

THE STATE (FINANCIAL INDEMNITY COMPANY (IRELAND) LIMITED)

.v.

E.P. O'CEALLAIGH



Judgment of Mr. Justice Barrington delivered the 9th day of November, 1983

This is an application for an absolute Order of Mandamus notwithstanding cause shown.

The case raises a net point on the interpretation of Section 34 of the Finance Act 1982 amending paragraph 11 of the 4th schedule of the principal Act. The case turns in particular on the interpretation of sub-paragraph 6 of paragraph 11.

Sub-paragraph 6 reads as follows:-

"A person chargeable to capital gains tax on the disposal of an asset to which this paragraph applies may apply to the inspector for a certificate that tax should not be deducted from the consideration for the disposal of the asset and that the person acquiring the asset should not be required to give notice to the Revenue Commissioners in accordance with sub-paragraph (7) (a) and, if the inspector is satisfied that the person making the application is the person

making the disposal and that -

(a) he is ordinarily resident in the State, or

(b) no amount of capital gains tax is payable in respect of the disposal, or

(c) the capital gains tax chargeable for the year of assessment for which he is chargeable in respect of the disposal of the asset and the tax chargeable on any gain accruing in any earlier year of assessment (not being a year ending earlier than the 6th day of April, 1974) on a previous disposal of the asset has been paid, then

the inspector shall issue the certificate to the person making the application and shall issue a copy of the certificate to the person acquiring the asset."

It will be noted that the section is mandatory and that the Inspector must issue the certificate provided he is satisfied that the relevant pre-conditions are met.

It is admitted in the present case that Financial Indemnity Company (Ireland) Limited is a company incorporated in Ireland and that it is ordinarily resident in the State.

The dispute in the present case concerns the requirement that the Inspector must be "satisfied that the person making the application is the person making the disposal".

In support of its contention that it is the person making the disposal the prosecutor has produced to the Inspector -

- (1) Title Deeds showing that it is entitled to the beneficial and to the legal estate in the property proposed to be sold.
- (2) A contract dated the 13th September, 1983 for the sale of these lands to Messrs J.P.J. Lyons Limited.

In other words the prosecutor has established that it is the owner of the lands in question and that it has entered into a binding contract of sale. There is no room for any dispute about this. There is some dispute as to whether all the lands for sale are registered lands but there is no doubt that the prosecutor is entitled to the ownership of all the lands. It would therefore appear that the prosecutor is in fact the person making the disposal.

The Inspector says however that he is not satisfied that the prosecutor is the person making the disposal. He has enquired how the prosecutor came by its title; the adequacy of the consideration paid by the prosecutor on its purchase of the land and the interrelationship between

the prosecutor and other companies named in the papers to wit Monarch Assurance Limited, Monarch Munificenca Limited and Thompion Builders Limited. One can have considerable sympathy with the Inspector's attitude but I think it important to stress that he is not operating under a section authorising a wide ranging investigation into a suspected scheme of tax avoidance.

The method whereby the prosecutor acquired its title to the lands in question appears slightly unusual. First of all it took from Monarch Assurance Limited an agreement for a lease for 999 years at a pepper-corn rent. Secondly Monarch Assurance Limited sold the freehold reversion in the lands to Thompion Builders Limited. Thirdly Thompion Builders Limited transferred the freehold to the prosecutor with a declaration that the leasehold interest should merge in the freehold. This method of conveyance does however appear to be a legitimate conveyancing device for avoiding stamp duties. In all the circumstances of the case it appears to me that the Inspector has misinterpreted his powers under the section and that he is not entitled, under the section, to engage in the wide ranging investigation that he has purported to engage in. It appears to me that on the evidence produced before him he must be satisfied that the prosecutor is the owner of these lands and that it has entered into a

binding contract of sale. He must therefore be satisfied that the prosecutor is the person making the disposal. I therefore think the matter should be remitted to the Inspector with an Order directing him to consider the matter in accordance with law.

*Approved.*

*John B. [Signature]*

*14/12/83.*