THE HIGH COURT

[2023] IEHC 628

[Record No. 2022/98R]

BETWEEN

JOSEPH HOWLEY

PLAINTIFF

AND

CHRISTOPHER MOOREHOUSE

DEFENDANT

JUDGMENT of Mr Justice Barr delivered electronically on the 10th day of November 2023.

Introduction.

1. The plaintiff is the Collector General of the Revenue Commissioners. The defendant describes himself as a retired agricultural painter.

2. This is an application by the plaintiff for summary judgment against the defendant in the sum of €2,026,454.48 in respect of unpaid income tax and interest thereon, assessed to be payable for the years 2004-2015. The principal sum of income tax was assessed as due and owing in the sum of €968,934.00, with the sum of €1,057,520.48, claimed as interest thereon.

3. While a number of defences were initially put forward by the defendant in his replying affidavits, at the hearing of the application, counsel on behalf of the defendant submitted that the matter should be remitted to plenary hearing on the basis of the following defences which the defendant maintained were available to him:

> (a) having regard to the fact that the assessments which were raised by the plaintiff in this case, were served on the defendant on 7th February 2018, and having regard to the fact that the summary summons was not issued by the plaintiff until 15th July 2022, the plaintiff unreasonably delayed in pursuing the debt claimed and has allowed penalising interest to accrue, thereby disentitling him from judgment in the full sum claimed;

(b) section 93(7)(d) of the Taxes Consolidation Act 1997, affords the defendant an opportunity to regularise his tax affairs when these proceedings conclude; any orders which the court was satisfied should be made in favour of the plaintiff, should take account of that provision and therefore any order of the court should provide for "liberty to apply" in the event that the defendant was successful in any late appeal that he may bring before the Tax Appeal Commission (hereinafter "TAC").

4. On behalf of the plaintiff, it was submitted that as the assessments in this case had been properly raised by the plaintiff and as the defendant had lodged an appeal thereto, which appeal had been refused by the TAC, the amounts claimed in the assessments had become "final and conclusive", including the statutory interest applicable thereto, such that it was not open to this Court to question the factual basis of the sums claimed in the summary summons and that in these circumstances, the plaintiff had established that the defendant had no defence to his claim herein.

5. The submissions of the parties will be outlined in greater detail later in the judgment.

The Evidence.

6. The plaintiff's application for summary judgment was grounded on the affidavit sworn by the plaintiff on 2nd November 2022. The plaintiff stated that notices of assessment were raised by the Inspector of Taxes of the Criminal Assets Bureau in respect of the defendant for the years 2004 to 2015. He exhibited a copy of the assessments in the affidavit. The plaintiff stated that demands were made upon the defendant to discharge the sum of €2,026,454.48 by letters dated 7th June 2018, 28th April 2022, 8th June 2022 and 24th June 2022. He exhibited copies of the said letters. The plaintiff stated that he waived his claim for further interest on the amount sought in the special endorsement of claim until judgment. He stated that he had been advised and believed that the defendant does not have any defence to the plaintiff's claim in the proceedings. He stated that the said sum remained due and owing by the defendant to the plaintiff over and above all just credits and allowances.

7. The defendant swore a replying affidavit on 22nd January 2023 in which he described himself as a retired agricultural painter. He stated that he was a settled member of the Travelling Community and had always lived a relatively modest life. He stated that

he had very limited literacy and writing skills. He stated that his estimated yearly income from agricultural painting was approximately €60,000 gross per annum. He stated that he suffered from significant mental health issues, which had worsened significantly following the death of his infant grandchild.

8. Later in the affidavit he stated that it was "completely absurd" to suggest that he enjoyed the level of income over the relevant period, which had been estimated by the plaintiff in its assessments. He stated that he was a horse trader, who had always enjoyed a modest income. He stated that he had never achieved such extensive means as were alleged by the plaintiff. He stated that he had instructed a firm of tax advisers in Walkinstown, Dublin, to complete the tax returns on his behalf for the relevant years. He had no doubt that the returns, once completed, would establish that the amount owed by him in tax, was significantly less that the amount claimed by the plaintiff.

9. The defendant went on to allege that the Criminal Assets Bureau had seized his accounts and had deprived him of access to them for the purpose of contesting the assessments raised by the plaintiff; thereby preventing him from instituting a valid appeal therefrom. He stated that he had tried to secure copies of the necessary documentation from the Bureau, but this had been withheld from him and as a result, he could not lodge an adequate notice of appeal. As a result, he stated that he could not effectively avail of the statutory appeals process that was available to him under the 1997 Act.

10. The defendant stated that there had been a four-year delay by the plaintiff from the time that he had raised the assessments, to the date of issue of the summary summons. He stated that no explanation had been provided by the plaintiff for that delay. He stated that it was unfair that he should be burdened with interest on such a large debt, due to the plaintiff's inaction.

11. The defendant stated that the statutory appeals process allowed him to regularise his position and he was seeking time to do so. He prayed the court for an order refusing the plaintiff's claim to summary judgment and stated that he should be allowed time to avail of the late appeal procedure provided for in the 1997 Act.

12. In response thereto, the plaintiff swore a further affidavit on 16th February 2023. In that affidavit he stated that the notices of assessment had all been served on the defendant personally by an officer of the CAB, accompanied by a member of An Garda Síochána, at approximately 08.00 hours on 7th February 2018, at the defendant's home at

No. 2 Esmond Road, Enniscorthy, County Wexford. He referred to a copy of the report of the CAB officer regarding service of the assessments upon the defendant, which he exhibited to the affidavit.

13. The plaintiff stated that the letter of demand dated 7th June 2018, was served on the defendant by two officers of CAB, in the company of three officers of An Garda Síochána at 11.03 hours on 7th June 2018. He stated that the individuals had attended at the defendant's home at the above address on that occasion, but there was no one present at that time. They therefore posted the demand through the front door of the defendant's home. He referred to a report made by the CAB officer regarding service, which he exhibited to the affidavit.

14. The plaintiff swore a further affidavit on 13th March 2023, in which he stated that it was not open to a taxpayer to dispute the quantum of tax that he or she was assessed to owe by the Revenue Commissioners in the context of summary judgment proceedings. The quantum of tax owed could only be challenged by way of an appeal to the Tax Appeal Commission, which had to be made in compliance with the provisions of the 1997 Act. The plaintiff stated that the defendant had omitted to state that he had lodged an appeal against all the assessments by notice of appeal dated 12th February 2018. By letter dated 9th March 2018, CAB had objected to the appeal on the basis that it was not valid under s.949L of the 1997 Act, in circumstances where the appeal did not comply with s.959AH of the 1997 Act, the defendant having failed to file returns, or pay the taxes either assessed or returned. The plaintiff went on to state that by letter dated 29 May 2018, a Tax Appeals Commissioner had notified the defendant that his appeal had been refused. The effect of the refusal of the appeal pursuant to the 1997 Act, was that the taxes owed were final and conclusive.

15. The plaintiff stated that no documents had been seized from the defendant by CAB. He stated that prior to the notices of assessment being raised, the CAB had uplifted information concerning the defendant from financial institutions in accordance with their statutory powers. That information was used by the Bureau to identify funds that the defendant had standing to his account in various institutions. The plaintiff stated that that procedure did not involve removing any documentation from the defendant. He stated that the access of the defendant to his own bank accounts, or indeed any other financial information he might have, had never been hampered by the CAB.

16. The plaintiff noted that the defendant had not identified any documentation which he alleged had been seized by the CAB and to which he had been denied access. He noted that the defendant had exhibited no evidence of any kind to support his allegation that he had been seeking documentation from the Bureau, which had been withheld from him, nor did he identify when it was alleged that "accounts and assets" had been seized.

17. The plaintiff stated that while the defendant had alleged that he was prejudiced by the plaintiff's alleged delay in bringing the proceedings; that was surprising in circumstances where he sought to delay the proceedings himself, while he spent an unidentified period of time preparing his tax returns, which he had been legally obliged to file up to seventeen years previously.

18. The plaintiff went on to explain in the affidavit how there was a nil balance owed in respect of tax for the year 2004; while there was an interest charge stated to be due in the sum of €87,076.20 in respect of the same year. It was explained that the plaintiff had obtained some receipts which it had applied in discharge of the earliest amount of tax due by the defendant. Sums of money that had been obtained from Enniscorthy Credit Union and Bank of Ireland, which had been applied in reduction of the defendant's total tax liability on 6th January 2020. They had been applied to the earliest tax owed, which resulted in the 2004 tax being paid in full and the amount of tax due for 2005, being reduced by €9,545.94. None of the interest had been repaid.

19. On 7th March 2023, an affidavit was sworn by D/Garda Lisa McHugh, deposing to the service of the assessments upon the defendant on 7th February 2018. She stated that she had accompanied Revenue Bureau Officer No. 68 to assist him in serving the tax assessments at 2 Esmond Road, Enniscorthy, County Wexford, on a male by the name of Christopher Moorehouse. She was aware that Christopher Moorehouse, born on 9th April 1966, resided at that address. She stated that she was in possession of a photograph of him. She stated that she met the defendant, whom she identified from the photograph. She identified herself to him. She was present when the Revenue Bureau Officer served him with a notice of change of Inspector of Taxes letter dated 7th February 2018 and notices of assessments for income tax in respect of the years 2004 to 2015 inclusive.

20. D/Garda McHugh stated that she wished to clarify that Esmond Road, Enniscorthy, County Wexford, was also known colloquially in the locality as "Saville Road", which she

thought could be due to the fact that there was a second road in Enniscorthy called Esmond Road.

21. On 23rd March 2023, the defendant swore his second affidavit, in which he corrected the assertion contained in the body of his previous affidavit, that he was a horse trader. He stated that that was not correct. He stated that that had occurred in the affidavit, due to a mistake on the part of his legal advisers. He stated that he was a retired gentleman and formerly had been in occupation as an agricultural painter.

22. In the affidavit, the defendant went on to question the averments that had been made by D/Garda McHugh in relation to service of the assessments upon him. He referred to enquiries that he had made of an official in the offices of Wexford County Council, who had confirmed to him that 2 Esmond Road and 2 Saville Road, were two completely different properties. He exhibited photographs of the two properties. He stated that he resided at No. 2 Saville Road, while his nephew, also called Christopher Moorehouse, resided at 2 Esmond Road. He stated that there was no "colloquial" address, or second Esmond Road. They were two completely different properties. In this regard he referred to the Land Registry folio and a screen shot from the Eircode website, which he exhibited to the affidavit.

23. The defendant stated that for the purposes of absolute clarity, he had no recollection of being served with documents at No 2 Esmond Road on 7th February 2018. He stated that he could not have been served at 08.00 hours on that date, because he did not reside at that address. The defendant stated that he did recall Revenue/CAB officials attending at his home at 2 Saville Road, on at least two occasions. He stated that on one occasion an official attended and left documentation on his doorstep. On the other occasion members of CAB attended at 2 Saville Road and carried out a raid of the property, in which they seized a second-hand jeep, a new caravan and a horsebox. He stated that neither of those occasions bore any resemblance to the events described by D/Garda McHugh in her affidavit.

24. The defendant stated that it was extraordinary that on the one hand, the plaintiff could aver in his grounding affidavit that no appeal had been lodged by the defendant, while in a further affidavit, he had stated that an appeal had been lodged and had been refused. He stated that insofar as he could assist on that point, he had no idea to what

appeal the plaintiff was referring. He had no recollection of such an appeal ever being brought, or being instructed to be brought on his behalf.

25. The defendant stated that it was his opinion that he was still within time to lodge a late appeal against the assessments, once returns were delivered by him. In that regard, he stated that he had attended at the offices of the Credit Union in Enniscorthy, but had been furnished with a member's statement which simply stated that his account had been closed. He stated that he was continuing to make efforts to obtain the relevant documentation. The defendant ended the affidavit by saying that he had defences to the plaintiff's claim, including; manifest deficiencies in service, which fatally undermined the plaintiff's entitlement to the debt claimed; the plaintiff's conduct in commencing the proceedings provided a material defence to the claim for interest; and the fact that he was prevented from, or was incapable of furnishing any relevant tax returns at the present time.

26. A fourth affidavit was sworn by the plaintiff on 18th April 2023. The plaintiff stated that it was most surprising that the defendant alleged that he did not have any knowledge of any notice of appeal having been lodged by him in respect of the assessments that had been raised. This was surprising because on 8th February 2018, just one day after the defendant had been personally served with the notices of assessment, he signed a letter of authority for John P O'Donoghue & Co, solicitors, to act on his behalf. On 12th February 2018, Clyde Casey of that firm, lodged a notice of appeal in respect of all the assessments. In the notice of appeal, the defendant identified each of the notices of assessment that had been personally served on him five days earlier. Copies of the assessments were submitted with the notice of appeal. The plaintiff exhibited true copies of the letter of authority and the notice of appeal.

27. The plaintiff stated that by letter dated 9th March 2018, CAB had written to the Tax Appeals Commission to object to the appeal. By letter dated 29 May 2018 addressed to the defendant's solicitor, the TAC notified the defendant's solicitor that his appeal on behalf of the defendant had been declined, on the basis that it did not comply with section 959 AH of the 1997 Act. The relevant correspondence was exhibited by the plaintiff.

28. The plaintiff stated that insofar as he had stated in a previous affidavit that the defendant "did not appeal the assessments", he had intended to convey that the defendant had not lodged a valid appeal of the assessments. He stated that the defendant had lodged

a notice of appeal; the appeal had been declined for the reasons set out above. As such, there had been no valid appeal of the assessments which would be sufficient to defer the enforcement of the taxes assessed to be due and owing. It was pointed out that insofar as the defendant alleged that he needed time to investigate his own financial affairs for the purposes of making returns and appealing the matter, that was not tenable, as he had admitted in a subsequent affidavit that the only items that had been seized by CAB were a car, a caravan and a horsebox.

29. The plaintiff stated that the defendant's assertions in relation to the lack of service of documents upon him, and in particular, his assertion that he did not reside at No. 2 Esmond Rd, was a deliberate attempt to muddy the waters. He had alleged that he in fact resided at No. 2 Saville Rd and had stated that that was not the same as No. 2 Esmond Rd; however, the letter of authority and notice of appeal submitted by him just days after he was served with the notices of assessment, both identified his address as No. 2 Esmond Rd. In addition, the letter of authority and the notice of appeal specified the defendant's PPS number, which accorded with the notices of assessment.

30. The plaintiff referred to the affidavit of service that had been sworn by D/Garda Lisa McHugh, which established that personal service had been effected on the defendant. In addition, the final letter of demand dated 7th June 2018, which was hand-delivered to the defendant at No. 2 Esmond Rd, was clearly received by the defendant, because his agent Mr Casey of John P O'Donoghue & Co solicitors, responded thereto by letter dated 29th June 2018. The plaintiff exhibited a copy of that letter.

31. The plaintiff concluded by stating that the defendant was using a number of addresses as his official business address and was attempting to create confusion where none existed. He was using the address of No. 2 Esmond Rd in his official correspondence with the plaintiff. The defendant's tax adviser had responded to the plaintiff and had referred to the assessments and to the demand by way of correspondence sent immediately following receipt of each document. The plaintiff stated that in these circumstances, there could be no doubt that the defendant had received the documents in the manner set out in the affidavits of service. He concluded the affidavit by stating that the defendant's recollection and evidence was unreliable, in circumstances where he alleged that he had no memory of receiving notices of assessment and a demand for

payment, or of instructing a solicitor to lodge a notice of appeal on his behalf, in the face of ample documentary and affidavit evidence to the contrary.

32. An affidavit was sworn by the defendant's solicitor, Mr Kevin O'Gorman, on 7th June 2023, in which he stated that the defendant had instructed that he was never served with documents underlying the plaintiff's claim. He stated that given the defendant's mental health and capability background, conclusive evidence on that issue had been difficult to locate. He exhibited some medical records in relation to the defendant.

33. He stated that insofar as the issues in relation to the address at which service was effected, were capable of independent investigation, he had been able to conclusively establish that the address recorded on the Revenue documents, was not the address at which the defendant resided. He stated that it was in those circumstances that "a service defence" had come to be actively pursued.

34. Mr O'Gorman went on to state that the defendant had encountered difficulties in obtaining documents from his previous advisers. He had sought an adjournment from the court to actively pursue the defendant's previous financial advisers for documentary records. That application had been refused, but the proceedings had been adjourned, following queries from the court in relation to the plaintiff's proofs.

35. Mr O'Gorman went on to state that having reviewed the plaintiff's supplementary affidavits in relation to service of the assessments, he made enquiries of the defendant's previous advisers in Waterford. He obtained a copy of their file. Having reviewed the documents, he stated that it "*seems clear that the defendant was served with the Revenue documents in 2018 and the defence previously raised by the defendant in this respect cannot be maintained*." He stated that having regard to the defendant's health and capability background, he did not believe that there was any attempt by the defendant to mislead the court. He stated that he had at all times acted upon instructions, which he believed were honestly given. Having regard to the documents obtained from the defendant's former advisers, he was eager to correct the record before the court and had sworn the affidavit for that purpose.

36. There were also affidavits of service before the court in respect of service of the summary summons, the notice of motion and the various grounding affidavits sworn by the plaintiff, upon the defendant. However, as service of these documents upon the defendant, is not in issue, it is not necessary to set out the content of these affidavits.

Submissions on behalf of the Defendant.

37. Given the grounds of defence put forward on behalf of the defendant, as outlined earlier in the judgment, it is appropriate to begin by setting out the basis on which the defendant maintains that he has a defence to the sum claimed by the plaintiff herein.

38. As noted, the defendant abandoned the defence that had been raised on the basis of the failure to serve the assessments upon him in 2018. Likewise, he did not pursue the assertions made in his replying affidavits, that the plaintiff, his servants or agents, had seized documents and had thereby rendered it impossible for him to furnish tax returns in respect of the relevant years.

39. On behalf of the defendant, Mr Gordon Walsh BL, rested his primary submission on the fact that there had been a delay of over four years from the date upon which the assessments had been raised by the plaintiff on 7th February 2018, and the issuance of the summary summons herein on 15th July 2022. It was submitted that the plaintiff, in his role as Collector General, must exercise his functions in a manner that does not give rise to an unjust enrichment at the defendant's expense. It was submitted that the doctrine of unjust enrichment was recognised in Irish law as being applicable in the area of tax law: see *Bank of Ireland Trust Services v. Revenue Commissioners* [2002] 4 IR 178.

40. In the *BOI TS* case Kelly J. (as he then was) had held that where the taxpayer had made a payment of VAT under compulsion of law, which was later found to be an overestimate of what was actually due in respect of that tax, that gave rise to an unjust enrichment on the part of the Revenue authorities, such that it was appropriate, not only to direct repayment of the amount of tax overpaid, but also that there should be a payment of interest thereon for the relevant period. Counsel submitted that while that case related to an overpayment of tax and the repayment of same, the broad principle that the doctrine of unjust enrichment applied in the area of tax law, was relevant to the present case.

41. It was submitted that in the present case, the rate of interest that was provided for under the 1997 Act, was in effect a penal interest. It was set at a level that was designed to encourage taxpayers to pay their tax on time and to punish them if they did not do so. It was submitted that the court should have regard to the fact that the plaintiff had delayed for four years in instituting his proceedings herein. No explanation had been forthcoming from the plaintiff for that delay. It was submitted that in these circumstances,

the plaintiff, and by extension, the State, would be unjustly enriched, if the plaintiff was permitted to rely on his delay in instituting proceedings, so as to unjustly enrich the State, by virtue of the fact that the defendant had to pay the penal rate of interest provided for under the 1997 Act, for the period while the plaintiff had delayed in instituting his proceedings.

42. Counsel for the defendant set out his core submission at para. 15 of his written submissions, as follows:

> *"15. It is submitted that this reasoning can be extended to penal interest which is unreasonably and inexplicably allowed to accrue. The defendant relies on Bank of Ireland Trust as identifying the following principle: there are certain forms of conduct which, if committed by the Revenue Commissioners in the exercise of their powers administering the tax system, constitute a form of unjust enrichment upon which the other party is entitled to rely in legal proceedings. It is submitted that allowing penal interest to accrue through unreasonable delay is one form of such conduct."*

43. In support of the proposition that delay is relevant to the period for which interest can be awarded, counsel referred to the second decision in *Bank of Ireland Trust Services Ltd v. Revenue Commissioners* (No. 2) [2003] 3 IR 398, where Kelly J. had to calculate the period for which the interest would be awarded. The plaintiff had claimed that interest should run from the date of overpayment of the tax in 1982, up to the date of repayment of the excess in January 1999. The defendant argued that the interest should only run from 22nd March 1991, being the date on which the plaintiff gave written notice of a claim for repayment of the excess tax. Kelly J. held that in the exercise of his discretion, he was satisfied that a just result would be achieved if the plaintiff was permitted interest from the time when it first gave notice of a claim for repayment of the tax. Thus, the plaintiff was not entitled to interest on the period between 1982 and 1991, when it had delayed in making a claim for repayment of the excess tax.

44. Counsel also relied on the dicta of Finlay Geoghegan J. in *Reaney v. Interlink Ireland Limited* [2016] IECA 238 where she stated as follows at para. 27:

> *"As appears from the foregoing, in addition to considering the purpose of an award of interest under s. 22 as being intended to compensate a person who has been wrongly out of his money it is also necessary in considering the period for which*

interest will be awarded to consider the facts pertaining to when the claim was made and how it was pursued. I do not accept the submissions made that the court should disregard the manner in which the proceedings were conducted. A plaintiff who delays in commencing or pursuing his proceedings may not be entitled to interest for the entire period from the cause of action or the commencement of the proceedings. It does not appear to me that would be a just exercise of the discretion. Such an approach is consistent with the judgment of Kelly J. in the High Court in Bank of Ireland Trust Services v. Revenue Commissioners (No. 2) [2003] 3 I.R. 398. The judgment concerned a claim for payment of interest on VAT which had been overpaid to the Revenue since March 1982. Kelly J. having determined that he would make the award pursuant to s. 22 of the 1981 Act then considered the relevant period. He found that whilst the money had been overpaid on the basis of a then existing practice since 1982, the plaintiff had not given written notice of a claim for repayment of tax until the 22nd March, 1991. On those facts, Kelly J. concluded that 'a just result is achieved if the plaintiff is permitted interest from the time when it first gave notice of a claim for repayment of such tax'."

45. Counsel pointed out that the judgment of the Court of Appeal in the *Reaney* case was successfully appealed to the Supreme Court, [2018] IESC 13, however that judgment did not express any disagreement with the dicta of Finlay Geoghegan J. on this aspect.

46. Counsel further submitted that in the present case, it was only necessary for the defendant to establish that he had a stateable defence to at least a portion of the amount claim by the plaintiff, in order to have the matter remitted to plenary hearing. In support of that proposition, he referred to the decision of Birmingham J. (as he then was) in *Cork County Council v. O'Driscoll* [2014] IEHC 243, where it had been held that in a case where the plaintiff was seeking payment of arrears of landfill levies allegedly due under the Waste Management (Land Fill Levy) Regulations 2002 and 2006, together with interest as provided for by Art. 14 thereof, the defendant had raised a number of defences to the summary claim, including that the claim was either statute barred, or could not proceed on grounds of unreasonable delay. In refusing to grant summary judgment and in remitting the matter to plenary hearing, Birmingham J. noted that delay on the part of the defendant in those proceedings, to proceed other litigation that had been instituted by him

as plaintiff, was partly balanced by the delay on the side of the plaintiff in those proceedings in not issuing a summary summons until four years after the service of the notice claiming the levy under the regulations. The judge also noted that it was proper at that stage, to take the defendant's case at its high-water mark. He held that as the defendant had identified legal arguments which, though they could not be said that they were likely to succeed, as the judge could not dismiss them as being bound to fail, meant that it was appropriate that the matter should go to plenary hearing.

47. Counsel pointed out that in her judgment on the plenary hearing, in that case, reported at [2018] IEHC 203, Baker J. noted at para. 154, that insofar as any argument might have been made by the defendant that interest ought not be chargeable on the unpaid levy on account of delay, the plaintiff's agreement not to seek that the statutory interest pursuant to Art. 14 of the Regulations of 2002, dealt fully with that argument.

48. In conclusion on this aspect, counsel submitted that the defendant had raised an arguable defence that having regard to the doctrine of unjust enrichment and having regard to the caselaw cited above, the plaintiff was not entitled to claim interest on the unpaid taxes for the period in which he had delayed in instituting proceedings.

49. It was submitted that the plaintiff had failed to establish in clear terms that the issue identified by the defendant did not constitute a defence to the relevant parts of the plaintiff's claim, which was a necessary prerequisite to his securing summary judgment. It was submitted that the court should remit the issue on whether interest could be claimed for the period in which the plaintiff had delayed in issuing the summons herein, to plenary hearing. It was submitted that in this regard, the defendant had crossed the threshold as provided for in *Harrisrange Limited v. Duncan* [2003] 4 IR 1.

50. The defendant's secondary submission was to the effect that on a true interpretation of s.933 of the 1997 Act, and in particular having regard to the provisions of sub-ss. (9) (a) and (b), the defendant could not proceed with a late appeal as provided for under that section, until the present proceedings had been completed. That being the case, it was submitted that if the court was minded to grant judgment in any sum to the plaintiff on the within application, it would be appropriate for the court to insert the usual "liberty to apply" provision in its order, so that in the event that the defendant was successful in his appeal against the original assessments, and if a lesser amount was directed to be paid

by the TAC, he should have liberty to return to the court to have the judgment amended in the appropriate manner.

51. It was submitted that insofar as there were dicta of Faherty J. in *Gladney v. Taglienti* [2021] IECA 300, where at paras. 52 and 107, the court seemed to indicate that a taxpayer could proceed with a late appeal while enforcement proceedings against him were extant, such dicta were *obiter* and it was submitted were wrong in law, having regard to the clear wording of s.933(9) of the 1997 Act. Accordingly, it was submitted that the court should include a 'liberty to apply provision' in its order as sought by the defendant.

Submissions on behalf of the Plaintiff.

52. On behalf of the plaintiff, Ms. Connaughton Deeny BL submitted that the key element in this case was that the amounts claimed in the assessments were now final and conclusive as being due and owing by the defendant in respect of tax for the relevant years. It was submitted that the amounts claimed for tax and interest had become final and conclusive by operation of the 1997 Act.

53. In this regard, counsel referred to the fact that when the assessments had been served on the defendant on 7th February 2018, he had lodged a notice of appeal on 12th February 2018. That appeal had been refused by the TAC in its ruling on 29th May 2018. That ruling had made it clear that the TAC had declined to accept the appeal on the basis that it did not relate to an appealable matter and was not a valid appeal in accordance with s.959AH of the 1997 Act. Therefore, the defendant's appeal had been refused in accordance with s.949N of the Act. The decision to refuse the appeal was said to be "final and conclusive".

54. It was submitted that it was well settled at law that the amount of tax or interest could only be appealed by a taxpayer within the statutory provisions provided for in the 1997 Act. That had been done by the defendant in this case. His appeal had been determined against him. It was submitted that in these circumstances, the court did not have jurisdiction to question the amounts that had been found due and owing in respect of tax and interest. In this regard, counsel referred to the decisions in *Deighan v. Hearne* [1990] 1 IR 499; and *Gladney v. Taglienti*. Counsel also referred to the determination of the Supreme Court on the leave to appeal application in the *Taglienti* case, which was reported at [2022] IESC DET 25, where the Supreme Court had stated as follows at para. 10:

"The settled law is that the court cannot try an issue of fact arising from an assessment made in default of a return other than through the appeals procedure provided in the relevant tax code."

55. Counsel submitted that the 1997 Act provided in s.1080, that every enactment relating to the recovery of any tax charged by an assessment and every rule of court so relating, shall apply to the recovery of any amount of interest payable on that tax as if that amount of interest were part of that tax. Thus, it was submitted that the interest was treated as part of the tax and could not be reviewed by this Court.

56. Insofar as the plaintiff had sought to rely on the decisions in *Reaney v. Interlink Ireland Limited* and the decision of Kelly J. in the second *BOI TS* case, as authority for the proposition that the court had a discretion in relation to the awarding of interest; that was misconceived, because in the *Reaney* case the court was dealing with interest that might be awarded under s. 22 of the Court Act 1981, which was a discretionary interest that could be awarded by the court. In the second *BOI TS* case, Kelly J. had been dealing with s.941(9) of the 1997 Act, which gave the court a discretion in relation to the allowance of interest on a sum claimed. It was submitted that in the present case, the court had no such discretion in relation to the statutory interest that was applicable pursuant to s.1080 of the 1997 Act.

57. Counsel pointed out that the defendant complained of delay on the part of the plaintiff in instituting the proceedings herein following the service of the notices of assessment in February 2018; however, that ignored the fact that he had delayed for a far greater period in making any returns, or paying the tax that was due. Indeed, it was submitted that it was noteworthy that even yet, the defendant had never filed returns in respect of the years 2004/2015, nor had he paid the amounts due under the assessments. He had also sought to delay the matter further, by seeking an undefined period of time within which to submit his returns in respect of those years. It was submitted that having regard to the objective of the Taxation Code, which was to provide certainty and finality in taxation matters; which goals had been provided for in the 1997 Act, it was neither appropriate, nor possible, for the court to question the amounts that had been found as due and owing in respect of tax and interest in this case.

58. It was submitted that having regard to the provisions of s.949N(3) and s.934(6) of the 1997 Act, which effectively provided for the finality and conclusiveness of decisions

where an appeal has been lodged, it was not possible for the defendant to bring a late appeal to the TAC. It was submitted that the defendant had exhausted his opportunity to appeal to the TAC and had not judicially reviewed that decision. Therefore, it was submitted that the matter was finally determined and could not be challenged by the defendant in these proceedings.

59. Finally, it was submitted that the defendant had not established any prejudice or loss as a result of the fact that the plaintiff had not issued the proceedings herein until July 2022. It was submitted that having regard to the provisions of the Tax Code, as set out in the 1997 Act, and having regard to the caselaw thereon, it was not open to the defendant to challenge the amount of the assessments, or the amount claimed in the summary summons. In these circumstances it was submitted that the plaintiff had established that the defendant had no defence to his claim in these proceedings. Accordingly, the plaintiff had established an entitlement to summary judgment in the amount claimed in the summary summons.

60. In relation to the "liberty to apply" point, it was submitted that it would be inappropriate for this Court to insert such a provision into any order that it may make, in the event that it was minded to grant summary judgment to the plaintiff. It was submitted that the provisions of the 1997 Act and the caselaw thereunder, made it clear that there should be finality in relation to tax matters. That was provided for in the 1997 Act by the elaborate appeal structure that was provided for therein. That had been exhausted in the present case.

61. In the event that the plaintiff obtained judgment against the defendant herein, it was submitted that it would be inappropriate to leave any avenue for that judgment to be reconsidered by way of a subsequent application to the court in the unlikely event that the defendant filed his returns, paid the amounts as set out in the assessments, had his appeal accepted as a late appeal by the TAC, notwithstanding that they had already determined his appeal herein, and was successful in obtaining a reduction in the amount of tax and/or interest due. It was submitted that the defendant had had the opportunities that were available to him under the 1997 Act and could have applied to put in a late appeal, if he had complied with the conditions applicable thereto, as set out by Faherty J. in the *Taglienti* case. He had not taken those steps and accordingly, it was therefore

inappropriate for the court to insert any such provision in any judgment or order that it may make in favour of the plaintiff.

Conclusions.

62. Summary judgment procedure is only suitable when there is a clear *prima facie* legal entitlement on the part of the plaintiff to the sum claimed. Usually when such applications are being moved, the plaintiff has a very strong case that money is owed to him by the defendant and the real question before the court is whether the defendant has established sufficient evidence in his affidavit to cross the threshold that he has at least an arguable defence to the plaintiff's claim, such that he should be allowed to resist judgment being marked against him in a summary manner and should be allowed to have the matter remitted to plenary hearing.

63. The approach which the court should take to an application such as this, is well settled in law. The relevant test was set down by the Supreme Court as far back as 1996 in *First National Commercial Bank v. Anglin* [1996] 1 IR 75. In that case Murphy J., giving the judgment of the court, endorsed the following test laid down in *Banque de Paris v. DeNaray* [1984] 1 Lloyd's Law Rep 21, which had been referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank PLC v. Daniel* [1993] 1 WLR 1453:-

> "*The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole 11 situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence*."

64. The test set down in the *Anglin* case has been applied in a number of cases in the intervening years. The appropriate test was more recently set out in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607 in which case Hardiman J. stated as follows at page 623:-

> "*In my view the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants affidavits fail to disclose even an arguable case*?"

65. In *Harrisrange Limited v. Duncan* [2003] 4 IR 1, McKechnie J. having analysed the relevant case law, set out a helpful summary of the relevant principles. It is not necessary to set these out in this judgment, as they are very well known. The court has had regard to all of these cases and to the principles set out in *Harrisrange* in reaching its determination herein.

66. The court has also had regard to the dicta of Moriarty J. in *Allied Irish Banks v. Killoran* [2015] IEHC 850, where he warned that the court should not accord substantive relief to defendants in summary judgment motions who raise spurious, fanciful or conjectural contentions to resist judgment. He advised that courts must be alert to defendants who seek merely to defer the evil day on the basis of arguments that do not pass muster, and must remain mindful of the de minimis rule in assessing summary judgment applications; see paragraph 56 of the judgment.

67. Turning to the approach that the court must take in relation to proceedings concerning the Taxation Code, the decision of the Supreme Court in *Deighan v. Hearne*, makes it clear that this court cannot try an issue of fact arising from an assessment made in default of a return, otherwise than through the appeal procedure provided for in the statutory regime. In this regard, Finlay C.J. stated as follows at p.506:

> "*The learned High Court Judge decided that having regard to the provisions of the Income Tax Code and the procedure for assessment in default of the making of returns which has been outlined in the decision of the Court that the Court could only intervene to set aside or vary an assessment otherwise than under the procedure provided by the Income Tax Acts if it were established either that the procedure carried out was ultra vires the statutory provisions or that one or other of those statutory provisions was invalid, having regard to the provisions of the Constitution. The Court could not try an issue of fact arising from an assessment made in default of a return otherwise than through the appeal procedure provided in the Income Tax Code.*
>
> *That decision, in my view, was correct. The Plaintiff had ample opportunity on the facts as found in the High Court to challenge the validity of the assessments in respect of which he now complains, and to proceed by the procedure of appeal through the Special Commissioners and through the Courts, which is available in such circumstances. In particular, it is of considerable significance that before*

instituting these proceedings and up to the time they came to hearing, the Applicant had not even sought an extension of time to appeal against the assessments which can be obtained in the discretion of the Inspector of Taxes or on appeal from him to the Special Commissioners at any time. In these circumstances the learned High Court Judge was correct in the decision which he reached, and I am satisfied this ground of appeal must fail."

68. The dicta in *Deighan v. Hearne* have been applied in a large number of cases. In *Gladney v. Taglienti*, Faherty J., giving the judgment of the Court of Appeal, endorsed the dicta in the *Deighan* case: see paras. 99-100. That approach was endorsed by the Supreme Court in its determination on the leave to appeal application, where the court reaffirmed the principle that the court cannot try an issue of fact arising from an assessment made in default of a return, other than through the appeals procedure provided in the relevant Tax Code: see para. 10, quoted above.

69. On the basis of those authorities, I am satisfied that this Court does not have jurisdiction to question the amount claimed in the assessments, particularly as the defendant has already exercised his right to appeal and the TAC has given a determination refusing the appeal. In these circumstances the amount claimed in the assessments, which amount, together with statutory interest, is claimed in the summary summons, is final and conclusive and cannot be challenged before this court.

70. In an effort to overcome that hurdle, Mr Walsh BL put forward the argument that he was not seeking to challenge the amount found due in the notices of assessment, but was seeking to challenge the enforceability of the claim to interest therein, on account of the delay on the part of the plaintiff in issuing his summons herein. I do not think that that submission is well founded for a number of reasons. First, the amount claimed in the assessments has become final and conclusive having regard to the decision on appeal of the TAC given on 29th May 2018. The interest that applied thereafter, due to the non-payment of the outstanding tax, up to 9th May 2022, being the date of referral of the taxes and interest for collection which was made by the plaintiff to his solicitors, arose by operation of law, and not due to any delay on the part of the plaintiff in instituting the proceedings.

71. The court does not accept the submission that there has been an unjust enrichment on the part of the plaintiff due to any delay on his part in instituting the

proceedings herein. An unjust enrichment can arise where a person obtains money, or some other benefit, to which they are not legally entitled. In the *BOI TS* case, it was held that the Revenue authorities had been unjustly enriched, because the plaintiff in that case had paid the VAT at the amount stated under compulsion of law. When it turned out that there had been an incorrect assessment of the amount of VAT payable by the plaintiff, the defendant in that case had effectively been unjustly enriched by such overpayment for the period after which payment had been made. There is no question of the plaintiff in this case having obtained a payment, or other benefit, to which it was not legally entitled. There is no question of the overpayment of any tax by the defendant. In these circumstances, the doctrine of unjust enrichment does not arise.

72. Insofar as the defendant sought to rely on the decision in *Reaney v. Interlink Ireland Limited* as authority for the proposition that a plaintiff who delays in instituting proceedings may not be entitled to interest for the entire period from the accrual of the cause of action to the commencement of the proceedings, I accept the submission made by counsel on behalf of the plaintiff that that case is of very limited relevance to the present case, as the court was there considering the imposition of interest pursuant to s.22 of the Courts Act 1981, which is a discretionary interest. Similarly, in the second *BOI TS* case, it is clear that the relevant statutory provision therein provided for the payment of a discretionary interest, as s.941(9) of the 1997 Act provided that if too much tax had been paid, the amount overpaid shall be refunded with such interest, if any, as the court may allow. Thus, those two cases were dealing with discretionary interest, which could be awarded by the court. In the present case one is dealing with interest that is applicable in a particular manner pursuant to the statutory code. The court does not have a discretion in relation to the accrual of that interest.

73. The defendant rests his submission that interest should not be payable on the period between the date of the notices of assessment in February 2018 and the date of issue of the summons in July 2022, on the basis that by holding off issuing his proceedings, the plaintiff thereby obtained for the State a penal rate of interest. There is no evidence before the court that the statutory interest that is provided for in s.1080 of the 1997 Act, is penal in nature. The rate of interest chargeable is set out in detail in the section. Just because the defendant may apply the label of "penal" to it, does not impose

any obligation on the plaintiff as Collector General, to institute proceedings within any particular period of time.

74. Furthermore, the defendant has not pointed to any detriment or loss that he has suffered due to the fact that the summons herein was not issued until over four years after the assessments were first raised. If the defendant had wished to avoid the accrual of interest on the unpaid taxes, he could have made his returns and paid the amount of tax due, at any time. He did not have to await delivery of the summary summons to enable him to make that payment and thereby prevent interest running on the unpaid taxes pursuant to the provisions of the Act.

75. Insofar as the defendant sought to rely on the decision in *Cork County Council v. O'Driscoll* as authority for the proportion that it would be appropriate for this court to remit the matter to plenary hearing, where there was an issue as to whether interest could be properly chargeable where there had been a delay on the part of the collecting authority in instituting proceedings, I am not satisfied that on a careful reading of the judgment of Birmingham J., that that proposition is sustained. The facts in the *O'Driscoll* case, were quite complex. The proceedings had a long history. It is not necessary for the court to outline these, suffice it to say that on a careful reading of the judgment of the High Court, it is clear that the matter was remitted to plenary hearing due to the fact that there were a number of fundamental matters genuinely in issue between the parties. Birmingham J. focused on the two primary grounds of defence, being whether the site was an authorised or unauthorised landfill site; and whether a legal basis for the proceedings survived the revocation of the 2002 and 2006 Landfill Levy Regulations in 2008. He was satisfied that an arguable defence had been made out; accordingly, he remitted the action to plenary hearing.

76. The substantive judgment of Baker J. following the plenary hearing, did not deal with the issue of delay and the enforceability of interest, due to the fact that the plaintiff had waived its claim to any interest that was payable pursuant to the regulations: see para. 154.

77. The court accepts the submission made by counsel on behalf of the plaintiff, that even if the issue of delay were to be relevant, then the court must look at the overall position in the case, where the defendant has been guilty of far greater delay, insofar as

he has not even yet made any returns in respect of the years 2004-2015, nor has he paid any of the tax due in respect of those years.

78. The court does not accept the assertion by the defendant that his inability to make returns, or lodge a valid notice of appeal, was due to the seizure of any documents by CAB. He has not stated what documents were alleged to have been seized by them. The court prefers the plaintiff's sworn evidence that he did not seize any documents belonging to the defendant, nor did CAB do so.

79. Taking all of these matters into consideration, I am satisfied that the plaintiff has established an entitlement to the sums claimed in the summary summons and has also established that the defendant has no defence to his claim herein. Accordingly, it is not appropriate for this Court to remit the matter to plenary hearing.

80. In relation to the secondary submission made on behalf of the defendant, that the court should insert into the judgment which it proposes to give in favour of the plaintiff, a provision providing for "liberty to apply", to deal with the possibility that the defendant may be able to bring a successful late appeal before the TAC, this submission is untenable in the circumstances of this case.

81. It is normally only appropriate for a court to insert the provision "liberty to apply" where there is a possibility that there is some further step that may need to be taken in relation to the matter which is the subject matter of the court's order. In this case, the court proposes to grant final judgment to the plaintiff. There is no further aspect of the matter that need come back before the court. Accordingly, it is not appropriate to insert such a provision into the final order of the court.

82. The court accepts the submission of counsel on behalf of the plaintiff that there is almost no possibility that the plaintiff will be successful in bringing any late appeal before the TAC, having regard to the fact that in order to do so he would have to (a) file returns for the relevant years; (b) pay the amount sought in the assessments; (c) persuade the TAC that it should entertain a further appeal, notwithstanding that it has already determined the defendant's appeal in the matter and notwithstanding that a judgment will have been obtained in the interim from the High Court; and even if the defendant were to overcome those hurdles, (d) he would then have to be successful in any appeal that he may bring. The court is satisfied that this possibility is indeed remote, due to the fact that the plaintiff has not made any returns in respect of the relevant years, nor has he sought

to lodge a late appeal. The court does not accept the submission made by counsel on behalf of the defendant that the dicta of Faherty J. in the *Taglienti* case, as referred to earlier in the judgment, were either *obiter* or incorrect.

83. Having regard to the all the relevant circumstances in this case, the court is not satisfied that it would be appropriate to insert the provision "liberty to apply" into its final order and therefore it refuses the defendant's application in this regard.

84. Having regard to the findings and conclusions reached by the court herein, the court will grant final judgment to the plaintiff against the defendant in the sum of €2,026,454.48, in accordance with para. 1 of the plaintiff's notice of motion filed on 14th November 2022.

85. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

86. The matter will be listed for mention at 10.45 hours on 13th December 2023 for the purpose of making final orders.