was averred that the defendant had instructed his solicitor that he had a good defence to the proceedings and it was acknowledged that the proceedings related to a claim for income tax for the financial years 2000/01 to 2006/07 up to September 2007. The affidavit went on to aver that the defendant had engaged the services of accountants and had instructed those accountants to finalise tax returns for the years in question and that the work was, as of the date of the swearing of the affidavit, well in hand and was due to be completed within approximately two weeks. It was averred that the defendant had instructed his solicitor that the returns, when finalised, would demonstrate that he had a good defence to the claim. In paragraph 7 of that affidavit it was averred as follows:-

"The Plaintiff's claim is based on the proposition that the defendant was the subject of assessments which have become final. However the Defendant instructs me that he has good grounds for a late appeal, which he proposes to make upon filing of the returns due."

Danny McNamee, solicitor, swore a further affidavit on behalf of the defendant on the 6th March, 2008 and in paragraph 6 of that affidavit it was averred:-

"The Defendant instructs me that the tax liability amounted to €492,080 and that he has provided his accountants with cheques for the full amount for transmission to the tax authority. There is a huge difference between this figure and the assessment of the Plaintiff that he owed almost €1.8 million. For the avoidance of doubt both the above figures are net of possible penalties, charges and interest."

The affidavit went on to aver that the plaintiff's claim was based on the proposition that the defendant was the subject of assessments which had become final and that the defendant had instructed his solicitor that he had good grounds for a late appeal and that the defendant expected to be in a position to have an application for a late appeal lodged within the immediate future. On the day following the swearing of that affidavit, that is, the 7th March, 2008, the Master granted summary judgment.

2.3 The factual position which was therefore identified, on affidavit, at the time that the Master granted judgment was that the defendant had averred through his solicitor that tax returns were being prepared in respect of the relevant years and it was, in effect, clearly acknowledged that the defendant had not filed returns of income tax for the years of the assessment in respect of which tax and interest was claimed. It was also apparent from the replying affidavits that the defendant had not paid the tax due for the years of assessment. The replying affidavits sworn on behalf of the defendant proceeded on the basis that assessments of tax had been issued by the plaintiff but that they were for an excessive amount and that tax returns which were being prepared for delivery by the defendant as of the date of the swearing of the affidavit on 6th March, 2008 would show a liability of €492,080. It was averred on behalf of the defendant that he was proposing to process a late appeal as it was claimed that he had good grounds for such a late appeal.

2.4 An issue raised by the defendant in this Court was whether or not the assessments were final and conclusive and had been properly proved by the plaintiff in the application before the Court. The plaintiff contended that the defendant had in effect acknowledged the final and conclusive nature of the assessments. What is clear is that whilst there was no express acknowledgement that the assessments were final and conclusive, it was acknowledged on behalf of the defendant that he had received the assessments for the stated amounts. This is illustrated by the averment contained in paragraph 4 of the affidavit of Thomas Tiernan, solicitor, sworn on behalf of the defendant on the 13th March, 2008. In that paragraph it was averred "The relevant circumstances include the fact that at the time that the tax assessments herein were issued, and during the ordinary time for appeal thereafter, the defendant and his then solicitors were labouring under the misapprehension that the defendant's books and records, which had been seized by CAB, had not been returned". The case made on behalf of the defendant proceeded on the basis, based upon averments in affidavits, that the assessments which the defendant had received were, when analysed, excessive in quantum. Given the manner in which the defendant has dealt with this case where he has expressly questioned the amount of the assessments received by him and sought entitlement to pursue an application for a late appeal as to the amount of such assessments, it is not open to the defendant, at this point in time, to argue that he did not receive such assessments in the amounts specified therein. They are also proved by being exhibited before this Court. Nor is it open to the defendant to dispute given the manner in which the case has been dealt with that he failed to dispute or contest such assessments within the time limited therefor by statute. In the defendant's application to be permitted to bring a late appeal, which was brought on foot of a notice of appeal dated the 12th March, 2008, the defendant sought, *inter alia*, an order "setting reducing and/or aside the said assessments in whole". The defendant proceeded before this Court on the basis that the assessments had been received and that he had not responded within the statutory timeframe and therefore required to pursue an application to be permitted to bring a late appeal if he was to dispute the assessments. In those circumstances the defendant cannot be heard, at this late stage, to question that he received the assessments in the stated amounts or to raise any issue based on an argument that he failed to respond to such assessments or to dispute or question them within the statutory timeframe. The basis upon which the parties were proceeding before this Court is clearly demonstrated by the averments contained in paragraphs 3 and 4 of the affidavit of Revenue Bureau Officer 32 sworn on the 8th October, 2008 wherein it was averred:-

"It appears to be common case between the parties that returns were not delivered by the appellant herein in respect of tax year 2000-1 (due on 31st January, 2002), 2001 (due on the 31st October, 2002), 2002 (due on 31st October, 2003), 2003 (due on the 31st October, 2004), 2004 (due on the 31st October, 2005) or 2005 (due on 31st October, 2006). It also appears to be common case that the assessments were raised in respect of these years for tax due on the 17th July, 2007 and were received by the defendant on or about that date. It appears to be accepted by the appellant that all documents and records seized by the Criminal Assets Bureau, or copies thereof, were returned in December, 2006."

Given the manner in which the case has been dealt with before this Court and the averments contained in the affidavits and given that the defendant openly acknowledged within the original submissions that he did not lodge an appeal prior to the commencement of these proceedings, it is not open to the defendant to pursue an argument based upon any contention that it has not been proved that he received assessments in the stated amounts or failed to question or dispute such assessments within the time limited therefor. It is a matter of law as to what legal status such assessments have in the absence of the defendant being permitted to pursue a late appeal. The defendant was not permitted to pursue a late appeal and it is therefore the case, as a matter of law, that the assessments which were received and acknowledged as being so received in the absence of an appeal have become in law final and conclusive.

2.5 The final and conclusive nature of the assessments follow from the fact that the defendant did not file returns of income tax for the years in question for which assessments were raised and for which assessments were issued and that no payment was made either in whole or in part thereon and no appeal was raised by or on behalf of the defendant against such assessments prior to the commencement of these proceedings which were issued on the 3rd October, 2007 or prior to the service of such proceedings on the 31st October, 2007.

2.6 The manner in which the defendant has dealt with these proceedings includes the fact that after the proceedings

were served, the defendant delivered a document entitled "Defence and Counter-claim". In that document the defendant set out his position in relation to the claim and traversed paragraph 4 of the plaintiff's special endorsement of claim and raised a counter-claim seeking damages and compensation for loss of earnings. The special endorsement of claim had stated at paragraph 2, as follows:-

"The plaintiff is a Bureau Officer appointed by the Criminal Assets Bureau pursuant to s. 8 of the Criminal Assets Bureau Act 1996. The plaintiff is also an Officer of the Revenue Commissioners nominated by the Revenue Commissioners to exercise the powers and functions of the Collector General, and who has been authorised by the Revenue Commissioners to sue in his own name in the High Court."

In the defence and counter-claim delivered by the defendant to the special endorsement of claim, no issue was taken in relation to the statement contained in paragraph 2 of the special endorsement of claim. Notwithstanding that fact the defendant raised an argument based upon the fact that the summons had been issued in the name of "Criminal Assets Bureau". The defendant argued that the plaintiff was not a statutory body established under the Criminal Assets Bureau Act of 1996. It was contended that under s. 966(1) of the Taxes Consolidation Act 1997 that the power to bring such proceedings was confined to a case where "an Officer of the Revenue Commissioners authorised by them for the purpose of this sub-section may sue in his or her own name in the High Court". It was contended that there was a specific statutory mechanism for proof that an Officer had been authorised for the purposes of s. 966(1) and that there was no plea in the summary summons that the plaintiff had been authorised for the purposes of subs. (1) of s. 966. It was therefore contended that as the summons failed to plead that the plaintiff had been authorised by the Revenue Commissioners for the purposes of the sub-section, that the summons failed to disclose a cause of action and that the proceedings ought to be dismissed.

2.7 The defendant's contention is summarised in his written submissions where it is claimed that since there has been a failure to plea that the plaintiff has been authorised by the Revenue Commissioners for the purposes of subs. (1) of s. 966 that there is a failure to disclose a cause of action which should result in the proceedings being dismissed. That argument fails to have regard to the plea contained in paragraph 2 of the special endorsement of claim and the defendant's response thereto. The defendant has approached these proceedings on the basis that his response to the special endorsement of claim is to be found in a document entitled "Defence and Counter-claim" and in that document no issue was taken or denial made in relation to the plea that the plaintiff is a Bureau Officer appointed by the Criminal Assets Bureau pursuant to s. 8 of the Criminal Assets Bureau Act 1996 or that the plaintiff is also an Officer of the Revenue Commissioner who was nominated by the Revenue Commissioners to exercise the powers and functions of the Collector General and who has been authorised by the Revenue Commissioners to sue in his own name in the High Court. That plea emanates from the provisions of s. 966 of the Taxes Consolidation Act 1997 and the authorisation therein set out. The plea, without expressly identifying the statute, relies on the statutory entitlement provided for in s. 8 of the Criminal Assets Bureau Act. The authorisation referred to in the plea is an authorisation emanating from that section. At the time that the defendant delivered his defence and counter-claim he was fully aware that the proceedings were being brought pursuant to s. 966 of the Taxes Consolidation Act 1997 as that had been identified and was expressly stated in the Criminal Assets Bureau's letter of the 20th August, 2007 that the proceedings would be under s. 966 of the Taxes Consolidation Act 1997. The proceedings herein were grounded on an affidavit sworn by Detective Chief Superintendent John O'Mahony sworn on the 27th November, 2007 wherein he averred that he was the Chief Bureau Officer of the Criminal Assets Bureau and he referred not only to the summary summons but also to the defence and counter-claim. In the light of the above, the Court is satisfied that there is no basis upon which the defendant at this late stage can resile from the approach which he has chosen to take. It was expressly pleaded that the plaintiff had authorisation and thereafter the defendant chose to put in a defence and counter-claim where that plea was not put in issue. Thereafter, the Chief Bureau Officer of the Criminal Assets Bureau expressly referred to the summary summons and to the defence and counter-claim delivered and proceeded on the basis, as he was entitled to, that the defendant took no issue with paragraph 2 of the special endorsement of claim. The argument put forward by the defendant, at this stage, effectively resiles from the position previously pleaded by the defendant. Absent such an approach from a defendant, an argument could be made that a formal plea identifying the precise statutory basis of the Chief Bureau Officer's authorisation might be required or dealt with in evidence or an affidavit but that does not arise on the facts of this case.

2.8 The defendant effectively argues that there is a required mechanism to prove authorisation. This Court is satisfied that that is not the case and that such authorisation can be established without oral or sworn evidence where it is pleaded and where the defendant puts in a defence and counter-claim which expressly does not put such authorisation in issue. This Court has on previous occasions identified circumstances where it has been established that there are various manners in which authorisation can be established. In *Criminal Assets Bureau v. P.S.* (Unreported judgment of Mr. Justice Finnegan delivered on the 19th October, 2004), authorisation was established by oral evidence and in the *Criminal Assets Bureau v. P. McS.* (Unreported judgment of Mr. Justice Kearns delivered on the 16th November, 2001), evidence was given on affidavit. The defendant seeks to distinguish the facts of this case from the approaches adopted in either of those two cases, particularly in the *Criminal Assets Bureau v. P. McS.* case. It is clear from the judgment in the *Criminal Assets Bureau v. P. McS.* case that the manner in which authorisation can be proved will vary from case to case and that there is no defined or obligated mechanism. In the *Criminal Assets Bureau v. P. McS.* case, an averment was made by Detective Chief Superintendent O'Mahony that the plaintiff had been authorised under s. 966(1) of the Taxes Consolidation Act 1997. In this case there is an express plea of authorisation contained in the summons and the defendant lodged a defence and counter-claim where that plea was not put in issue and in those circumstances the issue did not arise and on the facts of this case a plea averring to authorisation under s. 966(1) was not required. There is sufficient material before this Court to satisfy it as to the Officer's authorisation. If the defendant had adopted a different approach and had chosen not to deliver a defence and counter-claim wherein paragraph 2 of the special endorsement of claim was not denied, it would have been open to the Chief Bureau Officer to file an affidavit averring that he had been authorised under s. 966(1) of the Taxes Consolidation Act 1997. However given the approach adopted by the defendant that was unnecessary. The Court is satisfied that the defendant cannot, at this time, put in issue a matter which he has previously admitted and that there is no basis for the Court holding that the plaintiff has failed to establish the authorisation of the Revenue Officer to institute proceedings.

3.1 The final issue raised by the defendant concerns s. 966(3), (4), (5) and (6) of the Taxes Consolidation Act 1997 which are as follows:-

"(3) In proceedings pursuant to this section, a certificate signed by a Revenue Commissioner certifying the following

facts, that a person is an officer of the Revenue Commissioners and that he or she has been authorised by them for the purpose of subsection (1), shall be evidence until the contrary is proved of those facts.

(4) In proceedings pursuant to this section, a certificate signed by a Revenue Commissioner certifying the following facts -

(a) that the plaintiff has ceased to be an officer of the Revenue Commissioners authorised by them for the purposes of subsection (1).

(b) that another person is an officer of the Revenue Commissioners,

(c) that such other person has been authorised by them for the purposes of subsection (1), and

(d) that such other person has been nominated by them, in relation to the proceedings, for the purposes of subsection (2),

shall be evidence until the contrary is proved of those facts.

(5) In proceedings pursuant to this section a certificate signed by an officer of the Revenue Commissioners certifying the following facts:

(a) that before the institution of the proceedings a stated sum for income tax became due and payable to the defendant -

(i) under an assessment which had become final and conclusive, or

(ii) under section 942(6),

and

(b)(i) that before the institution of the proceedings payment of that stated sum was duly demanded from the defendant, and

(ii) that that stated sum or a stated part of that sum remains due and payable by the defendant,

shall be evidence until the contrary is proved of those facts.

(6) In proceedings pursuant to this section, a certificate certifying the fact or facts referred to in subsection (3) or (4) or paragraph (a) or (b) of subsection (5) and purporting to be signed as specified in that subsection or paragraph may be tendered in evidence without proof and shall be deemed until the contrary is proved to have been signed by a person holding at the time of the signature the office or position indicated in the certificate as the office or position of the person signing.

The defendant asserted that s. 966(3) provides a specific statutory mechanism for proving that proceedings had been instituted in accordance with s. 966 of the Taxes Consolidation Act 1997. In these proceedings no certificate pursuant to s. 966(3) has been exhibited within the plaintiff's application for summary judgment. The position is that Detective Chief Superintendent O'Mahony exhibits in paragraph 3 of his affidavit of the 27th November, 2007 a certificate dated the 27th November, 2007. That certificate is stated as having been issued pursuant to ss. 966(5) and 1080(4) of the Taxes Consolidation Act 1997 both as amended by s. 236 of the Finance Act 2001. In fact there is no provision for a certificate under s. 1080(4) as stated on the certificate exhibited. The sub-section dealing with certification is to be found in s. 1080(5). The certificate also stated, on its face, that the sections relied on were both amended by s. 236 of the Finance Act 2001 when the position is that that amendment had been rendered obsolete by a subsequent repeal and substitution of the entire s. 1080 by s. 145 of the Finance Act 2005. The defendant claims that the certificate exhibited is defective on its face and that the Court ought to reject the certificate as erroneous. A further and alternative argument was made that if the Court was prepared to accept the certificate notwithstanding the error on its face that such certificate ought to be rejected because of the lack of proof that the plaintiff had been authorised in accordance with s. 966(1) of the Taxes Consolidation Act.

3.2 Consideration of the provisions contained within s. 966 (subs. 5) identify that certain matters are deemed to be evidence thereby until the contrary is proved. The matters which are proved by such certificate are:

(1) A stated sum for income tax is due and payable by the defendant.

(2) Under an assessment which has become final.

(3) That before the institution of proceedings payment of that stated sum was duly demanded from the defendant, and

(4) That the stated sum remains due and payable.

The position, however, is that whilst those matters can be proved in evidence until the contrary is proved of those facts by producing in evidence a signed certificate, there is no requirement that such proof is put before the Court by that means. An examination of the facts of this case and the manner in which it has been defended demonstrates the following, namely:-

That a stated sum was acknowledged by the defendant as being demanded as due and payable. Under s. 958(2) of the Taxes Consolidation Act 1997 it is provided that preliminary tax becomes due and payable on or before the 1st November in the year of assessment. Sub-section (3) of that section provides that in relation to tax specified in an assessment that it shall become due and payable where an assessment is made before the due date on or before the due date and where the assessment is made on or after the due date on or before the specified due date for the year of assessment. The

facts of this case demonstrate that there is no issue and the defendant has defended these proceedings on such basis, but that the defendant acknowledges and accepts that he was obliged to file returns by the due date in respect of the years in issue. The facts of this case show that the defendant has proceeded to defend the proceedings on the basis that he submitted late returns in relation to each of the years of assessment. In adopting that course of action, which is established on the evidence before this Court, the defendant was proceeding on the basis that he accepted that demands for stated amounts had been made and that no returns had been made within the time limited therefore and as a matter of law it follows that in such circumstances the sums so assessed were due and owing together with the interest. There is no issue but that assessments were raised and copies are exhibited before this Court nor is there any issue but that they were served on the defendant as that is confirmed by the affidavits filed on behalf of the defendant.

It is also the case that no appeal was pursued by the defendant in respect of those assessments within the time limited therefore and this again is confirmed within the defendant's own affidavits. The legal position which therefore follows from those acknowledged and proved facts is that pursuant to s. 933(6)(a) and given the absence of an appeal that those assessments are deemed to be final and conclusive. It is common case that there is no appeal.

Another matter which can be proved by a s. 966(3) certificate is that before the institution of proceedings a payment of the sum due was demanded. The demand served on the defendant dated the 20th August, 2007 has been exhibited before this Court and has been proved and no issue has been raised by the defendant in relation to its receipt. In his affidavit sworn on the 16th January, 2009 the defendant averred that he took certain steps in the thirty days following receipt of the tax assessments and entered into correspondence relating thereto on dates prior to the institution of proceedings. The Court is satisfied that it has been established in the evidence that prior to the institution of proceedings payment of the sums stated in the assessments was duly demanded from the defendant. That is confirmed in the defendant's own affidavit.

The final matter which would be deemed evidence under a s. 966(3) certificate is that the stated sum or a stated part of that sum remains due and payable by the defendant. The affidavits available to the Court demonstrate the amounts sought in the assessments and detail the payments made by the defendant since such assessments were raised and the proceedings herein commenced. This information is available from the affidavits sworn on behalf of the defendant. This Court is therefore satisfied that there is no issue but that a part of the sum as duly demanded from the defendant remains due and payable and that this has been acknowledged by the defendant. The Court is satisfied that there is evidence available in relation to this matter from the affidavits before the Court that prove that sums remain due and payable by the defendant.

3.3 Each of the matters which could have been proved in evidence until the contrary was proved of those facts by a s. 966(3) certificate have, in fact, been proved before this Court by averments, exhibits and admissions and do not require to be proved by a certificate. The fact that such matters can be proved in evidence by a certificate does not result in a situation where the only means of proving such matters is by use of a certificate. The section in the Act permits of proof by use of a certificate but does not oblige proof thereby nor does it create a situation where the proof of the matters which would be covered by the certificate cannot be proved by other means or admitted by a defendant. An analysis of the facts of this case, that is, of the affidavits sworn, the documents exhibited and the admissions made by and on behalf of the defendant confirms that each and every one of the four matters which could be proved in evidence by a s. 966(3) certificate have, in fact, been proved to this Court. It follows that the matter raised by the defendant concerning the absence of an effective and proved certificate under s. 966(3) is of no practical relevance.

3.4 The Court is therefore satisfied that it has been proved in evidence and/or admitted facts the necessary proofs to result in judgment being granted in favour of the plaintiff for the sum claimed less any payments which have been made since the date of the proceedings. The defendant has failed to identify any bona fide defence to the claim. The appeal is dismissed.

3.5 The Court will hear the parties in relation to the final order to be made herein.