**APPROVED** **[2023] IEHC 551**

THE HIGH COURT
REVENUE

2022 No. 64 R

BETWEEN

JOSEPH HOWLEY

PLAINTIFF

AND

CORMAC LOHAN

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 13 October 2023**

**INTRODUCTION**

1. This matter comes before the High Court by way of an application to enter judgment in summary summons proceedings. The underlying debt arises out of an earlier order of the High Court directing that the defendant pay certain penalties under revenue legislation. The defendant seeks to resist the application to enter judgment on the basis that the Revenue Commissioners have a supposed duty to reconsider or reassess the penalties previously imposed by the High

Court. For the reasons explained in this ruling, the defendant has failed to disclose any credible defence to the proceedings.

**PROCEDURAL HISTORY**

2. The procedural history commences with an order of the High Court (O'Regan J.) made pursuant to Part 47 of the Taxes Consolidation Act 1997 (as amended by the Finance (No. 2) Act 2008). The High Court order was made on 23 October 2017. The operative part of the order reads as follows:

> "Pursuant to Section 1077B(3) of the Taxes Consolidation Act, 1997 as inserted by the Finance (No. 2) Act, 2008, IT IS ORDERED that the Respondent herein, Cormac Lohan, is
>
> 1. liable to a penalty of €47,379 pursuant to Section 27 of the Value Added Tax Act, 1972 (as amended) for negligently delivering incorrect VAT returns for taxable periods in 2003, 2004, 2005, 2006, and 2007
>
> 2. liable to a penalty of €42,752 pursuant to Section 27A of the Value Added Tax Act, 1972 (as amended) for deliberately furnishing incorrect VAT returns for taxable periods in 2008 and 2009
>
> 3. liable to a penalty of €54,657.50 pursuant to Section 116 of the Value Added Tax Consolidation Act, 2010 for deliberately furnishing incorrect VAT returns for taxable periods in 2010
>
> And Pursuant to Section 1077C of the Taxes Consolidation Act 1997 (as inserted by the Finance (No. 2) Act 2008) the Court doth declare that the Revenue Commissioners are entitled to recover from the Respondent the said penalties referred to above in the combined sum of €144,788.50."

3. The defendant lodged an appeal against that order to the Court of Appeal. The appeal was dismissed for the reasons stated in a written judgment delivered on 31 July 2019: *Dorr v. Lohan* [2019] IECA 230. The Court of Appeal upheld the imposition of penalties by the High Court. The effect of the dismissal of the appeal is that the High Court order of 23 October 2017 stands.

4. Thereafter, the within proceedings were instituted by way of summary summons on 18 May 2022. The plaintiff is the Collector General, is an officer of the Revenue Commissioners, and is duly authorised to collect tax and interest for and on behalf of the Minister for Finance for the benefit of the Central Fund.

5. The defendant entered an appearance to the proceedings on 29 July 2022. The plaintiff issued a motion seeking to enter judgment on 6 September 2022. The defendant filed an affidavit on 13 January 2023 setting out the grounds upon which he asserts that he has a credible defence to the proceedings. The Revenue Commissioners filed an affidavit in reply on 2 February 2023.

6. On 10 May 2023, the proceedings were allocated a hearing date of 6 October 2023. The proceedings duly came on for hearing before me on that date. At the outset of the hearing, counsel on behalf of the defendant applied for an adjournment on the basis that he had only just been briefed in the matter. I refused to adjourn the case out of the list but instead put the hearing back for one hour to allow counsel to review the papers and to consult with his client. The reasons for not granting a longer adjournment are as follows.

7. First, the defendant is himself a legal professional. More specifically, the defendant is a practising solicitor. As such, he must be taken to be aware of the procedures applicable in the High Court and of the significance of a hearing date having been assigned. This is not a case where a litigant in person has only belatedly been able to secure legal representation. The defendant has been aware since May 2023 that this matter has been listed for hearing. As a qualified solicitor, the defendant is well placed to secure legal representation by counsel if he so wishes. Alternatively, the defendant is more than competent to present the case himself as a qualified solicitor enjoying full rights of audience before

the superior courts. Indeed, it appears from the judgment of the Court of Appeal referenced earlier that the defendant may, indeed, have advocated on his own behalf before that court. Having regard to all of these considerations, it is not acceptable that the defendant should seek an adjournment on the day of the hearing by reference to the supposed lack of properly instructed legal representation.

8. Secondly, the grant of adjournments in the absence of good reason for same would be disruptive to the efficient administration of the Non-Jury List. This case had been allocated a hearing date as long ago as May 2023. The case was duly assigned to a judge for hearing and time set aside for the reading of papers in advance. An hour of court time had been set aside on 6 October 2023 specifically to deal with these proceedings. If the case had been adjourned out of the list on 6 October 2023, it would then have become necessary to find another hearing slot which would have a knock-on effect for other litigants who are awaiting a hearing date.

9. Thirdly, the issues arising on this application are not complicated. The court is only concerned, at this stage, with identifying whether or not there is a credible defence to the proceedings. The booklet of pleadings runs to no more than 45 pages (or some 60 pages if one includes a copy judgment as part of the count). As appears from the discussion which follows, the issues arising are net.

10. In all the circumstances, the interests of justice were met by putting the matter back for an hour to allow counsel to read the booklet of pleadings in full and to consult with his client, as necessary. I took the matter up again at noon and, having heard submissions from both parties, reserved judgment until today's date.

**PRINCIPLES GOVERNING APPLICATION FOR SUMMARY JUDGMENT**

11. The principles governing an application for summary judgment are well established. In brief, the court must assess whether the defence set out in the affidavits, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. In deciding whether the defendant has a credible defence, the court should concentrate its attention on the matters put forward by the defendant. (*Aer Rianta cpt v. Ryanair Ltd (No 1)* [2001] 4 I.R. 607, [2002] 1 I.L.R.M. 381).

12. If issues of law or interpretation are put forward as providing a credible defence, then the court can determine whether the propositions advanced are stateable as a matter of law. The court should, however, only carry out such an assessment where the issues are relatively straightforward and where there is no real risk of an injustice being done. (*Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44, [2014] 1 I.R. 749).

**LEGISLATIVE BACKGROUND**

13. The procedure for the imposition of penalties under revenue legislation is provided for under Part 47 of the Taxes Consolidation Act 1997 (as amended). Relevantly, the process involves the issuing of an initial "*opinion*" by a revenue officer to the effect that the taxpayer may be liable to a penalty. The taxpayer is afforded an opportunity to make submissions in relation to same. In the absence of an agreement between the parties, provision is then made whereby the revenue officer may make an application to the relevant court for that court to determine

whether (i) any action, inaction, omission or failure of, or (ii) any claim, submission or delivery by, the relevant taxpayer gives rise to a liability to a penalty under the revenue legislation on that person. The relevant taxpayer has a right to notice of the court application and a right to be heard in respect of same.

14. The legislation goes on then to provide as to how such a penalty is to be recovered. This is set out at Section 1077C of the Taxes Consolidation Act 1997 (as amended) which states that a penalty may be collected and recovered in like manner as an amount of tax. These provisions are supplemented by Section 9601 of the Taxes Consolidation Act 1997.

**GROUNDS OF DEFENCE ADVANCED**

15. At the hearing before me, counsel on behalf of the defendant indicated that his client would no longer be relying on much of the content of the responding affidavit in circumstances where it amounted to a collateral attack on the validity of the High Court order of 23 October 2017. The defendant does, however, continue to rely on paragraphs 7 and 8 of the affidavit. It is appropriate, therefore, to set these out in full as follows:

> "Mr. Dorr is well aware now, if he was not aware when he made his assessments, of the medical condition of [the defendant's accountant], notwithstanding any other matter averred to. In such circumstances it is fair and reasonable for Mr. Dorr to reassess his opinion on any assessment or subsequent penalty given such circumstances as set out, affected the accuracy and truthfulness of any such returns. I submit that there should not be any penalty such as this claim nor any other penalty.
>
> Notwithstanding the above, Mr. Dorr is entitled to reassess his opinion pursuant to the mitigation process as set out in the legislation. To date he has refused to even consider same nor provide any reasons for his opinion and refusal,

> particularly if it is true that new information has been furnished to him but which he has refused to apply to his opinion and assessments. His refusal reinforces the targeted nature of the original audit and his refusal to reassess the amounts claimed."

16. As appears, the defendant contends that the revenue officer has discretion to reassess his "*opinion*" on penalties and that he has refused to do so. The source of this supposed discretion is said to be Section 113 of the Value Added Tax Consolidation Act 2010. More specifically, reliance is placed on subsection 113(2)(c) as follows:

> "Where a person had a reasonable excuse for not doing anything required to be done, he or she shall be deemed not to have failed to do it if he or she did it without unreasonable delay after the excuse had ceased."

17. The defendant seeks to argue that there had been a "*reasonable excuse*" for his filing incorrect VAT returns, by reference to the medical condition of his accountant. It is further argued that the revenue officer should now reassess those penalties.

18. With respect, this argument is premised on a misunderstanding of the legislative scheme. The provisions of Section 113 have to be read in conjunction with Section 116 of the same Act. The latter section provides, *inter alia*, that a person who deliberately (a) furnishes an incorrect return, or (b) makes an incorrect claim or declaration, shall be liable to a penalty. The detailed procedure for the imposition of penalties is prescribed under Part 47 of the Taxes Consolidation Act 1997 (as amended). Crucially, the decision to impose a penalty resides with the High Court, not with the Revenue Commissioners. The role of the revenue officer is confined to the issuance of an initial "*opinion*". Once the matter is brought before the High Court, it becomes a matter for that court alone to decide whether or not a person is liable to a penalty. Here, the High Court has made an

order directing the payment of penalties and an appeal against that order has been dismissed by the Court of Appeal. The Revenue Commissioners are not entitled to undermine the High Court order by purporting to reassess the penalty which has been imposed by the court.

19. The defendant's reliance on the provisions of Section 113 of the Value Added Tax Consolidation Act 2010 is entirely misplaced. Those provisions do not address penalties, which are dealt with separately under Section 116. The provisions of Section 113 do not override the detailed procedure prescribed under Part 47 of the Taxes Consolidation Act 1997 for the imposition of penalties. Rather, they address a different matter, namely, the issuance of a notice of estimation or assessment of tax. In the present case, events have moved far beyond this stage of the taxation process and have culminated with a High Court order directing that the defendant pay a penalty.

20. The fallacy of the defendant's argument is illustrated by the following. The High Court has expressly found that the defendant's default was negligent and deliberate. There is no question, therefore, of the Revenue Commissioners now being entitled to reach the counterfactual finding that there had been a "*reasonable excuse*" for the negligent and deliberate furnishing of incorrect VAT returns.

21. For completeness, it should be noted that counsel for the defendant sought to suggest that there is a conflict of fact on the affidavits. More specifically, it was suggested that there appears to be a dispute as to whether or not the revenue officer had "*refused*" to consider some sort of application to reassess the penalty. With respect, no conflict of fact arises. The defendant has put no evidence before the court to the effect that he had made a formal application to the Revenue

Commissioners to reassess the penalty. Crucially, even if such an application had been made, it cannot give rise to a credible defence in circumstances where, as explained above, the Revenue Commissioners are not entitled to reassess the penalties which have been imposed by the High Court. The Revenue Commissioners are, accordingly, entitled to judgment.

**CONCLUSION AND FORM OF ORDER**

22. For the reasons explained above, the defendant has failed to put forward a credible defence to the proceedings. Accordingly, the plaintiff is entitled, on behalf of the Revenue Commissioners, to enter judgment against the defendant in the sum of €144,788.50 (together with interest). Interest will also accrue from the date of judgment.

23. As to costs, my *provisional* view is that the plaintiff, having been entirely successful in the proceedings, is entitled to recover his legal costs against the defendant in accordance with the default position under Part 11 of the Legal Services Regulation Act 2015. If the defendant wishes to contend for a different costs order than that proposed, he is to file written legal submissions within seven days. The plaintiff will have a further seven days thereafter to file a reply.

*Appearances*

Paul J. Brady for the plaintiff instructed by Ivor Fitzpatrick & Co
Mark Finan for the defendant instructed by J.T. Flynn & Co

Approved Garrett Simons