[2020] IEHC 486

THE HIGH COURT

[2020 No. 85 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF REGULATIONS 12 AND 14 OF THE EUROPEAN UNION (ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION) REGULATIONS 2012 (S.I. NO. 549 OF 2012) AND COUNCIL DIRECTIVE 2011/16/EU RE: EXCHANGE OF INFORMATION REQUEST DATED 26TH DECEMBER, 2016 FROM FRANCE

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

THE HIGH COURT

[2020 No. 86 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF THE AGREEMENT BETWEEN IRELAND AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL RE: EXCHANGE OF INFORMATION REQUEST DATED 19TH APRIL, 2016 FROM GERMANY

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

THE HIGH COURT

[2020 No. 87 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF THE MULTILATERAL CONVENTION ON MUTUAL ADMINSTRATIVE ASSISTANCE IN TAX MATTERS RE: EXCHANGE OF INFORMATION REQUEST DATED 4TH MARCH, 2019 FROM THE REPUBLIC OF KOREA

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

THE HIGH COURT

[2020 No. 88 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF THE CONVENTION BETWEEN IRELAND AND THE REPUBLIC OF ICELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL AND IN THE MATTER OF THE MULITALTERAL CONVENTION ON MUTUAL ADMINSTRATIVE ASSISTANCE IN TAX MATTERS RE: EXCHANGE OF INFORMATION REQUEST DATED 24TH APRIL, 2019 FROM THE REPUBLIC OF ICELAND

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 21st day of July, 2020

1. In *O'Sullivan v. A Company (No. 1*) [2020] IEHC 335, [2020] 6 JIC 2204 (Unreported, High Court, 22nd June, 2020), I made orders under s. 902A of the Taxes Consolidation Act 1997 requiring the respondent company to disclose certain information requested by the Revenue Commissioners on behalf of foreign tax authorities.

2. The issue now is as to costs. There are two major headings: the costs of the proceedings and the costs of compliance with the orders. Ms. Alison Keirse B.L. for the applicant seeks her costs under both headings. Likewise, Ms. Bernadette Quigley B.L. (with Mr. Frank Mitchell S.C.) for the respondent also seeks her costs under both headings.

Costs of the proceedings

3. I will start with the analogy of the costs of third party discovery before explaining why that is not an exact analogy. I pointed out in *Barry v. Commissioner of An Garda Síochána* [2020] IEHC 307 (Unreported, High Court, 8th June, 2020) that the mere fact that a third party is entitled to an indemnity for making third party discovery is not a guarantee of costs of the application itself, especially if it unsuccessfully opposes an application. The safest course for third parties is neutrality. Here, Ms. Quigley wisely took that course, limiting herself to seeking certain directions regarding redaction, which were consented to. Possibly strictly speaking, attendance by the respondent was not required since the directions she was seeking were granted by agreement. From one point of view Ms. Keirse was successful in the application. On the other hand, Ms. Quigley did not oppose the order so she certainly was not unsuccessful and got her directions by consent. On that basis it is not really a case where it can be said the applicant is entitled to costs following an event. If the applicant had proceeded on the basis that it was heard without any attendance by the respondent and was simply in effect a consent application, I would have made no order as to costs.

4. However, I now must turn to the big difference between third party discovery and the s. 902A process, which is that the Revenue Commissioners are entitled to the information sought *without* a court order by serving a notice under s. 902 of the 1997 Act. Section 902(2) provides for service of a notice *"[n]otwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under statute or otherwise",* and s. 902(11) makes compliance mandatory on pain of commission of a criminal offence. Ms. Keirse suggests correctly under those circumstances that the applications would have been unnecessary if the respondent had simply furnished the information as required by law.

5. In relation to the application regarding France, the notice is issued under s. 902 of the 1997 Act as applied by regs. 12 and 14 of the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012 (S.I. 549 of 2012), and was delivered on 13th June, 2017. The notices in relation to Germany, Korea and Iceland were issued under s. 902 as applied by s. 912A of the 1997 Act on 18th December, 2019.

6. The respondent unfortunately by not complying with notices did not comply with its legal obligations. It is true that on the one hand it did in effect negotiate with the Revenue and achieved a more restricted scope of disclosure, but that does not affect the principle. Secondly, it objected to the extent to which information was set out on the face of the notice and said that was inadequate to comply with EU law and to enable a challenge to the notice. However, it did not seek to challenge the notices by judicial review and cannot claim that such notices are legally flawed in some collateral way at this remove.

7. Reliance was placed on data protection obligations, but that is irrelevant because, as noted above, s. 902 applies notwithstanding any enactment as to restriction of provision of information. Failure to comply with the s. 902 notices means that the respondent must be liable in principle for the costs of any subsequent proceedings under s. 902A to seek to obtain the information.

Costs of compliance with the orders

8. The logic of *J.B. O'C. v. P.C.D*. [1985] I.R. 265 *per* Murphy J., and *G.H. v. I.* [2011] IESC 34 (Unreported, Supreme Court, 29th July, 2011), at paras. 25-26, *per* Denham C.J. (Macken and McKechnie JJ. concurring), is that the costs of complying with orders of this nature should be met by the Revenue. That is consistent by analogy with O. 31, r. 29 RSC, that a non-party is entitled to an indemnity for the costs of compliance with non-party discovery. Ms. Keirse submits, in one sense compellingly, that compliance with Revenue requirements is a common duty of all. For what it's worth, I totally agree, and would consider that ideally the costs of compliance should be borne by the person required to comply with the law like any other administrative costs of compliance with the law. You aren't entitled to indemnity for your accountancy costs if you are audited, for example. However, in the context of the existing caselaw it seems to me if Revenue want to establish that as a principle in the context of s. 902A, they would need to seek the insertion of a specific provision in the statute. So in the absence of that, the existing approach applies and I would allow the respondent the costs of compliance with the orders. Ms. Keirse is keen that any such costs should be limited to "*reasonable costs of compliance*" and in principle I would so limit the costs.

Cost of the costs application

9. The net effect is the applicant is entitled to costs of the proceedings and the respondent to the costs of compliance - so overall each has been 50% successful and 50% unsuccessful. The logic of that is there should be no order as to the costs of the costs application.

The overall outcome

10. As regards the overall outcome, in principle in the interests of saving the pointless expenditure of further costs, I would propose, subject to hearing counsel, to measure each as equivalent and to allow for set-off of one against the other with the net effect of no order as to costs overall.

11. While I don't therefore think that this is really a case that calls for any discretionary decision, I would have come to the same overall conclusion anyway had discretion been relevant. Order 99, r. 2(1) RSC (as substituted by the Rules of the Superior Courts

(Costs) 2019 (S.I. No. 584 of 2019)) provides that *"[s]ubject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules: (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively"*. I consider that insofar as my discretion under O. 99, r. 2 would be relevant, it seems to me that no order is the appropriate order having regard to all of the relevant factors and bearing in mind the statutory provisions referred to in O. 99 and applicable here.

Postscript – form of Order following further submission on set-off

12. For those reasons, having now heard counsel on the set-off proposal, the order is:

(i). the applicant is to have the costs of the applications and the respondent is to have the costs of compliance with the orders and both are measured as equal and are mutually set off resulting in no order as to costs overall; and

(ii). there is to be no order as to the costs of the costs application.