APPROVED **[2022] IEHC 228**

THE HIGH COURT
JUDICIAL REVIEW

2016 No. 40 JR

BETWEEN

BRIAN MURPHY

APPLICANT

AND

THE REVENUE COMMISSIONERS
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 May 2022

INTRODUCTION

1. These judicial review proceedings seek to restrain the Director of Public Prosecutions from prosecuting the Applicant for a number of alleged revenue offences. The Applicant asserts that the pursuit of the criminal prosecution would contravene the terms of a written settlement agreement entered into between him and the Revenue Commissioners in the context of certain civil proceedings and would involve a breach of his legitimate expectation that he would not be prosecuted. This assertion is made notwithstanding that the Director of Public Prosecutions is not a party to the settlement agreement, and that the settlement agreement does not purport to preclude criminal prosecution.

2. One of the principal issues for determination in these judicial review proceedings is whether the Applicant has established the first of the three preconditions for asserting a breach of legitimate expectation, namely the making of a representation on the part of the relevant public authority. Both sides are agreed that the nature and extent of any representation is to be assessed objectively, i.e. as it would reasonably be understood by a recipient, and not by reference to the subjective intention of the parties.

FACTUAL BACKGROUND

3. The applicant for judicial review, Mr. Brian Murphy, will be referred to hereinafter as "***the Taxpayer***" for ease of exposition. The Taxpayer is a qualified accountant and had been a partner in the well-known firm of accountants, Deloitte. The Taxpayer has since resigned from the partnership.

4. These judicial review proceedings concern a settlement agreement entered into between the Taxpayer and the Revenue Commissioners on 31 August 2015. To understand the events leading up to this settlement agreement, it is necessary to commence the narrative in February 2014. The Director of Public Prosecutions caused a criminal summons to be issued against the Taxpayer on 18 February 2014. The alleged offences concern the making of a claim for a refund of value added tax. The claim for a refund had been made on behalf of a company of which the Taxpayer had been a director and, possibly, also a shareholder via a trust.

5. The Taxpayer sought to challenge the issuance of the criminal summons in an earlier set of judicial review proceedings: *Murphy v. Revenue Commissioners* Record Number 2014 No. 399 JR ("***the first judicial review proceedings***"). The

first judicial review proceedings had been listed for hearing before the High Court at the start of July 2015.

6. Some weeks before the first judicial review proceedings came on for hearing, the Taxpayer had, on 15 June 2015, put forward a proposal to the Revenue Commissioners to discharge certain other unrelated arrears of tax. The proposal concerned arrears in respect of income tax for the tax year 2013, and value added tax (VAT) for the period January/February 2015. The Taxpayer had sought an assurance from the Revenue Commissioners that there would be no prosecution against him, saying that he had to be in a position to continue to work as an accountant in order to meet the scheduled payments under the proposed repayment agreement.

7. The firm of solicitors acting on behalf of the Revenue Commissioners, Pierse Fitzgibbon Solicitors, indicated, by letter dated 29 June 2015, that the repayment agreement, if entered into, would be without prejudice to any other enforcement action or prosecution action in being or yet to be initiated. The Revenue Commissioners had instructed that this form of wording be used.

8. The Taxpayer replied as follows on the same date:

> "[…] As I explained, I cannot commit to a payment plan with Revenue where any prosecution would have a very significant impact on my ability to earn professionally and therefore discharge amounts due. A solution here is a position whereby we draw a line under any judicial review proceedings taken by me, prosecutions in being or yet to be initiated so that I can have the certainty of making full payments to you.
>
> I commit to ensuring that ALL taxes and liabilities are filed and paid on time, and accept that I cannot preclude any action civil or otherwise from any future failings on my part around same. As I explained on the phone to you, I can make every effort to make full payment on this proposal, but not with a prosecution position as this would decimate any ability I have to earn the amounts required as part of this proposal."

9. Following a further exchange of correspondence, a partner in the firm of solicitors acting for the Revenue Commissioners wrote to the Taxpayer as follows on 6 July 2015:

> "We refer to various communications between our respective offices in terms of outstanding taxes and liabilities due and owing to our client the Collector General. We note you have been in extensive communication with Anna Lynch of these offices and we have taken our clients instructions. You will appreciate that our client has an obligation to collect herein and if we cannot agree terms as per previous communication and as clearly laid out by Anna Lynch, we have no option but to continue with legal proceedings.
>
> We reiterate the position as clearly outlined by our client in previous communications that the arrangement relates only to the tax and interest liability for income tax for the year ending 31st December 2013. This agreement if entered into is without prejudice to any other enforcement action or prosecution action [in] being or yet to be initiated.
>
> We trust this clarifies matters and please confirm your agreement to arrangement already outlined."

10. On 16 July 2015, the solicitors acting for the Revenue Commissioners reiterated their client's position as follows:

> "Our client has now issued us with instructions, based on a consultation with senior management and the District, to proceed with enforcement and Revenue cannot agree to the exclusion of the non prosecution clause in the terms and conditions of the instalment arrangement.
>
> We are issuing proceedings today and please take this as formal notification of same."

11. The Revenue Commissioners issued debt collection proceedings against the Taxpayer out of the Central Office of the High Court on 22 July 2015. The debt collection proceedings are entitled *Gladney (Inspector of Taxes) v. Murphy* and bear the following High Court record number: 2015 No. 195 R. It was arranged

to have the debt collection proceedings served on the Taxpayer by appointment following his return from abroad in mid- August 2015.

12. In the interim, there had been an ongoing exchange of emails between the Taxpayer and the solicitors acting for the Revenue Commissioners in the debt collection proceedings. It is apparent from this exchange that the Taxpayer had resolved to enter into a settlement agreement, notwithstanding the Revenue Commissioners' clearly stated position that any agreement would be without prejudice to any other enforcement action or prosecution action in being or yet to be initiated.

13. Relevantly, the Taxpayer stated as follows in an email of 5 August 2015:

> "Further to our conversations on the 16th July last, I said I would try and review my financial situation to see if I could manage to enter into this financial arrangement.
>
> I am ready to commit to the €4000 per month from 1 September as outlined in the proposal. However, I will need a few weeks more to pay down the initial instalment of €75,000. Can I please request that I be given until 31 October to do this. *The rest of the arrangement will stay in place as outlined by you*.*
>
> I look forward to hearing from you in respect of this."
>
> *Emphasis (italics) added.

14. There was a further exchange of emails on the question of the schedule of payments. Ultimately, a revised schedule of payments was agreed between the parties.

15. There is a significant dispute of fact between the parties as to what occurred in the days immediately prior to 31 August 2015. The Taxpayer has deposed on affidavit and repeated in oral evidence that, in a telephone conversation on the morning of 26 August 2015, he had told Ms. Anna Lynch, a legal executive in Pierse Fitzgibbon Solicitors, that he would not sign any agreement containing a

"*without prejudice to prosecution*" clause, and that Ms. Lynch had said that she would revise the agreement to remove the clause, but that the agreement with the clause removed would need to be approved by Revenue before issued to him. Ms. Lynch's recollection of this telephone conversation is very different. Ms. Lynch stated, in her oral evidence, that the Taxpayer had been consistently told that if he signed an agreement letter that it would not prejudice the Revenue Commissioners from pursuing criminal proceedings. As explained presently, this dispute of fact is not relevant to the case as pleaded: see paragraph 44 *et seq*. below.

16. On 31 August 2015, the Taxpayer was sent a letter of offer setting out the terms of a written settlement agreement. The Taxpayer signed and dated the settlement agreement on the same day and returned the signed version to the Revenue Commissioners' solicitors by post. The terms of the settlement agreement are set out in full under the next heading below.

17. Tellingly, notwithstanding the position now adopted by the Taxpayer, no steps were taken by him subsequent to the execution of the settlement agreement to withdraw his first judicial review proceedings. The first judicial review proceedings had been heard by the High Court (Noonan J.) in July 2015 and judgment had been reserved. The Taxpayer did not seek to discontinue those proceedings even though, on the Taxpayer's argument, the Director of Public Prosecutions was now precluded from pursuing the criminal prosecution the subject-matter of the judicial review proceedings.

18. Judgment was delivered in the first judicial review proceedings on 4 November 2015: *Murphy v. Revenue Commissioners* [2015] IEHC 670. The application for

judicial review was dismissed. The Taxpayer brought an appeal against this decision, but the appeal has since been withdrawn.

19. The Director of Public Prosecutions applied to have a (second) criminal summons issued against the Taxpayer on 12 October 2015. The criminal summons alleges a number of revenue offences relating to income tax returns for the tax years 2008, 2009, 2010, 2011 and 2012. The Taxpayer contends that the issuance of this criminal summons is in contravention of the settlement agreement of 31 August 2015.

20. The within judicial review proceedings were instituted by way of an *ex parte* application for leave on 25 January 2016.

SETTLEMENT AGREEMENT

21. Given its central importance to these proceedings, it is appropriate to set out the terms of the settlement agreement of 31 August 2015 in full 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."

22. The letter of 31 August 2015 constituted an "*offer*" on behalf of the Revenue Commissioners to settle the extant High Court debt collection proceedings on a specific basis. It was open to the Taxpayer to signify his "*acceptance*" of this offer by signing the letter and returning it to the Revenue Commissioners' solicitors. This offer had been preceded by an exchange of correspondence marked, for the most part, by the use of the caveat "*without prejudice*". The settlement agreement is, therefore, properly understood as representing the entire of the agreement between the parties.

23. The Taxpayer signed and dated the settlement agreement on 31 August 2015 and returned the signed version to the Revenue Commissioners' solicitors by post.

24. It is apparent from the terms of the settlement agreement that the agreement between the parties is confined to the specific legal proceedings referenced in the heading, namely *Gladney (Inspector of Taxes) v. Murphy*, High Court 2015 No. 195 R. These are "*the legal proceedings*" which the Revenue Commissioners are agreeing "*to suspend*" in consideration of the Taxpayer making the scheduled payments. The remedy provided for under the settlement agreement in the event of the Taxpayer failing to make the scheduled payments is that the High Court proceedings will be resumed immediately.

25. It is also apparent that the agreement is confined to the arrears of tax referenced in the heading, namely income tax for the year 2013 and value added tax for the two-month period from January to February 2015. The settlement agreement cannot be understood as referring to any other arrears. It should be explained that these arrears are in respect of taxes owed by the Taxpayer personally, and are entirely unrelated to the taxes the subject of the criminal summons issued in February 2014.

26. A settlement agreement, perhaps more than any other type of contract, falls to be interpreted objectively. There is 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. Litigation imposes a direct cost on the parties to the particular proceedings, and, more generally, entails a societal cost in terms of the provision of judicial and administrative resources.

27. It would undermine this public interest were the meaning and effect of a settlement agreement to turn on the *subjective* intention of one of the contracting

parties. Such an approach to interpretation would create uncertainty and would result in parties being less likely to enter into a settlement agreement for fear that they might have signed up to a less favourable outcome than that conveyed by the written terms. It is important, therefore, that a party who enters into a settlement agreement can do so secure in the knowledge that the agreement can be enforced in accordance with its written terms.

28. The settlement agreement of 31 August 2015 cannot, on any objective interpretation, be construed as precluding the Director of Public Prosecutions from pursuing criminal proceedings against the Taxpayer. The settlement agreement is precise in its terms and is confined to the specified legal proceedings and arrears of tax. Crucially, the Director of Public Prosecutions is not a party to the settlement agreement.

29. It should be recalled that, as of the date of the settlement agreement, the question of a criminal prosecution was not a moot point. There were, in fact, criminal proceedings already in being against the Taxpayer. The Director of Public Prosecutions had caused a summons to be issued against the Taxpayer on 18 February 2014. The criminal prosecution was to be on indictment before the Circuit Court. This criminal prosecution was the subject of the first judicial review proceedings and judgment was pending as of 31 August 2015.

30. Having regard to this factual matrix, and to the precise terms of the settlement agreement, the agreement cannot be construed as intended to capture either the criminal proceedings or the first judicial review proceedings. If, conversely, the settlement agreement had been intended to preclude the ongoing criminal prosecution then it is inconceivable that this would not have been expressly recorded in its terms.

DISCOVERY OF DOCUMENTS

31. The respondents to these proceedings were required to make discovery of documents by order of the Court of Appeal, *Murphy v. Revenue Commissioners* [2020] IECA 36. It is apparent from the documentation which has been discovered that there had been extensive email communication between (i) officials in the Revenue Commissioners and their solicitors, Pierse Fitzgibbon, and (ii) the revenue officials *inter se*, in respect of the proposed settlement agreement. The constant and unwavering position of the Revenue Commissioners had been that any settlement agreement was to be without prejudice to any enforcement action or prosecution action in being or yet to be initiated. It is also apparent from the documentation—and confirmed in oral evidence—that the revenue official most centrally involved in the matter, Mr. Aidan Duffy, had intended that an express clause to this effect should be included in the settlement agreement. Mr. Duffy had approved, in draft, the terms of the settlement agreement which was then sent to the Taxpayer on 31 August 2015. Mr. Duffy has stated in evidence that he did not notice the absence of such a clause from the draft settlement agreement and that this was a mistake on his part.

32. The case as advanced at trial, although not as pleaded, seeks to make much of these confidential communications between the revenue officials and their solicitors. I will return to consider the inferences, if any, to be drawn from these communications below, when discussing the unpleaded case advanced at trial. For present introductory purposes, it is sufficient to make two short observations.

33. First, a claim for breach of legitimate expectation, by definition, falls to be determined by reference to the outward conduct of the relevant public authority, not by reference to its internal communications. The existence of an actionable breach is contingent on the public authority having made a representation as to how it will act in respect of an identifiable area of its activity. This representation must have been addressed to or conveyed to an identifiable person or group of persons. (*Glencar Explorations plc v. Mayo County Council* [2001] IESC 64; [2002] 1 I.R. 84). Here, the Taxpayer did not, of course, have sight of the confidential communications until years after the supposed representation. Any representation can only be based on what was actually communicated to him in the summer of 2015.

34. Secondly, the nature and extent of a representation is assessed objectively, not by reference to the subjective views of the parties. The fact that the revenue officials may have thought it preferable or even necessary to include an express clause in the settlement agreement to the effect that the agreement was to be without prejudice to criminal prosecution is not decisive.

DECISION OF COURT ON THE CASE AS PLEADED

35. The Taxpayer's case, as set out in the statement of grounds, is advanced primarily as one alleging a breach of agreement on the part of the Revenue Commissioners. It is pleaded that the Taxpayer and the Revenue Commissioners had 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. It is further pleaded that both the Revenue Commissioners and the Director of Public Prosecutions have

a "*duty to adhere to*" the agreements of the Revenue Commissioners compromising revenue liabilities.

36. There are two obvious and insurmountable difficulties with the asserted claim for breach of agreement. The first is that the Director of Public Prosecutions is not a party to the settlement agreement; the second is that the settlement agreement does not purport to preclude criminal prosecution (for the reasons explained earlier at paragraphs 22 to 30). In an attempt to overcome these difficulties, the Taxpayer sought to reorient his case at the hearing to one alleging breach of legitimate expectation.

37. The claim for breach of legitimate expectation is pleaded as follows at paragraph (e)(4) of the statement of grounds:

> "The First Respondent 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 Applicant, which formed part of a transaction or series of transactions definitively entered into, or a relationship between the Applicant and the First Respondent, such as created an expectation, as was intended by the First Respondent, reasonably entertained by the Applicant, 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 Applicant 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."

38. As appears, the wording of the plea is modelled on the classic statement of the concept of legitimate expectation in *Glencar Explorations plc v. Mayo County Council* [2001] IESC 64; [2002] 1 I.R. 84 (*per* Fennelly J. at pages 162/63 of the reported judgment). Much of the language is taken directly from the judgment. The plea, however, fails to provide particulars of the representation alleged to

have been made; still less is it explained how any representation made by the Revenue Commissioners could bind the Director of Public Prosecutions.

39. The most that can be said of the plea in the present case is that it, tacitly, relies on the same particulars provided earlier in the statement of grounds in respect of the claim for breach of agreement, i.e. in respect of both pleas, the claim is predicated on the written terms of the settlement agreement of 31 August 2015. Certainly, there is nothing in the statement of grounds which presages the case sought to be advanced at trial, namely that the supposed omission of an express prosecution clause coupled with the supposed content of a telephone conversation on 26 August 2015 amounted to a representation.

40. It is necessary to pause here to explain that the scope of the court's jurisdiction in judicial review proceedings is confined to the grounds specified in the order granting leave to apply for judicial review (and any additional grounds arising from an amendment to that order). The position is stated as follows in *A.P. v. Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729 (at page 734 of the reported judgment):

> "When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required. On the *ex parte* application for leave the High Court Judge may grant leave on all, or some, of the grounds sought or may refuse to grant leave. The order of the High Court determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced. On any such application the High Court has jurisdiction to allow an amendment of the statement of grounds, if it thinks fit. Once an application for leave to [apply] has been granted the basis for the review by the court is established."

41. Order 84, rule 20 of the Rules of the Superior Courts provides that it shall not be sufficient for an applicant to give as any of his grounds an assertion in general

terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.

42. In the context of a claim for breach of legitimate expectation, this mandates that an applicant identify, *inter alia*, the facts or matters relied upon as constituting the representation made by the public authority which is said to have given rise to a legitimate expectation on the part of the applicant for judicial review. A representation on the part of a public authority is the foundation stone for any claim for breach of legitimate expectation. This is a matter within the peculiar knowledge of the person asserting the breach: a claim for breach of legitimate expectation is predicated on the relevant public authority having addressed or conveyed a representation to that person (or to an identifiable group to which he or she belongs). Where, as in this case, the representation is said to arise from communications addressed to the applicant personally, then he or she, by definition, will be in a position to provide proper particulars of the matters said to constitute the representation.

43. It is imperative that proper particulars of the representation relied upon be pleaded in the statement of grounds. This is not merely a matter of fairness to the respondent, i.e. to ensure that a respondent knows the case against them, it goes to the very jurisdiction of the court. As illustrated by the recent judgment of the High Court (McDonald J.) in *Perrigo Pharma International DAC v. McNamara* [2020] IEHC 552, a failure to identify specific material as forming part of the representation made will result in same being excluded from consideration by the court.

44. Applying these principles to the present case, the sole representation identified in the statement of grounds is the entering into of the terms of settlement. It is apparent from the verifying affidavit sworn by the Taxpayer that this refers to the written settlement agreement of 31 August 2015. The only conduct specified in the statement of grounds as supposedly giving rise to a representation is that conduct of the Revenue Commissioners in entering into the settlement agreement.

45. The case as pleaded, therefore, stands or falls on how the settlement agreement would be understood by an objective reader. For the reasons explained at paragraphs 22 to 30 above, the settlement agreement does not amount to a representation that the Director of Public Prosecutions would not pursue criminal proceedings against the Taxpayer, still less does it entail an unambiguous and unequivocal representation to that effect. There is 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.

46. The Taxpayer has thus failed to establish the existence of the first of the three "*positive*" preconditions for a claim for legitimate expectation, namely the making of an unambiguous and unequivocal representation by the public authority concerned. (*Cromane Seafoods Ltd v. Minister for Agriculture* [2016] IESC 6; [2017] 1 I.R. 119). This is to be ascertained objectively, i.e. by reference to the meaning that the representation would convey to a hypothetical reasonable recipient of the representation, rather than the subjective understanding of the parties themselves. (*Perrigo Pharma International DAC v. McNamara* [2020] IEHC 552).

47. For completeness, I should record that I am satisfied that—were it permissible to consider his subjective understanding—the Taxpayer's behaviour subsequent to 31 August 2015 is not consistent with his having thought that the settlement agreement precluded a criminal prosecution. I will return to this point at paragraphs 81 to 83 below.

48. Given that the Taxpayer has failed to establish the existence of a representation, it is not necessary to address the two remaining "*positive*" preconditions for a claim for legitimate expectation, nor to consider the two "*negative*" factors of the legal test.

49. In summary, the claim for legitimate expectation, as pleaded in the statement of grounds, is dismissed.

THE UNPLEADED CASE ADVANCED AT TRIAL

50. For the reasons explained under the previous heading, I have concluded that the Taxpayer's case, as pleaded, fails to establish a claim for either breach of contract or breach of legitimate expectation. This conclusion is sufficient on its own to dispose of these proceedings. However, I propose to consider *de bene esse* the new case advanced on behalf of the Taxpayer at trial. This is so notwithstanding that the case advanced at trial goes well beyond the case as pleaded in the statement of grounds.

51. I am taking this very unusual course because of the history of these proceedings. These proceedings have been hard fought on both sides, and have already entailed an appeal to the Court of Appeal on an interlocutory motion for discovery. The hearing before me involved the cross-examination of a number of deponents and ran for some seven days. It seems preferable to determine all

issues raised now, rather than dispose of the proceedings on a narrow ground which might be overturned on appeal, with the result that the proceedings might then have to be remitted to the High Court for a rehearing. The attendant delay and cost would not be in the interests of either party.

52. The unpleaded case advanced at trial is to the effect that the representation giving rise to the claim for legitimate expectation consists not only of the conduct of the Revenue Commissioners in entering into the written settlement agreement of 31 August 2015, but also includes certain oral statements allegedly made to the Taxpayer. These oral statements are alleged to have been made by Ms. Anna Lynch. At all material times, Ms. Lynch has been employed by Pierse Fitzgibbon Solicitors. This is the firm which had been acting for the Revenue Commissioners in the debt collection proceedings. Ms. Lynch is not a qualified solicitor, but rather a legal executive acting in an administrative role. Her job title is "*manager*" of the revenue department within Pierse Fitzgibbon. Much but not all of the correspondence between the Taxpayer and Pierse Fitzgibbon had been with Ms. Lynch.

53. The written legal submissions filed on behalf of the Taxpayer on 18 June 2021 summarise the representation newly relied upon to ground the claim for breach of legitimate expectation as follows:

> "In this case, Revenue, can enter into agreements or make representations that bind. Such binding promises or representations can be express or implied, and made up [of] statements or a course of conduct, or a mixture of both, as here. In this case, the 'representation' is comprised of actions and statements which are to be taken together, including:–
>
> a. the statement and positions adopted during the negotiations and communications between the parties over the inclusion of the condition that Revenue was entitled to continue to prosecute

Mr Murphy or issue new prosecutions or its exclusion;

b. the statement by Anna Lynch that she would take out the condition but that this was subject to approval by the Revenue;

c. Anna Lynch taking action ensuring the clause was not included in the terms of the agreement as she had stated to the Applicant and furnishing the draft to Revenue;

d. Revenue's agreement to the terms;

e. the authorisation of Pierse Fitzgibbon to issue the offer to Mr Murphy;

f. and the subsequent offering to Mr. Murphy of the terms of the agreement."

54. The central plank of the case made at trial is that Ms. Lynch had told the Taxpayer, in a telephone conversation on the morning of 26 August 2015, that she would revise the proposed settlement agreement to remove what the Taxpayer describes as the "*without prejudice to prosecution*" clause. This statement is alleged to have been made by Ms. Lynch in circumstances where the Taxpayer had supposedly told her on the same telephone call that he would not sign any agreement containing such a clause. I will return presently to consider the state of the evidence before the court on these matters: see paragraph 67 *et seq*. below.

55. Before turning to that task, however, it is necessary to address the following legal issue, namely, whether, for the purpose of assessing a claim in legitimate expectation, it is permissible for the court to look beyond the written terms of the settlement agreement and to consider the course of negotiations leading up to the execution of those written terms.

56. Counsel on behalf of the Taxpayer accepted that the rules in relation to contractual interpretation normally preclude reliance on pre-contractual negotiations as an aid to interpretation. It is also accepted that the terms of the settlement agreement in the present case are very straightforward on their face and do not require much by way of interpretation. It is submitted, however, that the pre-contractual negotiations may be considered as part of a claim for breach of legitimate expectation. This is said to follow because a claim for breach of legitimate expectation seeks a different remedy, fashioned to provide for a different scenario than a breach of contract. It is further said that a representation, even if not within the four walls of the contract itself, can nevertheless give rise to a legitimate expectation.

57. The difficulty with these submissions is that the settlement agreement of 31 August 2015 forms the centrepiece of the supposed representation. This is not a case where, for example, it is alleged that a statement made during the course of pre-contractual negotiations gave rise to a representation which exists in parallel with the contract ultimately entered into. Here, the allegation is that the pre-contractual negotiations culminated in a concluded contract on 31 August 2015, and that the absence from the contract of a "*without prejudice to prosecution*" clause constitutes part of the representation giving rise to the legitimate expectation.

58. On the Taxpayer's theory of legitimate expectation, the self-same document, i.e. the settlement agreement, would have two entirely different meanings. For the purposes of contract law, the settlement agreement would be interpreted as being confined to the civil proceedings between the Revenue Commissioners and the Taxpayer, *Gladney (Inspector of Taxes) v. Murphy*, High Court 2015

No. 195 R. For the purposes of public law, however, the settlement agreement would be given a much more expansive interpretation and would be understood as precluding criminal proceedings by the Director of Public Prosecutions.

59. With respect, the doctrine of legitimate expectation does not have such a radical effect on the law governing agreements entered into by public authorities. Whereas the remedies are, of course, very different, the law of contract and the doctrine of legitimate expectation both adopt an *objective* approach to interpretation. In the case of a contract, an agreement will be interpreted as meaning that which the document would convey to a reasonable person having all the background knowledge (*Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31). In the case of legitimate expectation, there must have been an unambiguous and unequivocal representation by the public authority concerned (*Cromane Seafoods Ltd v. Minister for Agriculture* [2016] IESC 6; [2017] 1 I.R. 119). This is to be ascertained objectively, i.e. by reference to the meaning that the representation would convey to a hypothetical reasonable person, rather than the subjective understanding of the party. See, generally, *Perrigo Pharma International DAC v. McNamara* [2020] IEHC 552.

60. The need for an objective understanding is especially important where, as in the present case, the representation is made in the context of the settlement of legal proceedings. There is a strong public interest in favour of the amicable resolution of legal proceedings. It would undermine this public interest objective were public authorities to be discouraged from entering into settlement agreements for fear that the clear terms of the written agreement would be overridden by an oral statement supposedly uttered during the course of negotiations. It is in the public interest that there be certainty as to the terms

upon which legal proceedings have been settled, and this is achieved by giving an objective interpretation to the language actually employed by the parties to embody their agreement in written form and which both parties have signed up to. The precise purpose of reducing the terms of settlement to writing is to avoid any possible dispute as to what has been agreed.

61. This is especially so where, as in the present case, one party has made a formal "*offer*" to settle proceedings on specified terms, and the other party has "*accepted*" that offer by signing up to those terms. The letter of offer dated 31 August 2015 set out the terms upon which the Revenue Commissioners were prepared to suspend the debt collection proceedings. These terms constitute the entire of the proposed settlement agreement.

62. The Taxpayer's attempt to portray the Revenue Commissioners as having "*removed*" a clause is inaccurate. This was not a case where, as sometimes occurs in commercial transactions, the parties were exchanging drafts of a proposed agreement with each side "*marking up*" proposed amendments. There was no such iterative process here. Rather, the Revenue Commissioners had made a standalone offer on 31 August 2015 on specified terms. It is not legitimate to attempt to change the meaning of that letter of offer by seeking to compare-and-contrast it with an earlier letter of offer of 29 June 2015. The letter of offer of 31 August 2015 is self-contained and falls to be interpreted on its own terms.

63. Even if it were legitimate to look to the earlier letter—and it is not—the difference in wording between the two letters does not support an inference that the Revenue Commissioners had abandoned their consistently stated position that any repayment arrangement would be without prejudice to any enforcement

action or criminal prosecution. Each letter has to be seen in the context in which it was written. By the time the letter of 31 August 2015 came to be written there had been a significant development: the Revenue Commissioners had issued debt collection proceedings against the Taxpayer on 22 July 2015. As appears from the structure of the letter and the language used, the letter of 31 August 2015 had been written in the specific context of those proceedings. It would have been superfluous to reference criminal proceedings when the letter of offer could only reasonably be understood as being confined to the debt collection proceedings.

64. It is also significant that, even on the Taxpayer's version of events, the representation allegedly made by Ms. Lynch had been expressed to be contingent on the Revenue Commissioners' approval. It was necessary, therefore, for the Taxpayer to await sight of the actual terms of settlement being offered by the Revenue Commissioners. It would have been readily apparent to him from reading the letter of 31 August 2015 that there was no representation being made to the effect that the extant criminal prosecution would be discontinued nor that future criminal proceedings were precluded.

65. For the reasons already discussed at paragraphs 22 to 30 above, the settlement agreement of 31 August 2015 cannot reasonably be understood as precluding the Director of Public Prosecutions from pursuing a criminal prosecution, including, relevantly, the criminal prosecution already in existence as of that date. Insofar as the conduct of the Revenue Commissioners in entering into the settlement agreement falls to be analysed as constituting a representation, there is no room for ambiguity or doubt as to the limited nature of the representation being made: it is confined to the debt collection proceedings.

66. It makes no difference whether or not Ms. Lynch had stated that she would omit any "*without prejudice to prosecution*" clause from the settlement agreement. No such supposed statement by Ms. Lynch could have overridden the clear and unequivocal terms of the settlement agreement which had been offered to the Taxpayer in the letter of 31 August 2015, which terms the Taxpayer accepted by signing and returning the letter of offer.

FINDINGS ON DISPUTED ISSUES OF FACT

67. For completeness, and again to ensure that all issues raised have been addressed by the court of trial, I propose to set out my findings on the disputed issues of fact. These findings are based on my assessment of the oral evidence of the Taxpayer and of Ms. Lynch. The findings are also informed by the contemporaneous documentary evidence; the affidavit evidence filed on behalf of the Taxpayer at the time of the application for leave to apply for judicial review; and the nature of the case as pleaded in his statement of grounds.

68. The onus of proof lies with the Taxpayer as the moving party. The evidence does not establish, on the balance of probabilities, that 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. I found Ms. Lynch to be a credible witness. She gave her evidence carefully, without exaggeration and with appropriate concessions. This is in marked contrast to the Taxpayer's demeanour in the witness box. The Taxpayer sought to parry difficult questions, and when pressed was often unable to provide any cogent explanation for the inconsistencies in his conduct. In particular, the Taxpayer was unable to explain his failure to make any reference to the telephone conversation of 26 August

2015 in his affidavit grounding the application for leave to apply for judicial review.

69. Ms. Lynch stated, in her oral evidence, that the Taxpayer had been consistently told that if he signed an agreement letter that it would not prejudice the Revenue Commissioners from pursuing criminal proceedings. Ms. Lynch also stated that she understood the proposed settlement would only be concerned with the taxes that Pierse Fitzgibbon were collecting and the payments that the Taxpayer was to make.

70. Ms. Lynch's version of events is corroborated by the contemporaneous documentary evidence. First, it is apparent both from the chain of correspondence between Ms. Lynch and the Taxpayer, and from the confidential communications between Ms. Lynch and the officials of the Revenue Commissioners (since made available on discovery), that the constant and unwavering position of the Revenue Commissioners had been that any settlement had to be without prejudice to any other enforcement action or prosecution action in being or yet to be initiated. Ms. Lynch was fully aware of the Revenue Commissioners' position. It is highly improbable, to say the least, that Ms. Lynch would have gone against the Revenue Commissioners' express instructions, i.e. by assuring the Taxpayer on 26 August 2015 that she would seek to arrange immunity from prosecution.

71. Even if Ms. Lynch had, for some inexplicable reason, decided on 26 August 2015 to seek to alter the fundamental basis of the proposed settlement agreement, it is inconceivable that she would have done so unilaterally without seeking explicit instructions from her clients to abandon their previous position.

72. Indeed, even on the Taxpayer's version of events, Ms. Lynch is recorded as having stated that the supposed change was subject to approval by the Revenue Commissioners. Crucially, there is nothing in the communications between Ms. Lynch and the officials of the Revenue Commissioners in the days between the telephone call on 26 August 2015 and 31 August 2015 which seeks express approval for the supposed change. Ms. Lynch did not warn her clients that, as is alleged by the Taxpayer, she had changed the fundamental basis of the agreement. Nor did Ms. Lynch explain that, again as alleged, she had given a specific assurance to the Taxpayer to the effect that he would not now be prosecuted. Ms. Lynch simply submitted, without comment, a draft of what subsequently became the final signed settlement agreement of 31 August 2015. This is entirely consistent with her evidence that she did not consider the draft as precluding criminal prosecution. Ms. Lynch reiterated in evidence her opinion that the settlement agreement was concerned only with the tax arrears specified therein. Her covering email to the Revenue Commissioners, enclosing the draft settlement agreement, had expressly stated that "*The agreement letter covers Income Tax y/e the 31.12.13 and VAT Jan/Feb 15*".

73. I am satisfied that the reason that Ms. Lynch did not seek approval, in her email of 27 August 2015 to the Revenue Commissioners, to change the fundamental basis of the settlement agreement is that Ms. Lynch did not make the statements attributed to her by the Taxpayer. Put otherwise, Ms. Lynch did not seek instructions to change the basis of the proposed settlement agreement precisely because she did not intend to make such a change, and she understood, correctly, that the draft terms of settlement did not preclude criminal prosecution but were instead confined to the specified arrears of tax.

74. It is correct to say that the draft settlement agreement sent to the Revenue Commissioners on 27 August 2015 does not contain a clause which explicitly states that the settlement is to be without prejudice to any enforcement action or prosecution action in being or yet to be initiated. It is also correct to say that the preference of the relevant official in the Revenue Commissioners, Mr. Aidan Duffy, had been that such a clause should have been included. Mr. Duffy has explained in evidence that he did not notice the absence of such a clause from the draft and describes this as a mistake on his part.

75. For the reasons explained earlier, I have concluded that the absence of an express "*without prejudice to prosecution*" clause does not affect the interpretation of the settlement agreement. For present purposes, the point is whether the contemporaneous documentation bears out the allegation that Ms. Lynch had told the Taxpayer that she would seek the approval of the Revenue Commissioners to remove the clause with a view to ensuring that the Taxpayer would be immune from prosecution. It does not. Ms. Lynch does not, for example, draw attention to the supposed fundamental change in position. The contemporaneous documentation is, instead, entirely consistent with Ms. Lynch's evidence that she had given no assurances to the Taxpayer.

76. Ms. Lynch's evidence is to the effect that she did not regard the draft settlement agreement forwarded to the Revenue Commissioners on 27 August 2015 as precluding a criminal prosecution. Ms. Lynch attached no significance to the absence of an express "*without prejudice to prosecution*" clause. Ms. Lynch stated that she had never included such a clause in the hundreds of settlement agreements she had drafted, and that on the facts of the present case the Taxpayer

had always been made aware that any settlement agreement would be without prejudice to any criminal prosecution.

77. I accept this evidence, which is consistent with the content of Ms. Lynch's emails to the Revenue Commissioners. I prefer Ms. Lynch's evidence to the contradictory version of events put forward by the Taxpayer, whereby Ms. Lynch is alleged to have decided unilaterally to seek to ensure that the Taxpayer would be immune from prosecution.

78. The second aspect of the contemporaneous documentation which is remarkable is that there is no reference anywhere to the supposed assurance given to the Taxpayer on 26 August 2015. The Taxpayer is a qualified accountant and, as is apparent from his extensive email communications, was very careful to set out a record of all of his dealings with the Revenue Commissioners, i.e. to create a paper trail. If, as alleged, Ms. Lynch had actually signalled a dramatic change in the position of the Revenue Commissioners on 26 August 2015, then it is extraordinary that there is no reference to this in any of the emails over the next number of days.

79. In fact, there is no demand from the Taxpayer for an assurance that he would not be prosecuted in the chain of correspondence from 16 July 2015 onwards. Thus, notwithstanding that the Taxpayer had been in regular email contact with Ms. Lynch and her colleagues, there is no further reference in the emails to the prosecution issue after that date. Rather, the emails are directed to the separate issue of the scheduling of payments. The Taxpayer was anxious to push out the dates both for the down payment of €75,000 and for the commencement of monthly payments. This is consistent with the express statement by the

Taxpayer in his email of 5 August 2015 that he was willing to commit to an agreement.

80. There is a third aspect of the contemporaneous documentation which supports Ms. Lynch's version of the telephone call. As is evident from the emails, the Taxpayer was aggrieved that the Revenue Commissioners would not agree to a more generous timescale for the payment of arrears and a lump sum. The Taxpayer referenced two alleged incidents where other taxpayers had supposedly received more generous payment terms. The Taxpayer alleged that he was being discriminated against. This formed the basis of a written complaint to the Ombudsman in August 2015. Again, if the Taxpayer's revised version of events were indeed true, the question of non-prosecution would inevitably have been referred to in the correspondence with the Ombudsman. The Taxpayer would have made the point that not only were the Revenue Commissioners imposing an onerous payment schedule, they had also refused to accede to his demand for non-prosecution.

81. Separately, the conduct of the Taxpayer subsequent to 31 August 2015 is also inconsistent with his version of the telephone call of 26 August 2015. The Taxpayer's contention is that he had understood the settlement agreement as precluding any criminal prosecution. On this logic, the necessity for the first judicial review proceedings fell away immediately the settlement agreement had been executed. It will be recalled that those judicial review proceedings sought to restrain the criminal prosecution instituted by the Director of Public Prosecutions in February 2014. The judicial review proceedings had been heard in July 2015 and judgment reserved. If the Taxpayer had genuinely believed that the Director of Public Prosecutions had agreed not to pursue that criminal

prosecution, then he would have withdrawn the judicial review proceedings and arranged to have the criminal proceedings, which were to be heard on indictment, struck out. The Taxpayer, under cross-examination in the within proceedings, had been unable to provide any cogent explanation as to why he failed to do so. The only reasonable inference is that the Taxpayer did not understand the agreement of 31 August 2015 as precluding criminal prosecution, and, accordingly, he maintained the first judicial review proceedings in being in the hope of obtaining an order restraining the criminal prosecution.

82. More importantly again, the papers grounding the application for leave to apply for judicial review in January 2016 make no reference to the statements now alleged to have been made by Ms. Lynch on 26 August 2015. Instead, the Taxpayer averred as follows (at paragraph 42 of his grounding affidavit):

> "There were various communications between Anna Lynch and I between 5th August 2015 and 31st August 2015 finalising the timing of making the various payment."

83. This summary accurately reflects the content of the communications during this period as evidenced by contemporaneous email correspondence. It was not until November 2020, that is almost five years after these proceedings were instituted, that the Taxpayer, for the first time, ventured an entirely different account of the telephone conversation of 26 August 2015. With respect, it is simply not credible that the Taxpayer would have omitted these crucial details from his grounding affidavit had the content of the telephone conversation been as he now alleges.

THE DELETION OF AUDIO RECORDS

84. The Taxpayer is critical of the failure of the Revenue Commissioners' external solicitors, Pierse Fitzgibbon, to retain the audio recordings of telephone conversations between the Taxpayer and members of that firm including, especially, Ms. Lynch.

85. Reliance is placed on the maxim *omnia praesumuntur contra spoliatorem*, i.e. everything is presumed against a wrongdoer who destroys evidence. This principle is sometimes referred to simply as "*spoliation*". Counsel on behalf of the Taxpayer cited, in particular, the judgment of the Supreme Court in *O'Mahony v. Tyndale* [2001] IESC 62; [2002] 4 I.R. 101.

86. Keane C.J. summarised the maxim as follows (at page 107 of the reported judgment):

> "The maxim is intended to ensure that no party to litigation, be they plaintiff or defendant, is subjected to a disadvantage in the presentation of his or her case because his or her opponent had acted wrongly by destroying or suppressing evidence. Its application will, accordingly, as the two authorities cited demonstrate, depend entirely on the circumstances of the particular case in which it is invoked. Not surprisingly, there is no authority for the proposition that it could be invoked so as to produce a clear injustice, i.e. an obligation on a court of trial to disregard the weight of the evidence which it has heard because some of the documents, although of no significance in the outcome of the case, have been, for no sinister reason, mislaid or destroyed or because some documents never existed in the first place."

87. Counsel for the Taxpayer conceded, very properly, that the maxim is only a maxim, not a rule of law, and has clear limits. It is submitted that the court can draw inferences from the failure to preserve evidence, but is not compelled to do so.

88. As explained in *O'Mahony v. Tyndale*, a court is not obliged to disregard the weight of the evidence. For the reasons outlined under the previous heading

above, I have concluded, on the balance of probabilities, that the Taxpayer's version of the telephone call of 26 August 2015 is inaccurate. His version is not borne out by the contemporaneous documentation nor by his own conduct subsequent to 31 August 2015.

89. It should also be noted that the audio recordings were deleted automatically in line with the solicitors' data protection policy at the relevant time. There is nothing in the materials before the court which suggests that the audio recordings were deliberately deleted with a view to these proceedings. The deletion is now the subject of a (belated) complaint to the Data Protection Commissioner. The existence of a pending complaint does not affect the High Court's full original jurisdiction to hear and determine these judicial review proceedings.

90. The Taxpayer also sought to place a premium on what are said to be handwritten notes taken by him in respect of telephone calls with Ms. Lynch including, relevantly, that on 26 August 2015. The provenance of these handwritten notes is dubious. There had been no reference to same in the early stages of these proceedings. The Taxpayer alleges that he only rediscovered these notes more recently. I am not satisfied that the notes have the status which would allow same to be referred to by a witness in refreshing their evidence.

91. As explained by McGrath and Egan, even in those cases where a witness is permitted to refresh his or her memory, it is the oral testimony of the witness and not the document from which he or she refreshes his or her memory that constitutes evidence: the document is hearsay and inadmissible as evidence of the truth of its contents (*McGrath on Evidence*, Round Hall, 2020, at §3-186). This court has had the benefit of oral testimony from both the Taxpayer and Ms. Lynch and this represents the "*best evidence*".

92. Finally, for completeness, it is incorrect to suggest, as the Taxpayer does, that his liberty is at stake in these judicial review proceedings and that this should affect the approach to be taken to the evidence. These are not criminal proceedings, and do not partake of the character of such merely because the relief sought is to prohibit the criminal proceedings taken by the Director of Public Prosecutions. These judicial review proceedings fall to be determined by reference to the evidential rules applicable to any civil proceedings. If at the conclusion of these judicial review proceedings (including any appeal against this judgment), the criminal proceedings are resumed against the Taxpayer, he will, of course, be afforded all of the safeguards attendant on a criminal trial as mandated by Article 38 of the Constitution of Ireland. These safeguards will, obviously, include the higher standard of proof applicable to criminal proceedings.

NO REPRESENTATION BY DIRECTOR OF PUBLIC PROSECUTIONS

93. For the reasons explained herein, I have concluded that the Taxpayer has not established the existence of a representation capable of grounding his claim for breach of legitimate expectation. This is so with respect to both his pleaded case and the new, unpleaded case advanced at trial. This conclusion is sufficient on its own to dispose of these proceedings.

94. For completeness, however, it should be explained that there is a further fundamental difficulty with the Taxpayer's claim for breach of legitimate expectation. The Taxpayer has failed to plead, still less establish the existence of, any representation on the part of the Director of Public Prosecutions. The entire of the case is predicated on the mistaken assumption that the Director

would be bound by a representation made by the Revenue Commissioners. The only conduct pleaded as giving rise to a supposed representation is that of the Revenue Commissioners in entering into the settlement agreement of 31 August 2015. Even on the unpleaded case advanced at trial, no conduct is attributed to the Director of Public Prosecutions. Both Ms. Lynch and Mr. Duffy confirmed in evidence that they had not had any dealings with the Director or her officials.

95. The office of Director of Public Prosecutions has been established under the Prosecution of Criminal Offences Act 1974. The Director is an independent office holder, independent of the Government, the Attorney General and other public authorities such as, relevantly, the Revenue Commissioners. The decision as to whether to prosecute revenue offences on indictment resides solely with the Director of Public Prosecutions. It is not a function of the Revenue Commissioners; and nothing that the Revenue Commissioners does or say could bind the Director in the exercise of her independent statutory function.

96. Both the decision to initiate a prosecution for an indictable offence and the subsequent conduct of the prosecution are functions exclusively assigned to the Director under the Constitution of Ireland and the relevant statutory provisions: see *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260 (at page 290) as follows:

> "The effect of the Act of 1974, was thus to vest in the respondent the function of prosecuting all crimes and offences, in courts other than those of summary jurisdiction, in the name of the people. It was clearly envisaged by the Oireachtas that the respondent, in performing those functions, would exercise the same role as had historically been performed by the Attorney General. In contrast to the systems in many civil law jurisdictions, the courts play no role in the prosecution of offences and both the decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned (with limited

> exceptions) to the respondent under the Constitution and the relevant statutory provisions."

97. Nothing that might have been said or done by the Revenue Commissioners could, as a matter of law, operate to fetter the Director's discretion. This legal analysis is not affected by the fact, if fact it be, that there might be a certain level of co-operation between the Revenue Commissioners and officials of the Director of Public Prosecutions in preparing for such a prosecution. This does not affect the independence of the Director's position.

98. Counsel on behalf of the Taxpayer had sought to sidestep this fundamental difficulty by submitting that the respondents had failed to plead that the Director of Public Prosecutions would not be bound by any representation made by the Revenue Commissioners. With respect, this submission overlooks the fact that the onus is upon the person alleging a breach of legitimate expectation to set out, in their statement of grounds, proper particulars of the representation relied upon: see paragraphs 40 to 43 above. Where, as in this case, the representation is said to arise from direct communications addressed to the representee personally, he or she will, by definition, be well placed to provide proper particulars of the matters said to constitute the representation.

99. It was for the Taxpayer to plead the basis upon which he contends that the Director of Public Prosecutions had made a representation to him to the effect that there would be no criminal prosecution once the settlement agreement had been entered into. If, for example, the Taxpayer wished to contend that in some way the officials of the Revenue Commissioners were acting as authorised agents of the Director of Public Prosecutions, then the obligation was upon the Taxpayer to set out the basis for this contention in his statement of grounds. Similarly, if the Taxpayer wished to contend that the Director of Public

Prosecutions was privy to the negotiations leading up to the settlement agreement or had approved the terms of same, then the basis for such a contention should have been set out.

100. There are no such pleas in the statement of grounds: no attempt is made to forge a link between the conduct attributed to the Revenue Commissioners and the position of the Director of Public Prosecutions. Having regard to the paucity of the statement of grounds, there was no obligation on the respondents to anticipate and traverse a plea which is not there. There is no obligation on a respondent to plead to a case which has not been made against it.

101. Moreover, and in any event, the principle that the Director of Public Prosecutions is an independent constitutional office holder is so fundamental that it need hardly be expressly pleaded. This is especially so given that—as evidenced by the correspondence from the years 2013 and 2014 exhibited as part of the respondents' affidavits—the Revenue Commissioners had explained the separate role of the Director of Public Prosecutions to the Taxpayer.

NO INJUSTICE OR UNFAIRNESS

102. The rationale underpinning the doctrine of legitimate expectation is that there will be circumstances where it would be unjust to permit a public authority to resile from a representation as to its future conduct. This is qualified by considerations of the public interest including, relevantly, the principle that the freedom of a public authority to exercise its statutory powers is to be respected (*Glencar Explorations plc v. Mayo County Council* [2001] IESC 64; [2002] 1 I.R. 84).

103. This rationale that there must be an injustice or unfairness at play has an especial importance in the context of the exercise by the Director of Public Prosecutions of her discretion to pursue criminal prosecutions. The Supreme Court has recognised that the Director is entitled, in principle, to reverse an earlier decision not to prosecute an individual. This is so even where the initial decision had been communicated to that individual. If the decision to reverse the initial decision has been made notwithstanding that there has been no change in circumstances, then that decision is, in principle, amenable to judicial review on the ground that there has been a breach of fair procedures. Whether such a breach has been established must, of course, depend entirely on the circumstances of the particular case. (*Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260). It will be necessary to demonstrate that the change in position of the Director of Public Prosecutions has caused disproportionate stress and anxiety to the applicant. (*Carlin v. Director of Public Prosecutions* [2010] IESC 14; [2010] 3 I.R. 547).

104. It follows that, if and insofar as the doctrine of legitimate expectation might apply to the Director of Public Prosecutions at all, it would be necessary, at the very least, to establish that it would be *unfair* to allow the Director resile from a representation that an alleged offender would not be prosecuted. No such unfairness arises in the present case. Here, it is accepted on both sides that the relevant officials in the Revenue Commissioners never wavered from their stated position that any settlement agreement was to be without prejudice to any enforcement action or prosecution action in being or yet to be initiated. If and insofar as the absence from the settlement agreement of an express clause reserving the right to prosecute gave rise to a representation to opposite effect—

and for the reasons explained earlier, it did not—then that was as the result of a mistake on the part of the Revenue Commissioners.

105. Of course, a claim for legitimate expectation will often involve a mistake in the *content* of the representation made: a public authority may, for example, have represented that a person is entitled to a particular benefit when, in truth, it is discretionary. Here, by contrast, it is the very making of the (supposed) representation that was the mistake. It had never been the position of the Revenue Commissioners that the settlement agreement would preclude criminal prosecution. This is not a case where, for example, the Director of Public Prosecutions had reached a considered decision not to prosecute and this decision had been clearly communicated to the alleged offender, only for the Director to reverse that decision subsequently. In the circumstances of the present case, there would be no unfairness in finding that the Revenue Commissioners should not be bound by a representation made in error.

106. This is especially so having regard to the following two factors. First, the Taxpayer did not act to his detriment upon the supposed representation. The Taxpayer did not, for example, withdraw his first judicial review proceedings. Secondly, any expectation was extremely short-lived. The Director of Public Prosecutions had applied to issue a summons in a second set of criminal proceedings within six weeks of the date of the making of the supposed representation on 31 August 2015.

CONCLUSION AND PROPOSED FORM OF ORDER

107. The Taxpayer has not established the existence of a representation capable of grounding his claim for breach of legitimate expectation. This is so with respect

to both his pleaded case and the new, unpleaded case advanced at trial. The settlement agreement of 31 August 2015 does not amount to a representation that the Director of Public Prosecutions would not pursue criminal proceedings against the Taxpayer, still less does it entail an unambiguous and unequivocal representation to that effect. There is 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.

108. The Taxpayer has thus failed to establish the existence of the first of the three "*positive*" preconditions for a claim for legitimate expectation, namely the making of an unambiguous and unequivocal representation by the public authority concerned. The application for judicial review will therefore be dismissed.

109. The parties are directed to file short written legal submissions in respect of the allocation of costs by 30 May 2022. The submissions should address the costs of the application in April 2021 for leave to cross-examine, as well as the costs of the substantive hearing. The case will be listed for argument on costs on 1 June 2022 at 10.30 am.

Appearances

Paul McGarry, SC and David Dodd for the applicant instructed by McMahon O'Brien Tynan
Paul O'Higgins, SC and Alison Keirse for the respondents instructed by the Revenue Solicitor

Approved Garrett Simons