[2016] IEHC 246

THE HIGH COURT

[2014 No. 385 R.]

BETWEEN

FRANK WATKINS

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Michael Moriarty delivered on the 19th day of April, 2016

Introduction

1. This application is a case stated by His Honour Judge Michael White (as he then was) pursuant to s. 941(2) of the Taxes Consolidation Act 1997 ("the Act of 1997").

2. On 1st June, 2010, 30th July, 2010, 1st April, 2011, 12th January, 2012, 27th September, 2012, 19th November, 2012, and 21st January, 2013, an appeal was heard by the judge from a determination by an Appeal Commissioner on 9th July, 2009. Judge White delivered a draft determination on behalf of the appellant and the respondent on 19th November, 2012, and 21st January, 2013. The honourable judge delivered his final determination on 21st January, 2013 wherein he determined the assessments for value added tax for the periods 1st January, 2003-31st December, 2003, 1st January, 2004-31st December, 2004, 1st January, 2005-31st December, 2005, 1st January, 2006-31st December, 2006, 1st January, 2007-31st December, 2007 and 1st

January, 2008-31st April, 2008 and the profits assessable for income tax for the years 2003, 2004, 2005 and 2006.

3. The issue before the Circuit Court was the quantum of the turnover and profits earned by the appellant in the course of his public house trade operated at his licensed premises known as "The Fighting Cocks", Townsend St., Birr, Co. Offaly. Arising from oral and written evidence, together with written and oral submissions on behalf of the parties, the judge found the following facts to be proved or admitted:

> "The Appellant has traded as a licensed vintner at premises situate at Townsend Street, Birr, Co. Offaly since 1998. The licensed premises was originally an old type front bar and small lounge. In 2004, substantial refurbishment was carried out to the premises including the installation of a new sound system and facilities for music performances in the lounge.
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> In or about February, 2006, the Respondents audited a local drinks wholesaling company, G.R. Robinsons Limited of Belmont Co. Offaly. This audit established that inter *alia*, the drinks wholesalers facilitated undeclared cash sales to a number of its customers of which the Appellant was one. Arising from this the Respondents initially wrote to the Appellant offering an opportunity to make an unprompted disclosure and thereafter, the Respondent undertook an audit of the Appellant's business commencing on 12th September 2007. On that date a detailed interview was conducted at the Appellant's premises. Present were the Appellant, his then accountant, Michael Kinsella together with Mr. Slattery and Mr. Adrian Dorr of the Revenue Commissioners.
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> The Appellant's accounting records were appalling and he himself acknowledged that they were deficient and did not comply with his statutory

obligations to keep full and true records. He was unable to produce (sic) historical till rolls for each till in the premises, and was not in a position to produce till roll receipts on 12th September, 2007. He did not carry out a daily or weekly summary of the till rolls. There was no cash book logging cash payments, setting out the date, the amount, and the recipient. His bank statements, cheque stubs, purchase invoices and miscellaneous documentation were available.

In August 2009, the Appellant changed accountant from Mr. Kinsella of Byrne Casey & Associates to Mr. Dolan of Dolan Smith Ltd. who thereafter endeavoured to reconstruct appropriate books of account and to present those to the Respondents."

4. The matters in dispute at the appeal hearing were *inter alia*:

"a. That the mark up on the purchases for sale at the premises set by the Respondents of 124% before the Appeal Commissioner and 126.59% before this Court were arbitrary and not in accordance with industry norm or the Appellant's accounts. In particular it was contended on behalf of the Appellant that the Respondent's calculations did not take account of the following:-

i. That prior to September 2007 the Appellant charged 10c less for drinks in the front bar compared with the back lounge;

ii. That off-license sales were made on an unstructured basis and sold at discounted prices;

b. That the percentage increase on the mark up from year to year initially at 5% and subsequently at 3% was arbitrary and not justified."

5. The judge set out the following evidence and his conclusions pertaining to the specific findings that are at issue in this case:

> "**a. The Issue of a Price Difference between the Applicant's Bar and Lounge**
>
> The Appellant's evidence on this issue comprised his own direct evidence together with that of his son Noel Watkins. Both were rigorously cross-examined on the issue largely to the effect that when interviewed during the audit the Appellant's documented reply was that there was no such price difference and further, this contention was not raised before the Appeal Commissioner hearing and only lately emerged at the Circuit Court appeal. Revenue evidence in effect stood over the memorandum of interview as a fair and reasonable account of the Appellant's audit interview and the reliability of same. There was no such independent evidence corroborative of such practice (till notes etc.) and it was impossible on the evidence to quantify what might have been sold at a reduced price if the practice in fact existed. In the circumstances, considering the totality of evidence on this issue, I determined that the Appellant had not discharged the onus of proving this pricing structure entitling him to an adjustment on the basis of same.
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> **b. Off Sales**
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> The Appellant's evidence on this issue comprised his own direct evidence together with that of his son Noel Watkins, David Manion and Thomas Conneely. The issue was challenged in cross-examination largely to the effect that when interviewed during the audit the Appellant's documented reply (on 2 occasions) was that there were no off-licence sales and further, this contention was not raised before the Appeal Commissioner hearing and only

lately emerged at the Circuit Court appeal. I noted an apparent contradiction between the evidence of Noel Watkins (he stated there was a button on the till for 'open sales') with Mr. Mulrooney's evidence (which simply stated that employees could not deal with off-licence sales but had to refer to Noel Watkins). There was no documentary evidence to verify the fact or quantum of off-licence sales. In that Revenue in the audit assigned a blanket 50% mark-up to can sales (wherever consumed), against a general mark-up of 112%, having regard to the totality of the evidence, I concluded that no further allowance for off-licence sales should be allowed.

c. Year on Year Increase in Mark-Up

Mark up and the variation thereof year on year was strenuously contested between the parties. The Respondent's evidence on mark up as adopted in the Assessments was to the effect that, in the absence of detailed statutory records for the years under audit, the Inspector was required to undertake a detailed trade analysis of the Appellant's business to accurately compute mark up and from that, the Applicant's tax liabilities. Such analysis was done for 2005 which indicated a mark up for that year of 124%. Evidence as to arriving at mark up for surrounding years was that the Respondent adopted a calibrated adjustment up for the following years and down from previous years in reference to price variations and the respondent's audit experience in the trade generally. The Applicant's challenge to the assessment as to mark up principally centred upon (i) a price difference between the front bar and back lounge for the years under audit; (ii) off-licence sales at a reduced selling price; (iii) inclusion of other not for resale purchases in computing mark-up. Alternative computations were submitted by the Appellant and the Respondent

on this issue; I concluded that the 124% mark up adopted by the Respondent for 2005 was appropriate. In light of the competing evidence as to the impact of acknowledged price changes year on year, I determined that rather than the 5% adjustment posited by the Respondent, a 2% adjustment should be made."

6. The following questions were stated by Judge White for determination by this Court:

"a. Having regard to the use of the word 'require' in s. 941(2) of the Act of 1997, is a Circuit Court Judge obliged to state a case even where he or she does not believe he or she made any determination on a point of law or that an issue of law arose in the hearing before him or her?

b. Did I misdirect myself in law in finding that having regard to the provisions of Section 934(3) of the Taxes Consolidation Act 1997, the burden of proof rested upon the Appellant to prove on the balance of probabilities that Respondent's assessments were incorrect?

c. Did I misdirect myself in law in determining that having regard to the provisions of Section 934(3) of the Taxes Consolidation Act 1997 the burden of proof rested upon the Appellant to prove on the balance of probabilities:- (i) that a contended for price difference between his front bar and back lounge operated at the material time; and (ii) that he also provided off-sales from his licensed premises and the quantum thereof?

d. Did I misdirect myself in law in finding that the evidence adduced on behalf of the Appellant as to:- (i) a purported price difference between the front bar and back lounge, and (ii) the purported conduct of an off sales business from his premises, when considered both in isolation and against the background of the totality of the evidence before me was insufficient to

discharge the burden of proof upon him in order to achieve a reduction from the tax assessments under appeal?

e. Did I misdirect myself in law when I ruled that the mark-up should be increased from year to year by 2%, having regard to the totality of evidence before me?"

Question A

7. During oral submissions, it was accepted by both parties that this question was moot and that this Court was not required to consider this question given that Judge White stated a case to this Court seeking the determination of questions of law.

Question B

8. Section 934(3) of the Act of 1997 provides:

"Where on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand."

9. The effect of s. 934(3) is such that the assessment shall stand unless the appellant in an appeal hearing displaces an assessment with sufficiently persuasive evidence. The burden of proof in this case falls on the appellant as it does on all tax appellants (see *Menolly Homes v. Appeal Commissioners and Revenue Commissioners* [2010] IEHC 49; *J(T) v. Criminal Assets Bureau* [2008] IEHC 168).

There is no issue of controversy on this issue and it is accepted by both parties that the onus is on the appellant to discharge the burden of proof. The judge did not misdirect himself in law on this issue. Thus, the answer to this question is no.

Question C

10. The applicant contended that question C is a mixed question of law and fact and should be categorised together with questions D and E. However, it appears to the Court that the question is in the same vein as that in question B in that the Court has been asked to review whether the judge misdirected himself in law by determining, having regard to s. 934(3) of the Act of 1997, that the onus of proof rested upon the appellant to prove on the balance of probabilities that (i) that a contended for price difference between his front bar and back lounge operated at the material time; and (ii) that he also provided off-sales from his licensed premises and the quantum thereof. This is purely a question of law and the question as phrased does not require the review of the actual application of the law to the particular facts. The reasoning as set out for question B is applicable to this question. Thus, the answer to this question is no.

Question D

11. The applicant submitted that the Court should not determine these questions as they are not in the form required for the High Court to discharge its review function. It was contended that the judge did not state the precise evidence on which he relied, the findings based on that evidence or the inferences that were drawn that led to his conclusions. The applicant argued that the findings of fact are required to be set out by the judge in order for this Court to determine whether the applicable legal

principles have been correctly applied. Reliance was placed on the Supreme Court decision of Denham J. (as she then was) in *McGinley v. Deciding Officer Criminal Assets Bureau* [2001] IESC 49 in relation to the correct form a case stated should take. Denham J. applied the principles outlined in *Emerson v. Hearty and Morgan* [1946] N.I. 35 and *Mitchelstown Co-op Society v. Commissioner for Valuation* [1989] 1 I.R. 210. The decision quoted the following from *Emerson*:

> "We have thought that this may be a convenient opportunity to call attention to the principles which ought to be observed in drafting Cases Stated.
>
> The Case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the Judge.
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> The Case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings.
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> What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did.
>
> The point of law upon which this Court's decision is sought should of course be set out clearly in the Case. But we think the Judge is certainly entitled to expect the party applying for the Case Stated to indicate the precise point of

law upon which he wishes to have the decision of the appellate Court. It would be convenient practice that this should ordinarily be done in the written application for the case stated."

In *Mitchelstown Co-op Society v. Commissioner for Valuation* [1989] 1 I.R. 210 at pp. 212-3, Blayney J. approved the principles in *Emerson*:

"I am in complete agreement with, and I respectfully adopt, this statement of the principles to be observed, but an examination of the case stated by the Tribunal shows that it has not been drafted in accordance with those principles.

The case does not contain any clear statement of the facts found by the Tribunal. The entire transcript of the evidence is annexed to the case and it is stated in the case that 'the Tribunal accepted the uncontradicted evidence adduced on behalf of the appellants in these appeals as regards the descriptions given of the various installations.' This is the only part of the case which could constitute a finding of primary facts, but in my opinion it is clearly not such a finding. Evidence remains evidence even where it has been accepted. There must still be a finding of fact based on such evidence. There is no such finding in the case. Furthermore it is in the case that the facts must be found and stated. This court should not be required to go outside the case stated to some other document in order to discover them.

The same principle applies to the contentions of the parties; the inferences to be drawn from the primary facts, and the Tribunal's determination. All these must be found within the case, not in documents annexed. In the same way, the fact that the judgment of the Tribunal is annexed to the case does not dispense the Tribunal from setting out its

determination in the case. This is a specific requirement of s. 5 of the Act of 1988.

It may be objected that the observance of these principles will lead to the case stated being excessively long. That may be so, but it will result in this court being able to deal with the matter much more expeditiously. Furthermore, it seems to me that it would be a dangerous precedent to permit any divergence from the principles to be observed in the drafting of cases stated which were set out by Murphy L.J. in his judgment in *Emerson v. Hearty and Morgan* [1946] N.I. 35. In my opinion it is of great importance that these principles should continue to be observed."

12. In respect to the applicant's challenge to the form of the case stated, the respondent argued that the appropriate remedy for the applicant would have been to seek an order of *mandamus* to require the case to be stated in a particular form.

13. The respondent submitted that the only issues involved are those of fact, relating solely to the quantum of earnings. The respondent relied upon the principles identified as being applicable in the consideration by the court of a case stated in *O'Culachain (Inspector of Taxes) v. McMullan Brothers Ltd.* (1994-1997) V I.T.R. 200 at pp. 202-3. It was submitted that the determinations of the judge in the present case came within principle one, which is "findings of primary fact by the judge should not be disturbed unless there is no evidence to support them." The respondent submitted that the applicant has not indicated, first, any matter on which the judge reached the wrong decision and, secondly, any finding of fact on which there was no evidence to support the judge's findings of fact.

Decision

14. In *Mara v. Hummingbird Ltd.* [1982] I.L.R.M. 421, Kenny J. acknowledged that the distinction between an issue of law and an issue of fact is not clear-cut. He observed at p. 426:

> "The line between questions of law and those of fact can rarely be drawn firmly so as to separate one from the other.
>
> A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayers purchase the Baggot Street premises? These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the courts should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of the documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw."

15. The Supreme Court applied the conclusions of Kenny J. in *O'Culachain (Inspector of Taxes) v. McMullan Brothers Limited* [1995] 2 I.R. 217, wherein Blayney J. summarised the principles applying to whether a particular decision was correct in law as follows:

> "(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.
>
> (2) Inferences from primary facts are mixed questions of fact and law.
>
> (3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.
>
> (4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.
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> (5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

16. As explained in Purcell McQuillan, *Irish Income Tax* (2014) at para. 2205, the relationship between the evidence heard by the Appeal Commissioners, and the inferences which they draw from that evidence, may be subdivided into three categories:

> (1) where the Appeal Commissioner or judge infers particular facts from the evidence before them (i.e. findings of primary fact), they may proceed to infer further, purely factual, conclusions from those primary facts, typically in a case where the taxpayer's underlying records are alleged to be unreliable or

inaccurate. Such findings can only be overturned as raising a matter of law if they are such that no reasonable body of Appeal Commissioners could have arrived at them.

(2) Where the question is one of mixed fact and law. This often arises where the Appeal Commissioner or judge is required to apply a vague legal or tax concept to a particular set of facts as found by them. A vague concept is one where in some or many instances there may be no definite answer as to whether or not a term or expression applies to a given set of facts.

(3) Pure matters of law, such as depend entirely upon the interpretation of a contract or other legal document.

17. In respect to the purported price difference between the front bar and back lounge, Judge White made a finding of fact after weighing the evidence before him concerning the purported price differential. The judge was concerned with assessing whether there was a price differential or not, its effect on sales figures and thereafter on tax liability. The judge did not have to apply a legal concept to the findings of fact that he made, and did not draw any inferences from the facts as so found. The particular finding on this issue was that "[t]here was no independent evidence corroborative of such practice (till rolls etc.) and it was impossible on the evidence to quantify what might have been sold at a reduced price if the practice in fact existed." In this regard, the form of the case stated satisfies the requirements as elucidated in the authorities referred to by Denham J.

18. As is clear from the authorities, findings of primary fact should not be disturbed unless there is no evidence to support them. The applicant in submissions accepted that this was the relevant test. However, the applicant failed to address this issue in submissions, let alone establish to the satisfaction of the Court that there was

no evidence before Judge White to make the determination as he did. In para. 5(a), set out above, the evidence, findings and conclusions of the judge on this point are outlined. There clearly was evidence before the Court supporting its conclusion of fact. Furthermore, even without conflicting evidence, where the applicant's evidence was vigorously contested at the hearing, the Circuit Court judge was not obliged to accept the evidence of the applicant unless satisfied with the quality of that evidence.

19. The second issue – the purported conduct of an off-licence sales business from his premises –also concerns a finding of fact on the same basis as that relating to the price differential. The judge determined that no further allowance for off-licence sales should be allowed, and he accepted the Revenue's assessment that a blanket 50% markup to can sales should be applied. The determination made by Revenue was based on the appellant's documented reply when interviewed on two occasions that there were no off-licence sales. Although not explicitly stating that he accepted the finding by Revenue, it can be clearly inferred that the judge accepted this as his finding of fact, following his assessment of the totality of the evidence, in making the determination that the assessment by the Revenue Commissioners should not be disturbed. As with the first issue, addressed above, the applicant failed to indicate to this Court how there was no evidence before the judge to justify his finding. Paragraph 5(b), above, shows that there was evidence before the judge on which he made his determination of fact to the effect that there were no off-licence sales. Thus, in any event, it appears to this Court that it would be difficult for the applicant to establish the contrary.

20. On the basis of the above, this Court determines that the answer to the question is no.

Question E

21. Turning to the final question, the issue once again relates to findings of fact following an assessment of the evidence, being a determination as to the appropriate percentage of a markup assessment in the absence of detailed records for the years under audit. Thus, this Court must be put in a position to have findings of fact made by the judge in the case stated in order to determine whether there was no evidence to support any finding made by the judge. Upon consideration of the section of the case stated on the year on year markup, as set out above at para. 5(c), the Court cannot establish the finding of fact made by Judge White which formed the basis for his conclusion that a 2% increase should apply, rather than that assessed by the Revenue Commissioners. The Court does note that the judge weighed conflicting evidence, the relevant excerpts of which the Circuit Court judge referred this Court to in the case stated. However, it is not for this Court to attempt to ascertain the judge's findings of fact by examining transcripts in order to assess the weight which the Circuit Court judge placed on the conflicting evidence before him in coming to his findings of fact, whatever they may be, and, following on from that, his subsequent conclusion that the appropriate year-on-year mark up should be 2%.

22. However, in consideration of the entire circumstances of this case, I have my doubts as to whether it could be concluded that there was no evidence to support the findings of fact made by the judge. While this Court has not been able to discern the findings of fact which lead to the conclusion of Judge White, it is highly doubtful that remittal of this particular question to the Circuit Court will result in a scenario far removed from the assessment as it currently stands at 2%. This is particularly so in light of the fact that the assessment has already resulted in a reduction of the 5% calculated by Revenue but also in light of the fact that the evidence raised by the

applicant on this point related mainly to the price difference and off licence sales on which the judge made findings of fact as stated above.

23. Furthermore, this case stated was signed by Judge White on 7th July, 2014, and thus any issues regarding the form of the case would have been apparent from that date or soon after. The applicant had ample opportunity to seek an order of *mandamus* to ensure that any issues in relation to the form of the case stated could have been rectified before the matter came for determination before this Court. To argue and make complaint solely on the basis of the form of the case stated in respect to questions D and E is misconceived given the timeframe in which the applicant could have sought to have this issue rectified. Thus, in light of all of the above, this Court determines that this matter should not be remitted to the Circuit Court and that the assessment of 2% should stand.

24. Accordingly, the answers to the question submitted will be as follows:

A. No determination has been made on this question.

B. No.

C. No.

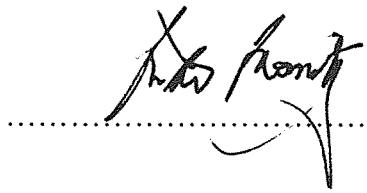
D. No.

E. No.

25. On final listing of the matter for judgment, on 3rd May, 2016, Mr. Aston, S.C. for the respondent, applied for costs of the case stated. Brief argument followed, in the course of which Mr. McEntegart, S.C. for the applicant, raised a number of arguments in ease of his client, including the accommodation reached at hearing on the important question A. Only very limited latitude is vested in the Court to diverge from costs following the event, but, having considered these matters, plus by own inadvertent error in the initial draft judgment in stating that no written submissions

had been furnished by the applicant, I shall exceptionally depart from my normal practice, but only to the extent of limiting the respondent to two-thirds of the costs of the case stated as may be determined by agreement or taxation.

Approved the 11th day of May, 2016:-



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