APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/36

Woulfe J.
Whelan J.
Allen J.

Neutral Citation Number [2024] IECA 236

BETWEEN

JOSEPH HOWLEY

PLAINTIFF/RESPONDENT

AND

CORMAC LOHAN

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Allen delivered on the 30th day of September, 2024

Introduction

1. This is an appeal by Mr. Cormac Lohan *("Mr. Lohan")* against the judgment of the High Court (Simons J.) delivered on 13th October, 2023 ([2023] IEHC 551) and consequent order made on 31st October, 2023 (and perfected on 16th January, 2024) granting summary judgment against Mr. Lohan in the sum of €144,788.50 in respect of penalties pursuant to ss. 27 and 27A (as amended) and s. 116 of the Value Added Tax Consolidation Act, 2010, together with interest and costs.

High Court order of 23rd October, 2017

2. On 23rd October, 2017, in proceedings brought by a Revenue officer, Mr. Adrian Dorr, under Part 47 of the Taxes Consolidation Act, 1997 as amended by the Finance (No. 2) Act, 2008 the High Court (O'Regan J.) firstly ordered that Mr. Lohan was liable to:-

1. A penalty of €47,379.00 pursuant to s. 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. A penalty of €42,752.00 pursuant to s. 27A of the Value Added Tax Act, 1972 (as amended) for deliberately furnishing incorrect VAT returns for taxable periods in 2008 and 2009;
3. A penalty of €54,657.50 pursuant to s. 116 of the Value Added Tax Consolidation Act, 2010 for deliberately furnishing incorrect VAT returns for taxable periods in 2010.

And secondly, declared pursuant to s. 1077C of the Taxes Consolidation Act, 1997 (as amended) that the Revenue Commissioners were entitled to recover from Mr. Lohan the said penalties in the combined sum of €144,788.50.

3. An appeal by Mr. Lohan to this Court was dismissed on 31st July, 2019 for the reasons set out in the judgment of Peart J. ([2019] IECA 230) with which Baker and Costello JJ. agreed. The issue on that appeal was whether Revenue had adduced sufficient evidence before the High Court to allow it to properly determine that Mr. Lohan was liable for the penalties and this Court concluded that it had.

4. Section 1077C of the Act of 1997 provides that where a relevant court has made a determination that a person is liable to a penalty it shall also make an order as to the recovery of the penalty and, without prejudice to any other means of recovery, that the penalty may be collected and recovered in like manner as an amount of tax. By s. 1077C(3), that section

applies in respect of any act or omission giving rise to a liability to a penalty, whether arising before, on or after the passing of the Finance (No. 2) Act, 2008.

5. Section 960I of the Act of 1997 provides that without prejudice to any other means by which payment of tax may be enforced, any tax due and payable may be sued for and recovered by proceedings taken by the Collector General in any court of competent jurisdiction.

The action to recover the penalties

6. By summary summons issued on 18th May, 2022 Mr. Howley, the Collector General, claimed judgment in the sum of €144,788.50 with interest and costs. An appearance was entered by Mr. Lohan on his own behalf on 29th July, 2022 and on 6th September, 2022 a motion for summary judgment was issued. The motion was grounded on a short affidavit of a Revenue officer, Ms. Claire Jones, which said no more than that the High Court had made the order of 23rd October, 2017; that Mr. Lohan had not paid the money; and that Mr. Lohan did not have any *bona fide* defence and that the appearance had been entered solely for the purpose of delay.

7. The motion for judgment was first listed before the High Court on Monday 21st November, 2022. On the preceding Friday, 18th November, 2022 Mr. Lohan's solicitors came on record by filing and serving a notice of change of solicitors.

8. The motion for judgment was adjourned from time to time to allow Mr. Lohan to file a replying affidavit – which was filed on 13th January, 2023 – and a further affidavit of Mr. Howley – which was filed on 10th February, 2023. On 13th March, 2023 the motion was transferred to the non-jury list where – on 10th May, 2023 – it was listed for hearing on 6th October, 2023.

9. When the motion was called on for hearing, counsel for Mr. Lohan applied for an adjournment on the basis that he had only just been briefed. By then, fourteen months had

elapsed since Mr. Lohan – who is a solicitor – had first entered an appearance; eleven months since he had appointed solicitors to deal with the matter on his behalf; eight months since the exchange of affidavits had completed; and five months since the hearing date had been fixed. Simons J. refused to adjourn the hearing but put the case back for an hour to allow counsel to read his brief and to consult with his client.

10. I pause here to say that so much of the appeal to this Court as suggested that the judge erred in law in refusing Mr. Lohan's application to adjourn was not developed in the written submissions and eventually abandoned.

11. The substance – or more accurately, perhaps, the thrust – of Mr. Lohan's answer to the claim, and of his appeal, was – as Simons J. put it – that the Revenue Commissioners have a supposed duty to reconsider or reassess the penalties previously imposed by the High Court.

12. If, strictly speaking, the issue on the motion was summary judgment was whether Mr. Lohan had an arguable defence, the defence he put forward was a legal defence which raised a net question of law. It was not then – or on the appeal to this Court – suggested that the point of law was not capable of being dealt with summarily.

13. For the reasons given in a short and focussed written judgment, Simons J. found that Mr. Lohan had failed to put forward a credible defence and that the Collector General was entitled to judgment.

The legislative framework

14. Part 47 of the Taxes Consolidation Act, 1997 provides for *"Penalties, Revenue Offences, Interest on Overdue Tax and Other Sanctions."* Chapter 3A of that Part provides for *"Determination of Penalties and Recovery of Penalties."* Section 1077B provides for *"Penalty notifications and court determinations."* It provides that:-

> *"(1) Where—*

(a) in the absence of any agreement between a person and a Revenue officer that the person is liable to a penalty under the Acts, or

(b) following the failure by a person to pay a penalty the person has agreed a liability to,

a Revenue officer is of the opinion that the person is liable to a penalty under the Acts, then that officer shall give notice in writing to the person and such notice shall identify –

(i) the provisions of the Acts under which the penalty arises,

(ii) the circumstances in which that person is liable to the penalty, and

(iii) the amount of the penalty to which that person is liable,

and include such other details as the Revenue officer considers necessary.

(2) A Revenue officer may at any time amend an opinion that a person is liable to a penalty under the Acts and shall give due notice of such amended opinion in like manner to the notice referred to in subsection (1).

(3) Where a person to whom a notice issued under subsection (1) or (2) does not, within 30 days after the date of such a notice –

(a) agree in writing with the opinion or amended opinion contained in such notice, and

(b) make a payment to the Revenue Commissioners of the amount of the penalty specified in such a notice,

then a Revenue officer may make an application to a 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 person in respect of whom the Revenue officer made the application gives rise to a liability to a penalty under the Acts on that person.

(4) A copy of any application to a relevant court for a determination under subsection (3) shall be issued to the person to whom the application relates.

(5) This section applies in respect of any act or omission giving rise to a liability to a penalty under the Acts whether arising before, on or after the passing of the Finance (No. 2) Act 2008 but shall not apply in respect of a penalty paid, or amounts paid in respect of a penalty, before the passing of that Act."

15. Section 1077C, as I have said, provides for the recovery of penalties.

16. The scheme of the legislation is perfectly clear and straightforward. *"Persons"* who are subject to the obligations imposed by the various Tax Acts may by their action, inaction, omission, failure, claim, submission or delivery of returns incur a liability to a penalty. The amount of the penalty depends on the circumstances in which the act or omission comes to light, whether the act or omission is careless or deliberate, and whether the person has cooperated with any investigation or inquiry started by Revenue. The penalty is imposed by the legislation and will have been incurred by the person's action, inaction, omission, failure, claim, submission or delivery as the case may be. In default of agreement and payment, the Revenue officer is entitled to form an opinion as to whether a liability has arisen but the arbiter of whether the act or omission identified by the Revenue officer gave rise to a penalty – and the arbiter of the amount of the penalty – is a court of competent jurisdiction.

Discussion and decision

17. That is what happened in this case. Mr. Lohan was the subject of a Revenue audit, as a result of which discrepancies were identified between his VAT returns and his sales records, and he was assessed for VAT. The Revenue officer, Mr. Adrian Dorr, formed the opinion that Mr. Lohan was liable to penalties, and he put the evidence which he had

gathered before the High Court and asked the High Court to make a determination pursuant to s. 1077B: which the High Court duly made, and this Court affirmed.

18. It is now submitted on behalf of Mr. Lohan – as it was below – that what is said to be the requirement in s. 1077B that a Revenue officer should form an opinion and serve notice of same applies where a Revenue officer seeks to collect and recover a penalty on foot of a finding of liability by the High Court. It seems to me that the proposition need only be stated to be seen to be unsustainable. If on one view the procedure laid down in s. 1077B might be perceived as the first step in the collection of a penalty, the immediate objective is to establish whether – or not – a liability to a penalty has arisen. The opinion of the Revenue officer that a person is liable to a penalty is the first step in the statutory procedure which ultimately leads to a determination by the court of competent jurisdiction. Once the determination has been made, there is no scope for an opinion by the Revenue officer who initiated the s. 1077B application – one way or the other. Theoretically, at least, the opinion of the Revenue officer that a person was liable to a penalty might not have been altered by a contrary determination by the court but there could be no question of the Revenue officer bringing a second court application. Mr. Lohan contends that the section is to be literally construed but it simply makes no sense to contemplate that the Revenue officer might be entitled, still less required, to revisit a court determination pursuant to s. 1077B that the person is liable to the penalty, *a fortiori* the court order pursuant to s. 1077C for the recovery of the penalty.

19. It is now submitted that the issue in the earlier proceedings of *Dorr v. Lohan* was whether the court should affirm or reject the opinion of the Revenue officer. That is not correct. The issue on an application pursuant to s. 1077B is not the correctness or reasonableness of the opinion of the Revenue officer but whether – objectively – the person is liable to the penalty.

20. It is submitted on behalf of Mr. Lohan that in making what was referred to as the Dorr Order, the High Court was not supervising or directing the imposition, collection or recovery of a penalty but was making a declaration under s. 1077C that Mr. Dorr was entitled to recover same. Each element of this is based on a misunderstanding of the statutory scheme. In the first place, the penalties were not imposed by either Mr. Dorr or the court but by Oireachtas Éireann. Secondly, the primary order sought and made on Mr. Dorr's application was not a declaration under s.1077C but – as is spelled out on the face of the order – a determination under s. 1077B(3) that he was liable to the penalties. Thirdly, the ancillary order made by the High Court on 23rd October, 2017 was not – as is now suggested – a declaration that Mr. Dorr was entitled to recover the penalties, rather that the Revenue Commissioners were entitled to recover them.

21. It is now argued that s. 1077C(1)(b) is permissive and not mandatory and that the decision to impose/collect/recover remains with *"an officer"*. This again fails to recognise that Chapter 3A of Part 47 of the Act of 1997 is not concerned with the imposition of penalties but with whether they have been incurred. Moreover, the provision in s. 1077C(1)(b) which allows a penalty to be collected in like manner as an amount of tax is simply an enabling provision. In practical terms a decision may need to be made as to the best means by which a penalty may be collected or as to the likely ability of the person to satisfy a judgment but there is no question that anyone – least of all the Revenue officer who brought the s. 1077B application – might be required, or even entitled, to revisit the question of liability to the penalty.

22. At the oral hearing of the appeal, counsel for the Collector General drew the Court's attention to s. 960E of the Act of 1997 (which was inserted by the Finance (No. 2) Act, 2008 and applies in respect of tax payable after 1st March, 2009) which provides that tax due and payable to the Revenue Commissioners shall be paid to and collected by the Collector

General; that the Collector General shall demand payment of tax that is due and payable but remaining unpaid; and that where tax is not paid in accordance with that demand, the Collector General shall collect and levy the tax that is due and payable but remaining unpaid. The effect of Mr. Lohan's argument, it was said, would be to qualify the clear statutory duty of the Collector General to collect tax which was due and payable but remained unpaid. Counsel for Mr. Lohan had no answer.

23. It is now said that s. 1077C does not disapply, and s. 1077B does not exclude, the asserted requirement that a Revenue officer must form an opinion and serve notice before commencing summary summons proceedings. That again fails to recognise the difference between the separate exercises of first establishing whether the person is liable to the penalty and then collecting the amount determined by the court to be recoverable.

24. From the erroneous proposition that before the proceedings issued Mr. Dorr, or his successor, or Mr. Howley – who is not suggested to be Mr. Dorr's successor – should have revisited the requirements of s. 1077B(1), the argument leaps to the proposition that an officer could not arrive at an informed opinion without reference to ss. 116 and 113 of the Value Added Tax Consolidation Act, 2010. These provisions together – so the argument goes – import a reasonable excuse test.

25. Section 116 of the Act of 2010 provides for *"Penalty for deliberately or carelessly making incorrect returns, etc."* Section 113 provides time limits for the estimation or assessment of tax, including in circumstances in which a person had a reasonable excuse for not doing anything required to be done.

26. Without getting bogged down in the detail, the improbable tale on which this submission is founded is Mr. Lohan's evidence in his replying affidavit filed in these proceedings on 13th January, 2023 in which he deposed that six months previously he had had a chance conversation with his erstwhile accountant, Mr. Linnane, in which Mr. Linnane

disclosed that he – Mr. Linnane – had been the subject of a Revenue audit at the same time as Mr. Lohan. Mr. Linnane, it was said, had made a submission on surrounding medical issues which Mr. Lohan understood might have been accepted by Mr. Dorr. It was, said Mr. Lohan, always his position that the differential between his income tax filings and VAT returns was because Mr. Linnane had filed the incorrect income tax returns and that what he described as *"differentials"* – which Mr. Dorr had characterised as discrepancies – could be explained.

27. Mr. Lohan's replying affidavit, of course, post-dated the summary summons by about eight months; the High Court order of 23rd December, 2017 by nearly six years; and the VAT assessments by nine and a half years. If, as Mr. Lohan deposed, the simple, consistent, and readily demonstrable explanation for the differential between his VAT returns and his income tax filings was that he had overpaid his income tax, it is difficult to see what his recent conversation with Mr. Linnane might have added. The forlorn hope expressed by Mr. Lohan was that if Mr. Dorr *"reassess[ed] his opinion pursuant to the mitigation process as set out in the legislation"* there might be no penalty.

28. It was all a bit vague but the inexorable consequence of Mr. Lohan having overstated his income would be that he overpaid his income tax in the relevant years; and the inexorable consequence of a *pro tanto* reduction of his VAT liability would be that he would have paid €144,788.50 on the VAT assessments raised on 3rd July, 2013 which – on the case he would make – were demonstrably wrong but which he had not appealed. Mr. Lohan's wishful thinking that all of this – if made out – might form the basis of a defence to the claim for penalties did not go so far as to extend to the refund of the overpaid income tax and VAT.

29. None of this could have possibly availed Mr. Lohan. The VAT assessments were raised on 3rd July, 2013 and were not appealed. Mr. Dorr formed the opinion that Mr. Lohan was liable to penalties under the Acts and by originating notice of motion issued on 8th May, 2017 put his opinion, and the evidence on which it was based, before the High Court. On

23rd October, 2017 the High Court determined that Mr. Lohan was liable to the penalties and on 31st July, 2019 Mr. Lohan's appeal to this Court was dismissed.

30. The penalties to which Mr. Lohan is liable were determined by the High Court order of 23rd October, 2017. In coming to that determination, the High Court found that Mr. Lohan had delivered incorrect VAT returns for taxable periods spanning eight years and adjudicated on the circumstances in which those returns had been delivered; negligently in the years 2003 to 2007, carelessly in 2008 and 2009, and deliberately in 2010. Leaving aside the fact that Mr. Lohan never asked the Revenue Commissioners to do so, there is no basis in the legislation – however construed – for the proposition that the Revenue officer or the Collector General was entitled, never mind required, to re-open ten year old VAT assessments or to revisit questions which had been heard and finally determined by the courts.

31. I agree entirely with the analysis by Simons J. of the relevant legislative provisions and with his conclusion that Mr. Lohan failed to put forward a credible defence. I would dismiss the appeal.

Courts Act interest

32. There is one relatively minor adjustment that needs to be made to the High Court order. The order of 31st October, 2023 – correctly reflecting the judgment of 13th October, 2023 – records that besides the sum of €144,788.50, the plaintiff should have interest on that sum and that interest would also accrue from the date of the judgment.

33. It appears that there is no specific provision in the Tax Acts for interest on penalties and the summary summons claimed interest pursuant to the Courts Act, 1981. Section 22 of the Courts Act, 1981 confers a power on a court, when ordering the payment by any person of a sum of money, to award interest at the rate standing for the time being specified in s. 26 of the Debtors (Ireland) Act, 1840 on the whole or any part of the sum in respect of the whole

or any part of the period between the date when the cause of action accrued and the date of the judgment.

34. The notice of appeal did not address the order for the payment of interest but at the oral hearing the Court asked the question whether it should have spelled out whether the award of interest was in respect of the whole or part of the sum and/or the period in respect of which interest was to be paid. Presumably for good and sufficient practical reasons, counsel for the Collector General said that the claim for interest was not being pressed and that the order could be adjusted accordingly.

Form of order and costs

35. In the circumstances, I would dismiss the appeal and affirm the order of the High Court that the plaintiff recover against the defendant the sum of €144,788.50 and his legal costs, to be adjudicated in default of agreement.

36. In circumstances in which the appeal has failed in its entirety, it seems to me that the Collector General is entitled to an order for his costs of the appeal but – with the usual warning about the risk that it may increase his exposure to costs – I would formally allow the Mr. Lohan the opportunity to argue otherwise. I would allow the Mr. Lohan until 14th October, 2024 to file and serve a short written submission – not to exceed 1,000 words – in relation to costs; in which event the respondent will have fourteen days within which to respond.

37. As this judgment is being delivered electronically, Woulfe and Whelan JJ. have authorised me to say that they agree with it and the orders proposed.