

THE HIGH COURT

1985 No. 594R

BETWEEN/

EDWARD N. HEARNE

PLAINTIFF

AND

EOIN O CIONNA MICHAEL MacDONNCHADHA  
THOMAS M. WHELAN TIMOTHY O'BRIEN TRADING AS J.A. KENNY & PARTNERS

DEFENDANTS

Judgment of Mr. Justice O'Hanlon delivered the 24th day of June 1988.

The Plaintiff, in his capacity as Collector General and Officer of the Revenue Commissioners, claims payment in these proceedings of sums alleged to be due by the Defendants in respect of Income Tax (PAYE) for the year ended 5th April, 1984, with interest thereon, and in respect of Pay Related Social Insurance Contributions for the years ended 5th April, 1983, and 5th April, 1984, with interest thereon.

These sums are claimed to be due in respect of persons "employed" by the Defendants during the relevant periods, that is to say, persons in relation to whom the Defendants are to be regarded as employers for the purposes of the Acts under which the obligation to make PAYE and PRSI payments arose during the years referred to.

The Defendants do not dispute that the amounts claimed by the Plaintiff are payable by someone, and have hitherto not been paid, but they contend that the employees in question were not in their employment at any relevant time but were employed by a limited company, Kenny

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International Limited, which was formed by the Defendants to provide engineering consultancy services for overseas markets. They concede, however, that during the periods covered by the Revenue Commissioners' claim, they - the Defendants - acted as paymasters for the employees of Kenny International Limited. In a report compiled by Messrs. Arthur Young and Co., Accountants, exhibited in an affidavit filed on behalf of the Defendants and sworn by the first-named Defendant, a brief history is given of the relationship between the partnership and the limited company. At Par. 3 it states as follows:-

"... however, during several administration changes when the company was without a financial controller, the affairs of both entities were confused and employees of K.I.L. were included in error with the partnership's employees when P.35 annual return of PAYE/PRSI were made to the Revenue.... At no stage were the employees of K.I.L. doing any work for J.A. Kenny & Partners and their legal employer was K.I.L."

The procedure followed, as between the partnership and the limited company during the period in question is referred to in an affidavit sworn by the first-named Defendant, Eoin O Cionna, and filled herein the 8th day of June, 1988. Paragraph 10 of that affidavit reads as follows:-

"10. Regarding paragraph 8 of the Affidavit of Barry O'Hara, he is correct in stating that wages were paid to Kenny International Limited's employees by J.A. Kenny & Partners and that the sums so paid were charged by J.A. Kenny & Partners to Kenny International Limited. At no stage were J.A. Kenny and Partners responsible for PRSI or PAYE relating to Kenny International Limited's employees. The reason why J.A. Kenny & Partners paid the wages of Kenny International Limited's staff for the period was twofold:

Firstly: to give the company a start with its overseas development projects, and

Secondly: it was easy administratively to do so and to maintain a separate payroll which was done

but it was on the clear understanding that Kenny International

Limited would pay back Kenny & Partners any monies it paid on its behalf at the end of each year."

It appears that the Revenue wrote to the limited company in the month of January, 1985, concerning PAYE and PRSI due in respect of the two-year period ending on the 30th April, 1984, and a letter of reply dated the 21st February, 1985, was received from Messrs. Coveney Colligan and Co., Auditors and Accountants, who were then acting on behalf of the Company. This letter read as follows:-

"Dear Sir - We refer to your recent letter to the above named company which was received by them on 28th January 1985. During the two years ending 30th April, 1984 wages were paid by J.A. Kenny & Partners and charged to Kenny International Ltd. The Partnership, J.A. Kenny & Partners accounted for P.A.Y.E./P.R.S.I. on all salaries and wages. Their reference number is 0057881H."

I presume that this letter was written under a misapprehension and in the belief that the PAYE/PRSI liability in respect of the limited company's employees had in fact been discharged by the partnership in respect of the two-year period in question, which appears to be period covered by the present claim.

In the statutes dealing with the obligation of employers to deduct from employees' emoluments and pay over to the Revenue sums due in respect of PAYE, and in regulations made under these statutes as to the procedure to be followed, the word "employer" is given a special meaning. In S.I. No. 28 of 1960, made under the provisions of the Finance (No.2) Act, 1959, the word "employer" is defined as meaning "any person paying emoluments" and the word "employee" is defined as meaning "any person in receipt of emoluments" (Regulation No.2). The same definition is found in Sec. 124 of the Income Tax Act, 1967. As the Defendants acknowledge that in the present case they were the persons paying the emoluments in respect of the relevant period they

must, in my opinion, be regarded as the "employers" for the purposes of the Income Tax Acts and Regulations made thereunder who were obliged by law to make the appropriate deductions from those emoluments at the time of payment and pay over the sums deducted in respect of the tax liability of the employees to the Revenue.

No similar provision appears to be contained in the Social Welfare (Consolidation) Act, 1981, or in the other statutes dealing with payment of employees' contributions in respect of social welfare benefits, or in the Regulations made thereunder, specifying that this special meaning is to be given to the word "employer" when dealing with the obligation to make deductions from emoluments and pay over the amounts so deducted to the Collector General. Accordingly it is open to contention in the present case that, depending on the factual circumstances of the case, the employer who was bound to make the deductions and pay over the amounts deducted to the Revenue, was the limited company and not the partnership. This contention is based on the claim now made on behalf of the Defendants that the partnership was only acting as paymaster from week to week for the limited company and - in effect - making periodical loans of the net amount receivable as wages by persons who in reality were employed by the limited company, on the basis that the sums so advanced would in due course be refunded to the partnership by the limited company.

Without deciding whether a Defence along these lines should succeed, it appears to me that there is sufficient substance in the contention to make it appropriate to allow this part of the Plaintiff's claim stand over for plenary hearing, and this is the course I propose to take in relation to so much of the claim as relates to sums claimed to be due for Pay Related Social Insurance payments.

With regard to the PAYE claim, however, it appears to me that whatever the internal arrangement may have between as between the partnership and the limited company, the partnership assumed the role of paymaster for these employees in respect of the period covered by the Plaintiff's claim, and as such must be regarded as "the employer" within the meaning ascribed to that term by the provisions of the Income Tax Act, 1967, and the Regulations to which I have already referred.

Accordingly, I propose to give judgment in favour of the Plaintiff at this stage against the Defendants for the amount claimed for income tax (PAYE) and interest thereon up to the date of institution of these proceedings, 30th September, 1985, totalling £99,388.53, with further interest on the principal sum of £81,969.93 at 1.25% per month or part of month from the 1st October, 1985, up to the date of judgment in these proceedings.

I will remit the remaining part of the claim for plenary hearing.

*R.J. O'Hanlon*  
 R.J. O'Hanlon  
 24th June 1988.

Counsel for the Plaintiff:- Tony Aston BL (instructed by Patrick J. Maher, Revenue Solicitor)

Counsel for the Defendants:- Twinkle Egan, BL (instructed by Eugene F. Collins & Son, Solicitors).