



**UNAPPROVED
THE COURT OF APPEAL**

**Donnelly J.
Faherty J.**

Neutral Citation Number [2021] IECA 300

Pilkington J.

Appeal Number: 2018/293

BETWEEN/

Michael Gladney Plaintiff/Respondent

v.

Adriano Taglienti Defendant/Appellant

AND

Appeal Number: 2018/292

Michael Gladney Plaintiff/Respondent

v.

Samantha Kavanagh Defendant/Appellant

Judgment of Ms. Justice Faherty dated the 10th day of November 2021

1. There are two appeals before the Court. Both arise on foot of Orders made by Noonan J. on 6 July 2018 that the plaintiff (hereinafter “Revenue”) recover the sum of €170,813.84 from Mr. Taglienti (hereinafter “the first appellant”) and €75,751.95 from Ms. Kavanagh (hereinafter “the second appellant”), together with costs in each case when taxed and ascertained.

The first appellant: background and procedural history

2. Proceedings were commenced against the first appellant by way of a summary summons which issued on 8 December 2016. The special indorsement of claim sets out the

claim for €170,813.84 as comprising income tax for the year ending 31 December 2007, PAYE, PRSI, USC and LPT for the year ending 31 December 2015 and VAT for 1 November 2007 to 31 December 2007. The first appellant entered an Appearance on 1st June 2017.

3. By notice of motion dated 4 July 2017, Revenue sought liberty to enter final judgment in the sum of €170,813.84.

4. The application was grounded on the affidavit of Evelyn Donegan of Revenue sworn on 29 June 2017. At para. 2, she avers that Revenue's claim is for €95,313.35 in respect of tax and the sum of €75,500.49 in respect of interest by way of arrears of income tax, PREM Annual and VAT. At para. 3, she avers that on 14 October 2014, Revenue raised an amended assessment of €28,420.00 in respect of tax and €25,895.91 in respect of interest (total €54,315.91) for VAT for the period November and December 2012. She avers at para. 4 that Revenue called upon the first appellant to discharge the sum of €170, 813.84 but that he failed, refused or neglected to discharge the said sum. She further avers that the first appellant has no *bona fide* defence at law or on the merits on the case.

5. The first appellant swore a replying affidavit on 4 October 2017. Therein, he takes issue with Revenue's claim in respect of tax and interest due in respect of VAT for the period November and December 2012, stating that no reference is made to the year 2012 in the summary summons. At para. 4, he avers that he is a stranger to the alleged liability of €170,813.84. He avers that his position is set out in a letter of 7 December 2016 which his solicitors sent to Revenue's solicitors. In that letter, his solicitors advised Revenue that notwithstanding a telephone call and letter from a Mr. John O'Leary of Revenue to the first appellant requesting a meeting for an audit to take place on 30 March 2010 no such meeting (or audit) ever took place in 2010, or subsequently. He avers that although he received a document entitled "Income Tax Assessments and VAT Assessments for

2007” no explanation has been given to him for the figures set out therein despite requests made to Ms. Margaret Malone and Ms. Martha Byrne of Revenue at a meeting on or about 17 June 2016. The first appellant avers that at the meeting of 17 June 2016, Ms. Malone promised to send him proof of the origin of the figures used in the assessments but same were never sent to him. He further avers that he received a tax clearance certificate from Revenue on 20 May 2010 which said his “tax affairs are in order”. He states that that representation was made to him without qualification and that same constitutes an estoppel from which Revenue cannot lawfully be permitted to resile.

6. The first appellant claims that there is grave uncertainty regarding the nature and extent of the alleged tax liabilities and that pursuant to Revenue’s Customer Services Charter (“RCSC”), he is entitled to clarification regarding his outstanding liabilities (if any). He asserts that Revenue’s failure to advise him of his statutory right of appeal (save regarding a claimed VAT liability), and the estoppel to which the tax clearance certificate gives rise, are legal issues appropriate for the High Court to determine and are not matters appropriate for the statutory appeals process. He thus avers that he has a *bona fide* defence to the proceedings.

7. On 2 November 2017, Ms. Donegan swore a Corrective and Supplemental Affidavit exhibiting therein an amended summary summons. She seeks to withdraw paragraph 4 of her grounding affidavit in its entirety due to what she claimed were “clerical errors”. In summary, she states that what she should have averred to in her previous affidavit is as follows:

- On 8 October 2014, Revenue raised an assessment of €28,420 regarding VAT for 1 January 2007 to 31 December 2007 which was sent to the first appellant and his Accountants, Seamus Walsh & Co.

- On 14 October 2014, Revenue raised an amended assessment in respect of income tax for the year end 31 December 2007 in the sum of €65,217. This too was sent to the first appellant and his Accountants.

8. Ms. Donegan avers that both notices informed the first appellant of his entitlement to appeal and the manner of such appeal. She states that he failed to appeal and accordingly the assessments became final and conclusive under the Taxes Consolidation 1997 Act, as amended (“the 1997 Act”). She avers that as of 26 November 2016, the sums due and owing in respect of 2007 tax liabilities were as follows: €114,676.82 in respect of income tax for the year ended December 2007; €1,821.11 in respect PAYE/PRSI/USC and LPT for 2015; and €54,315.92 in respect of VAT for 2007, being a total of €170,813.84.

9. In response to the first appellant’s averment that no audit took place in 2010, Ms. Donegan says that his claim in this regard is irrelevant as it is not open to him to defend the proceedings as he did not embark on the statutory appeals process.

10. In any event, Ms. Donegan goes on to aver that Mr. O’Leary carried out an audit on 30 March 2010 at the offices of the first appellant’s then agent Mr. Brendan Cosgrove during which “records were examined, notes were taken, and copies of working papers were taken by Mr. O’Leary”. In this regard, Ms. Donegan exhibits a document said to be a contemporaneous note of Mr. O’Leary’s interview with Mr. Cosgrove. The note records that the first appellant, Mr. Cosgrove and Mr. O’Leary were present on 30 March 2010.

11. Ms. Donegan states that arising from that audit, Revenue raised notices of assessment of 8 October 2014 which were not appealed by the first appellant.

12. With regard to the estoppel claim, Ms. Donegan avers that the tax clearance certificate of 20 May 2010 pertained only to a moment in time and did not preclude Revenue from raising assessments in respect of matters prior to or contemporaneously with the tax clearance certificate.

13. By Order of the High Court (Faherty J.) on 13 November 2017, the summary summons was amended by the substitution of the word “assessment “in lieu of “return”.

14. Revenue’s amended summary summons was served on the first appellant on 21 November 2017.

15. On 23 December 2017, the Master of the High Court awarded costs of a motion to the first appellant and allowed him to put in a replying affidavit to Ms. Donegan’s Corrective Affidavit.

16. By notice of motion grounded on an affidavit of Ms. Elizabeth Quinn, Revenue Solicitor, Revenue appealed the costs order made by the Master of the High Court. The costs order was subsequently set aside by Order of the High Court.

17. The first appellant’s replying affidavit to Ms. Donegan’s Corrective and Supplemental Affidavit was sworn on 19 December 2017. He avers that he is at a loss to see how Revenue can pursue their claim for the reasons already set out in his prior affidavit. He notes the withdrawal by Ms. Donegan of the contents of paragraph 4 of her grounding affidavit and he contends that the true meaning and inference to be drawn from that withdrawal is that Revenue never called upon him to discharge €170,813.84.

18. The first appellant goes on to set out what he states is the true position in relation to his tax affairs, as follows: his tax agent Mr. Cosgrove died in or about 2011. In or about 2014, his current tax agent was Mr. Walsh. He states that he met Mr. Walsh in late 2014 and was shown documentation that Mr. Walsh had received from Revenue. The documentation referred to events in or about 2007 long before Mr. Walsh became his tax agent. In this regard, the first appellant exhibits a letter of 4 July 2014 from Revenue to Mr. Walsh which advised, *inter alia*, that Revenue had been investigating the fast food sector over a number of years including the instigation of a “Revenue Enquiry” on the first appellant. That enquiry had been “temporarily set aside” as there were a small number of

test cases being dealt with by the appeals process. The letter stated that as the first test case had now run its course, Revenue's enquiry into the first appellant was being recommenced and that Revenue were in a position to issue VAT assessments and income tax assessments for 2007. However, in view of the time lapse, Mr. Walsh was being given an opportunity to review his files and discuss the matter with the first appellant and to revert to Revenue within thirty days from the date of the letter. Reference was made in the letter to the additional assessments Revenue proposed to raise, being the sum of €28,420.88 in respect of VAT for 2007 and €140,350.00 in respect of income tax for 2007. It appears that this letter was not responded to in writing.

19. The first appellant avers that he did not understand the documentation, or the origin of the demand being made in circumstances where he had received a letter dated 10 June 2008 from Revenue which advised that an audit on his business had concluded and that no further liability arose. He further states that he recalled an earlier audit in 2004 as a result of which he paid €1600 to Revenue. This arose due to an error made by his former accountant Mr. Cosgrove regarding the VAT rate applied to soft drinks.

20. At para. 9 of his Affidavit, the first appellant addresses the Revenue notice dated 5 March 2010 giving notice of an audit to be carried out by Mr. O'Leary and to take place on 30 March 2010. He repeats his prior averment that he did not meet Mr. O'Leary, that Mr. O'Leary did not attend his premises and that he did not meet Mr. O'Leary with his accountant Mr. Cosgrove. He further states that he did not receive any communication from Mr. Cosgrove in relation to such a meeting.

21. The first appellant goes on to state that he does not understand how Ms. Malone could be sending him documentation in 2014 relating to extra taxes for 2007. He says that he went to see Ms. Malone on three occasions in 2016 at which times he was told that he could appeal the assessments raised. He stated that his reply to Ms Malone was in words

to the effect “what am I appealing, there was no audit”. He avers that Ms. Malone’s response to this was that she would send him copies of the documentation in her possession. The first appellant goes on to state that from the conversations he had with Ms. Malone in 2016, it was his clear understanding that he did not have to appeal the amended assessment to the Taxation Appeal Commissioners (“TAC”) until he understood the origin of the demands being made of him with respect to his business in 2007. He states that Ms. Malone did not send him any documentation and that his next communication was from Revenue’s solicitors.

22. The first appellant repeats his contention that he retains his right of appeal and that this right has not yet crystallized in the absence of Ms. Malone having forwarded him the promised documentation.

23. Furthermore, he takes issue with Revenue’s characterisation of the tax clearance certificate which issued to him on 20 May 2010. He avers that tax clearance certificates are issued where a tax payer has complied with his or her obligations under the Tax Acts. They are not issued provisionally or contingently. He asserts that the tax clearance certificate issued to him has not been rescinded.

24. The first appellant thus maintains that Revenue’s proceedings should be struck out or, alternatively, remitted to plenary hearing.

25. On 9 February 2018, Ms. Donegan swore a Further Corrective and Supplementary Affidavit wherein she advised that in her first Corrective Supplementary Affidavit she inadvertently withdrew para. 4 of her grounding affidavit where it was her intention to withdraw paragraph 3 thereof and that, accordingly, she wished to reinstate para. 4 of her original affidavit.

26. At para. 5, she states that the first appellant was specifically advised by Revenue on 11 November 2016 that he would not be receiving any further documentation from

Revenue and that he could appeal the assessments which had been raised and that a late appeal would be allowed. In this regard, Ms. Donegan exhibits a contemporaneous note of a meeting which took place between the first and second appellants and three Revenue Officials, Mr. Denis O'Connell, Ms. Malone and Ms. Martha Byrne. The note records that Revenue's letter of 10 June 2008 to the first appellant was discussed. It also records that Ms. Malone advised that the letter of 10 June 2008, to which the first appellant had referred, concerned a desk-based audit which took place in 2006 in relation to a potential sale of property in Ashford and potential CGT issues arising from the sale and that same had no relevance to the income tax and VAT assessments for 2007. The note also documents that the first appellant was advised that he should have appealed the amended assessments raised in 2014, and that a late appeal had been open to him. As he had not appealed, the assessments were final and conclusive, and no discussion could take place about the assessments.

27. At para. 6 of her affidavit, Ms. Donegan avers that there is no record of the first appellant having been promised documentation by Revenue, or told that he did not have to appeal the assessments until such documentation was forthcoming.

28. She further avers (at para. 9) that albeit a tax clearance certificate issued to the first appellant in May 2010, the outstanding liability for income tax for 2007 had not then existed as the assessment notices were not issued until October 2014. She goes on to state that the occurrence of a tax audit would not preclude a tax clearance certificate issuing.

29. The first appellant's third affidavit was sworn on 8 March 2018. He takes issue with the number of clarifications sought to be made by Ms. Donegan. He denies that he was advised on 11 November 2016 that a late appeal would be allowed. He states that while on or about 18 June 2016, when he was verbally advised of his right to appeal, he had

understood that his right of appeal was on hold pending receipt of a substantial volume of documentation from Revenue.

30. The first appellant also takes issue with the suggestion that the note of 11 November 2016, as referred to by Ms. Donegan, was contemporaneous. He maintains that the note contains a number of inaccuracies. In particular, he denies that at the meeting Ms. Malone retrieved a file relating to the 2006 audit.

31. On 8 March 2018, the second appellant swore an affidavit confirming the first appellant's account of the meeting of 11 November 2016, which she had also attended

32. Ms. Byrne of Revenue swore an affidavit on 16 April 2018. She states, *inter alia*, that at the meeting of 11 November 2016 she took notes until asked to stop by the first appellant. She says the note was completed immediately after the meeting and that its content was checked with Ms. Malone and Mr. O'Connell who agreed its accuracy.

33. In his further affidavit sworn 27 April 2018, the first appellant maintained that he had no recollection of Ms. Byrne or any other Revenue Official annotating the meeting which took place on 11 November 2016. He repeated his averment that Ms. Malone did not retrieve the file relating to the 2006 audit at that meeting.

The second appellant: background and procedural history

34. By summary summons dated 17 January 2017, Revenue claimed the sum of €75,751.95 as due and owing by the second appellant by way of income tax returns for the year end December 2008, comprising €40,444.75 by way of income tax and interest; a VAT assessment for November and December 2008 in the sum of €22,902.03 inclusive of interest and a VAT assessment in respect of September and October 2009 in the sum of €12,405.17 again inclusive of interest.

35. The second appellant entered an Appearance on 1 June 2017.

36. On 13 March 2017, her solicitors issued a notice for particulars.

37. By notice of motion dated 27 March 2017, Revenue sought liberty to enter final judgment against the second appellant in the sum of €75,751.95. The application was grounded on the affidavit of Majella Conroy of Revenue sworn 23 March 2017. The second appellant swore a replying affidavit on 18 May 2017. She avers that the only demand she recalled was a letter from Revenue’s solicitors dated 4 January 2017 immediately prior to the proceedings issuing and that to that point in time she was not aware of any outstanding taxes and that she did not receive any notice of assessment.

38. She states that on 7 December 2016, her solicitors wrote to Revenue enclosing Revenue’s letter of 10 June 2008 to the first appellant confirming that an audit had concluded and that there was no further liability arising. Her solicitors also enclosed the first appellant’s tax clearance certificate of 20 May 2010 together with Revenue’s letter of 5 March 2010 notifying the first appellant of an audit with regard to the period 1 January 2007 to 2010. The second appellant’s solicitors advised Revenue that no such audit had ever taken place and that the first appellant had been promised documentation pertaining to the origin of the figures referred to in the assessments but that no such documentation was ever received by the first appellant. Her solicitors had requested details of the first appellant’s tax returns from Revenue. The second appellant exhibits Revenue’s solicitors’ response to the latter request which was that the first appellant had received full particulars of the amount sought.

39. The second appellant avers that she is at a fundamental disadvantage as she “genuinely” does not know the basis of her alleged liability.

40. Ms. Conroy of Revenue swore a Supplemental Affidavit on 1 June 2017. Therein she exhibits a notice of assessment in respect of VAT for 1 January 2008 to 31 December 2008 and 1 January 2009 to 31 October 2009 which was sent to the second appellant on 8 October 2014, with a copy also forwarded to her agents, Doyle Associates. Ms Conroy

further avers that a notice of assessment in respect of income tax payable for year end 31 December 2008 issued to the second appellant on 14 October 2014 with a copy also sent to her agent. Ms. Conroy states that the second appellant did not appeal the notices of assessment and that no payments were made on foot of the assessments. She avers that by letter dated 7 October 2016, Revenue provided the second appellant with a summary statement of account for income tax for the year end 31 December 2008, VAT for year end 31 December 2008 and VAT for the period January – October 2009. She further states that the second appellant was advised that in default of payment the matter would be pursued through the courts.

41. The second appellant's second affidavit was sworn on 29 June 2017. She states that she remains at a loss as to how €75,751.95 is owed particularly as the Revenue audit (unspecified as to time) of the takeaway business she carried on with the first appellant had resulted in no additional tax liability arising and that the first appellant had been issued with a tax clearance certificate on 20 May 2010. She states that she is at a further loss to understand the claimed liability against the first appellant in the sum of €170,813.84.

42. She says that as she does not understand the basis of her alleged liability she is unable to instruct her solicitors regarding the claims made against her. Accordingly, she wishes to ascertain from Revenue the basis of the assessments in order to defend the proceedings. She states that Revenue's solicitor had effectively refused her solicitor's requests for particulars. She maintains that she has a *bona fide* defence to the proceedings.

The judgment of the High Court

43. At the hearing of Revenue's applications for summary judgment on 6 July 2018 the appellants were legally represented. Their counsel apprised the High Court that the appellants' fundamental position was that they had been promised documentation by Revenue which was never provided and albeit that there was uncertainty as to what

happened at meetings between them and Revenue, the legal issue that arose was that the appellants “were given a specific representation...that they would be given those documents”. It was on that basis that their estoppel claim arose. It was emphasised that the appellants did not know the basis of the assessments and given that deficiency, their statutory right of appeal was of no benefit to them.

44. In his *ex tempore* judgment of 6 July 2018, Noonan J. granted Revenue an order for judgment against the first appellant in the sum of €170,813.84 and the second appellant in the sum of €75,751.95 together with costs in both cases.

45. In concluding that Revenue was entitled to judgment, Noonan J. did not accept that the appellants had an arguable defence. While noting the submission made on their behalf that there was a legal issue arising on foot of the Revenue Charter to the effect that the first appellant had been promised that he would receive certain documents, and that he could not determine that dispute, Noonan J. went on to hold, as follows:

“But I have to say that it seems to me that no assessment would ever be final in circumstances where a taxpayer, all the taxpayer had to do to prevent it becoming final was to say, ‘Oh well, I was told I was going to get documents or somebody was going to write a letter to me or something of that nature’. It seems to me the tax code is absolutely clear and the decisions to which Ms. Connaughton–Deeney [Revenue’s counsel] has referred are absolutely clear. The Courts do not provide a parallel system of enquiry into the calculation of tax assessments. There is a very elaborate system of appeal provided. And of course, if it is alleged that the assessment is for some reason invalid as a result of a failure to comply with a legal obligation on the part of Revenue, then it seems to me the remedy is judicial review, as was in the case that Mr. Dwyer [counsel for the appellants] has referred

me to, that's the *Keogh v. CAB* case. As I say, that would be the appropriate remedy. It is clearly not a defence to an application for summary judgement. And again, in fairness to Mr. Dwyer he didn't push the boat out on the tax clearance certificate issue. He said it was a somewhat secondary issue, not a major issue as he described it, and I think he is absolutely right about that. It seems to me that it would be an extraordinary state of affairs if simply because somebody got a tax clearance certificate at a particular point in time, it meant that the Revenue could never at any future stage revisit the matters no matter what came to light. But it seems to me to be no more than a statement that is fixed in time, that is of that particular time no particular - no liability, [which] as I should say, arises in the case of the taxpayer, but that predates the issue of the assessments in this case by some three years. And the plain fact of the matter is that both of these defendants were advised by tax advisors.

Now, I know there's been a few ins and outs about that, but it really doesn't matter. At the end of the day, everybody whether they have a tax advisor or a solicitor or not, is bound by an assessment and the law applies equally to everybody. There is a clear mechanism available for appeal and for an extension of time to appeal, and even at this stage, for a further appeal extension of time application to be made in circumstances where the tax is paid and a return is made. And I can't accept the proposition that because these are small businesses they're not really in a position to make returns. I'm afraid life would be very difficult for the Revenue if that was a valid defence in cases of this nature.

So, despite Mr. Dwyer's excellent submissions and urgings, I'm afraid I have to reach the conclusion that there is no arguable defence in this case. And to use the words of the Supreme Court in the *Aer Rianta v. Ryanair* case; 'the defendants

have not shown that they have a fair or reasonable probability for having a defence to either of these claims’, so I must give judgment for the amounts in each case ...”

The issues arising

46. The central issue in these appeals is whether it is open to the appellants to challenge either the factual basis for, or the validity of, the assessments raised by Revenue in October 2014 in the context of Revenue’s application for summary judgment on foot of a summary summons which issued after the time limit provided for the statutory appeal of the assessments had expired and where the summary proceedings have been brought to enforce assessments which became “final and conclusive” in the absence of any appeal by the appellants to the TAC.

47. Revenue’s position in the High Court, and the position it maintains in these appeals, is that pursuant to s. 933(6)(a) of the 1997 Act, and s.111(2) of the Value Added Tax Consolidation Act 2010, as amended (substituted by the Finance (Tax Appeals) Act 2015, s. 949) it is not open to the appellants to challenge the assessments in a motion for summary judgment in circumstances where the assessments have become final and conclusive.

Discussion

48. Before considering the parties’ arguments, it is apposite at this stage to refer to the relevant statutory provisions at issue in the proceedings.

49. Section 933 of the 1997 Act provides, in relevant part:

“933(1) (a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as “other officer”) shall be entitled to appeal to the Appeal Commissioners on giving, within

30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.

...

(6) (a) In default of notice of appeal by a person to whom notice of assessment has been given, the assessment made on that person shall be final and conclusive.”

50. A late appeal is possible pursuant to s.933(7)(a) of the 1997 Act but that procedure must, in effect, be invoked within twelve months after the date of the Notice of Assessment. Outside of this provision, a further appeal may be permitted pursuant to the provisions of s.933(7)(d), but only where the intending appellant lodges an appropriate return and pays the full amount of the tax and interest due.

51. Section 111(2)(a) of the 2010 Act provides that where a notice of assessment is served under s.111(1) the taxpayer may, if he or she claims the amount due is excessive, appeal to the Appeal Commissioners on giving notice to Revenue within twenty one days of the service of the notice of assessment. Section 111(2)(b) provides that on the expiry of the requisite notice period, if, *inter alia*, no notice of appeal is received, the amount due “shall become due and payable”.

52. The import of the relevant statutory provisions means that the appellants had 30 and/or 21 days to appeal to the TAC, in default of which the assessments became “final and conclusive” or “due and payable”, as the case may be. After the expiry of the appeal periods, their option was to make a late appeal within 12 months after the date of the notices of assessment, or, failing that, appeal by way of making the appropriate return with the full amount of tax and interest due to be paid.

53. The relevant legislation provides for an appeal to the High Court on a point of law from the decision of the TAC. Moreover, at the time the assessments in issue here were raised, the tax codes provided for a full appeal from a decision of the Appeal

Commissioners to the Circuit Court and from there to the High Court and Court of Appeal/Supreme Court on a point of law. The appeal from the Appeal Commissioners to the Circuit Court was removed with effect from 21 March 2016. As Revenue points out, however, the option of an appeal to the Circuit Court was open to the appellants (as well as an appeal to the High Court on a point of law) had they appealed their October 2014 assessments to Appeal Commissioners, and in the event that they were dissatisfied with the outcome of those appeals.

54. As matters stand, Revenue maintains that the option of an appeal to TAC, and thereafter an appeal to the High Court on a point of law, remains open to the appellants once they satisfy the requirements of s. 933(7)(d) of the 1997 Act.

55. Revenue's principal contention in these appeals is that the authorities make clear that it is not open to a taxpayer who fails to avail of the extensive statutory appeals process to seek to challenge the basis and /or the validity of an assessment in the context of proceedings for summary judgment. Revenue contends that the appellants fall within the purview of this jurisprudence.

56. On the other hand, the first appellant maintains that he should be allowed to defend the summary proceedings on the basis, *inter alia*, that the factual backdrop of the subject assessments (namely the audit which Revenue claims took place) did not occur. Moreover, he contends that leave should also be given to defend the proceedings on the basis that an officer of Revenue promised to supply the first appellant with evidence as to the occurrence of the audit which, it is submitted, gave rise to a legitimate expectation that no enforcement would occur until such time as promised documentation had been furnished. The second appellant maintains she is entitled to defend the proceedings on the basis that she cannot ascertain the basis for the assessments levied on her.

57. The appellants also maintain that the circumstances of their cases are such that neither an appeal to the TAC nor judicial review afford them an appropriate or sufficient or adequate remedy and that the absolutist position of an appeal to TAC or judicial review, or nothing at all, lacks mutuality/equality of arms, in circumstances where the Revenue is entitled to seek summary judgment but where the taxpayer is denied the opportunity to raise an arguable defence to same.

58. In their written and oral submissions to this Court, the appellants outline a number of bases upon which they rest their argument that they have a arguable defence to the proceedings that Revenue have instituted against them. They will be addressed in due course.

59. It should be observed, at this juncture, that there is no dispute between the parties as to the principles to be applied by a court on an application for liberty to enter final judgment in summary proceedings. As noted by Clarke J. (as he then was) in *I.B.R.C. Limited v. McCaughey* [2014] I.R. 749, the underlying test for summary judgment applications was distilled by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 to the following proposition, “*is it ‘very clear’ that the defendant has no case?*”.

60. The overall principles to be applied are succinctly enumerated in the judgment of McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, at p. 7:

- “(i) *The power to grant summary judgment should be exercised with discernible caution,*
- (ii) *In deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,*
- (iii) *In so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf*

of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence,

- (iv) Where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,*
- (v) Where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure,*
- (vi) Where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues,*
- (vii) The test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", - which latter phrase I would take as having as against the former an equivalence of both meaning and result,*
- (viii) This test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,*
- (ix) Leave to defend should be granted unless it is very clear that there is no defence,*
- (x) Leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action,*
- (xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally,*

(xii) *The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave to defend, as the case may be.*”

61. In *McGrath v. O’Driscoll* [2006] IEHC 195, [2007] 1 I.L.R.N. 203, Clarke J. echoed McKechnie J.’s view that questions of law, where the issues arise are relatively straight forward, and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment, may, where appropriate, be resolved on a motion for summary judgment, a view endorsed by Denham J. in *Danske Bank v. Durkan New Homes* [2010] IESC 22.

62. In *McCaughey*, Clarke J. elaborated on the concept of a credible defence, at paras. 22 and 23. He stated:

“It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in Aer Rianta c.p.t. v. Ryanair Limited [2001] 4 I.R. 607 be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in McGrath v. O’Driscoll [2008] IEHC 197, [2007] 1 ILRM 203, the court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from Danske Bank v. Durkan New Homes [2010] IESC 22 (Unreported, Supreme Court 22nd April 2010).

*Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607. it needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant.”*

63. In the within appeal, in summary, what is advanced by the first appellant by way of arguable defence is as follows:

- Revenue did not comply with the four-year time limit on the raising of assessments;
- Revenue acted in breach of the Code of Practice for Revenue Auditors (“the CPRA”) and/or the RCSC;
- The assessment is invalid because no audit was ever conducted by Revenue;
- The failure of Revenue to provide promised documentation rendered it impossible to discern the basis of the assessments and, thus, rendered nugatory the statutory appeals process;

- A tax clearance certificate which issued on 20 May 2010 rendered the assessments invalid or unenforceable because the certificate had not been formally rescinded. (In truth, this latter defence was not pressed by counsel for the appellants).

64. The second appellant's position is that she should be granted a plenary hearing because she could not ascertain from the assessments raised in respect of her the basis for such assessments.

65. As I have already observed, the fundamental issue to be decided in these appeals is whether the trial judge erred in finding that there was no arguable defence in the within proceedings because the assessments had been rendered "final and conclusive" by reason of the appellants' failure to challenge their respective assessments through the statutory appeal mechanism provided for in the relevant legislation and, insofar as they asserted that the assessments were invalid, their failure to challenge the assessments by way of judicial review, which the trial judge opined would have been the appropriate remedy in such circumstances.

66. In concluding as he did, Noonan J. relied on a number of authorities, including the judgments of the High Court and the Supreme Court in *Deighan v. Hearne* ([1986] IR 603 and [1990] 1 IR 499) and the decision of the High Court in *Gladney v. Di Murro* [2017] IEHC 100.

67. In *Deighan*, the assessments in question had been made under a "default procedure" whereby if a taxpayer failed to deliver a return, the tax inspector was entitled to make an assessment according to the inspector's best judgment. Under the relevant legislation (the Income Tax Act 1967 ("the 1967 Act")), as here, the taxpayer was entitled to appeal to the (then) Appeal Commissioners with 30 days of the notice of assessment. In default of an appeal, the assessments became "final and conclusive" by virtue of s.416(6) (a) of the 1967

Act. The procedure for collection by the Collector General in *Deighan* (as provided for in the legislation) was to issue a certificate to the County Sheriff in respect of the sums assessed. The County Sheriff then sought to collect the sum. The plaintiff/taxpayer sought to challenge the assessment *inter alia* on the basis that they were invalid and on constitutional grounds. In the High Court, Murphy J. held, *inter alia*, that the fact that the assessment became “final and conclusive” in accordance with the relevant provision of the 1967 Act was not a direct consequence of the assessment made by the inspector “*but the failure of the taxpayer to dispute the assessment*”. He stated:

“To the extent that the taxpayer may be precluded from disputing the assessment, this restriction takes effect as something more akin to a statutory estoppel resulting from the inaction of the taxpayer than a judicial order or decree purporting to have been made by the Inspector.”

68. The plaintiff/taxpayer had also argued that the final and conclusive nature of the assessment denied him a right of access to the courts. Murphy J. addressed this argument in the following terms:

“The short answer to the argument based on this proposition is that so long as there is a valid and effective determination of the tax payable by the plaintiff there is no justiciable issue to refer to the court. ... While... as the Constitution very clearly provides... the High Court is invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, the court has an inherent jurisdiction to decline to entertain certain issues where legislation has provided other suitable and appropriate machinery to resolve them. It seems to me, therefore, whilst accepting that the High Court does indeed possess the jurisdiction to determine in the event of controversy the liability of a citizen to tax that this is not a jurisdiction which the courts would exercise save in the most exceptional

circumstances as long as long as legislation provided a constitutional procedure competently staffed and efficiently operated to carry out that unpopular but very necessary task.” (at pp.147-148)

69. In the Supreme Court, in upholding the constitutionality of the statutory provisions in issue, Finlay C.J. held that the exercise by the inspector of his powers under the 1967 Act was not the administration of justice “[t]here being no justiciable controversy between the taxpayer and the Revenue Commissioners”. This was in circumstances where the assessment had become final and conclusive by reason of failure to appeal. Moreover, Finlay C.J. was satisfied that:

“...having regard to the right of the taxpayer to appeal against an assessment and his right, if an assessment were made ultra vires the powers vested in the Inspector or upon the basis of an arbitrary or capricious premise, to challenge that by way of judicial review, the power vested in the Inspector to make an assessment and, if no appeal is brought against that, the subsequent provisions that it should then become final and conclusive do not vest in the Inspector powers which can be considered unjustly harsh nor does it constitute any failure to protect the rights of the taxpayer.” (at p.504)

70. In *Deighan*, the plaintiff had also appealed the decision of the High Court declining to try as an issue of fact whether for the periods in respect of which assessments were made on the plaintiff he had been carrying on the business of a furniture wholesaler Finlay C.J. addressed this ground of appeal, as follows:

“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 that this ground of appeal must fail.” (at p. 506)

71. *Deighan* was followed in *Gladney v. Di Murro* (a case also relied on by the trial judge in the within proceedings). In *Di Murro*, assessments as to income tax were raised by Revenue and no appeal was lodged by the defendant/taxpayer to the TAC. Thus, after thirty days of the assessment, the provisions of s.933(6)(a) came into play making the sum assessed a final and conclusive liability. The other statutory appeal provisions, as provided for in s.933(7), were not invoked. In the High Court, in the context of Revenue having applied to enter final judgment, the central point made by the defendant/taxpayer was that the provisions of Order 37 RSC applied to Revenue in precisely the same manner as they

apply to all other summary claims and that since the defendant had raised arguable grounds of defence to Revenue's claim, the matter should be referred to plenary hearing in accordance with the principles applicable to determining applications for summary judgment. Revenue's response to that argument was that the substantive provisions of the tax code meant that any matters of defence to the assessments that had been raised by Revenue were required to be dealt with solely within the specified statutory mechanism.

72. Hunt J. addressed the arguments advanced by stating that in his opinion, *"the scope of the matters that may properly be raised by the taxpayer outside the statutory appeal procedure in Revenue matters has been conclusively determined by the decision of the Supreme Court in Deighan v. Hearne & Ors. [1990] 1 I.R. 499"* and citing the dicta of both Murphy J. in the High Court and Finlay C.J. in the Supreme Court (as quoted above).

73. Hunt J. was of the view that the taxpayer was attempting to do *"precisely that which was found to be impermissible by the Supreme Court [in Deighan]"*. He found that the points of defence raised by the defendant such as to the form of the assessment, the timing thereof, and the correctness of the sum would require findings of fact and thus *"lie squarely within the limitation identified by the Supreme Court [in Deighan] and may only be raised on appeal to the specialist tribunal constituted for that purpose, or to the courts where available."* In so far as issues raised might also involve the determination of legal or jurisdictional questions relating to the assessment, *"the appropriate channel remains the specialist tribunal, or alternatively the jurisdiction of the High Court on judicial review."*

74. He went on to state:

"23. Likewise, the desire of the defendant to ascertain the precise basis of the assessment through use of the discovery process does not give rise to a permissible ground of defence in a case of this kind. The observations of Gilligan J. in T.J. v. The Criminal Assets Bureau [2008] IEHC 168 are relevant in this respect. He

noted that the whole basis of the Irish taxation system is developed on the premise of self-assessment, and that the whole basis of self-assessment would be undermined if, having made a return which is not accepted by the Revenue, a taxpayer was entitled to access all relevant information that was available to the Revenue. He noted that the Revenue were only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. A person subject to such an assessment has the right of an appeal to the Appeal Commissioners, the right to a further appeal to the Circuit Court, the right to a further appeal on a point of law to the High Court, and from there to the Supreme Court. To this list may be added the availability of judicial review against any actions of the Revenue or the Appeal Commissioners which are capable of engaging that remedy, and the ability of the Appeal Commissioners to state a case to deal with any legal complexities that may arise.

24. The observation of Gilligan J. to the effect that nobody is better placed than the taxpayer himself to know what income was received or what gains were made is particularly applicable to the position of the defendant in this case. I can see no practical reason why the defendant could not attempt to discharge the burden of proving that the assessed tax is not payable in a hearing before the Appeal Commissioners.

25. The Oireachtas has determined that such factual disputes ought to be determined through the extensive appellate procedure described by Gilligan J., and in my view it is not in the public interest that disgruntled recipients of assessments

should be permitted to delay contesting matters of dispute pertaining to either the existence or extent of a liability to tax until the point where the Revenue has moved to enforcement procedures, well after the expiry of the initial appeal time limits. On the contrary, it is in the public interest that such matters should be dealt with as stipulated by statute, rather than consuming scarce time and resources being litigated in court. The defendant still has the option of proceeding with an appeal, subject to fulfilling the conditions required to permit an appeal at this late stage.”

75. In *Di Murro*, the taxpayer had relied on the decision of O’Higgins J. in *Criminal Assets Bureau v. Matthew Kelly* [2000] 1 ILRM 271 where leave was given to defend both on the basis that Revenue had intimated to the taxpayer’s advisor that there was no need to appeal an assessment whilst negotiations were in progress and on a legal issue relating to the vesting of property in the bankruptcy assignee. Hunt J. did not regard that decision as having strong binding effect given the circumstances of that case and the absence of any reference to *Deighan* in the decision.

76. Ultimately, in *Di Murro*, Hunt J. concluded:

*“29. I agree with the submission of the plaintiff that to permit a parallel system of litigation in relation to matters such as this would be to seriously undermine or set at nought the appeal procedure prescribed by the Act. Consequently, although some or all of the matters relied upon by the defendant may be arguable in the appropriate context, I am satisfied that application of the reasoning approved in *Deighan* has the effect that such issues may not be litigated in the current proceedings. In effect, an assessment to income tax must be challenged either by judicial review or appeal. There is no ‘second bite’ available in summary proceedings to a taxpayer who has neglected or refused to utilise the appropriate mechanisms to dispute an assessment to tax. In most other contested debt cases,*

court proceedings are the first opportunity for the defendant to identify arguable defences to claim for payment. That is not the position in Revenue assessment cases, and this difference constitutes the rationale for adopting a different and limited approach to the defence of summary claims in such matters.” (at para. 29)

77. The approach of Hunt J. in *Di Murro* has been endorsed by Birmingham P. in *Gladney v. Forte* [2019] IECA 228. There, the proceedings arose on foot of a Revenue audit following which an assessment issued. The taxpayers in question did not participate in the audit or the assessment. Nor did they appeal to the Revenue Commissioners. In an interim judgment delivered on 16 March 2017 following Revenue’s application for summary judgment, the High Court (Barrett J.) invited Revenue to take instructions as to whether it would consider undertaking a further special audit in light of what Barrett J. considered was the genuine confusion on the part of the defendants/taxpayers (who were unrepresented) as to the availability of a remedy through the courts in the event that they elected not to proceed with an appeal to the Appeal Commissioners. Barrett J. also queried whether Revenue would be satisfied for the court to remit the matter to the Appeals Commissioner for a fresh determination as to liability or whether Revenue would suggest some other means of advancing matters in light of Barrett J.’s particular concerns. Revenue’s response was to assert that they were entitled by statute to summary judgment, relying on *Deighan* and *Di Murro*.

78. Ultimately, notwithstanding Barrett J.’s considerable sympathy for the defendant/taxpayers in that they may have laboured under a misapprehension as to what was expected of them, he nevertheless went on determine that the low threshold identified by the Supreme Court in *Aer Rianta v. Ryanair* for sending the matter to plenary hearing had not been met in the case.

79. The defendants duly appealed to this Court, advancing some thirty-five grounds of appeal, including a challenge to the validity of the estimated notice of assessment and the statutory mechanism governing such notices and appeals therefrom and the High Court's refusal to consider their motion in relation to discovery, estoppel and other miscellaneous reliefs.

80. In relation to the challenge to the validity of the estimated notice of assessment, Birmingham P. (writing for the Court) held as follows:

“So far as the question of validity of the estimated Notice of Assessment is concerned, I agree with the High Court Judge that the statutory scheme is clear and has been since at least Duignan (sic) v. Hearne in 1990. The issue was readdressed in recent times by Hunt J. in Gladney v. DiMurrio (sic) and his observations therein, which are entirely non-controversial, have not lost their force by reason of the fact that a settlement was arrived at on appeal.” (at para. 10)

81. There have, however, been instances where the courts have permitted matters to be remitted to plenary hearing notwithstanding that the taxpayer has not invoked the statutory appeals mechanism. In *Irwin v. Grimes* (Unreported, High Court, Carroll J., 27 July 1995), [1995] 7 JIC 2704, a claim for income tax based on an assessment raised was permitted to go to plenary hearing on the basis that the defendant/ taxpayer had raised an arguable defence that he was non-resident in the jurisdiction during the relevant period. As observed by Hunt J. in *Di Murro*, in *Criminal Assets Bureau v. Kelly* [2000] ILRM 271, O'Higgins J. remitted a factual dispute to plenary hearing on the basis that the taxpayer's advisors had been told that there was no need to appeal whilst negotiations were under way. It was also argued in *Kelly* that profits generated by the defendant were not his in the sense that they had vested in the Official Assignee pursuant to the provisions of the Bankruptcy and Insolvency Act 1857, the defendant having been adjudicated bankrupt at the relevant time.

O'Higgins J. held that it was arguable that the defendant was not a chargeable person within the meaning of s.52 of the 1997 Act.

82. In *Gladney v. Lambe* [2014] IEHC 350, Barton J. permitted the question of whether certain letters written by the defendant constituted valid notices of appeal within the meaning of s.957(4) of the 1997 Act to go to plenary hearing, stating:

“As the question for determination here is a mixed question of fact and law and as I am not satisfied that fuller argument and greater thought is evidently not required for the better determination of the issues involved and that in the circumstances of this case it is both desirable and appropriate that these be determined in the context of a plenary hearing rather than on an application for liberty to enter final judgment”. (at para. 31)

The appellants’ contention that the trial judge’s reliance on Deighan and Di Murro was in error

83. What the appellants contend is that the trial judge erred in finding that they were debarred from raising their arguable defence points in respect of the assessments by virtue of the fact that they had not availed of the statutory appeal mechanisms provided for in the relevant tax codes. In essence, the appellants maintain that the effect of the trial judge’s reliance on *Deighan* and *Di Murro* constituted the ousting of the court’s jurisdiction in applications for summary judgment and, thus, set at naught the principles espoused in *Aer Rianta v. Ryanair, Harrisrange* and *McCaughey*. In particular, counsel for the appellants relies on the *dictum* of Clarke J. in *McCaughey* that, where facts are put forward, “...[t]he court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be” (at para. 23). Counsel points to the fact that the

first appellant, on affidavit, has averred that the audit relied on by Revenue did not happen. He submits that the trial judge ought properly to have accepted the first appellant's assertion in this regard and remitted the matter to plenary hearing.

84. It is contended that far too much has been extracted from the ratio in *Deighan* by subsequent courts when dealing with applications by Revenue for summary judgment. Counsel submits that when one looks carefully at *Deighan*, the case did not concern motions for summary judgment by Revenue, rather it concerned a certification process whereby Revenue sent a certificate to the County Sheriff who sought then to collect the sum assessed *via* an execution process. Counsel further points out, in his written submissions, that the assessment in *Deighan* had been made under a "default procedure" whereby when the taxpayer had failed to deliver a return, the tax inspector was entitled to make an assessment according to the inspector's best judgment. Thereafter, pursuant to the relevant statutory provisions in *Deighan*, in default of an appeal the assessment became final and conclusive. Counsel submits that in the instant cases, the assessments made were not in default of delivery of a return but rather, according to Revenue, consequent upon the carrying out of an audit (albeit the appellants deny that an audit was in fact carried out).

85. Counsel's core submission is that the interpretation ascribed by later courts to *Deighan* as strictly limiting the form of any challenge to a Revenue assessment of taxes to either (i) an appeal to the TAC or (ii) a challenge by way of judicial review to the validity of the assessment, is wrong in law. It is contended that *Di Murro* and *Forte* were wrongly decided. Counsel emphasises that he is not challenging the actual decision in *Deighan* itself, rather it is the understanding derived from *Deighan*, as applied in *Di Murro* and *Forte*, that is under challenge by the appellants. He argues that, fundamentally, it cannot be taken from *Deighan* that on a motion for summary judgment, the High Court has to decline its inherent jurisdiction in summary judgment applications or ignore the principles

upon which that jurisdiction is exercised as set out in *Aer Rianta v. Ryanair, Harrisrange* and *McCaughey*.

86. It is submitted that this is particularly so in circumstances where the High Court's inherent jurisdiction in summary judgment matters was not actually engaged in *Deighan*, and where the High Court, in *Deighan*, expressly acknowledged that a court can review an assessment that is final and conclusive in exceptional circumstances. Accordingly, it is argued that the ratio in *Deighan* cannot be utilised to bar judicial consideration of challenges made to assessments in summary judgment applications. It is further submitted that if the Supreme Court in *Deighan* had intended that the High Court should disregard its own summary judgment jurisdiction, it would have expressly said how and when such jurisdiction could be disregarded.

87. It is for all of the reasons set out above that counsel for the appellants contends that in *Di Murro*, Hunt J. fell into error in finding that “*the scope of the matters that may properly be raised by the taxpayer outside the statutory appeal procedure in Revenue matters has been conclusively determined... in Deighan...*”. It is asserted that in so concluding, Hunt J. wrongly set aside the jurisdiction of the High Court in summary judgment applications in Revenue matters and that Hunt J. erroneously concluded that there was no “*second bite*” available in summary proceedings to a taxpayer who had neglected or refused to utilise the appropriate mechanism to dispute an assessment of tax. It is in those circumstances that counsel requests the Court to depart from its decision in *Forte* insofar as it adopted the reasoning of Hunt J. in *Di Murro*.

88. Revenue's fundamental contention is that the issues which the appellants now assert constitute an arguable defence are matters that could have been raised by them before TAC, including the first appellant's contention that no audit was ever conducted, even were it the case (which Revenue denies) that a concluded audit was a precondition to the

raising of the assessments. It is submitted that what the appellants are in effect trying to do is challenge the assessments in a forum that is outside of the statutory appellate procedure provided for in the tax codes, a course of action which Revenue submits is not open to the appellants. Moreover, insofar as the appellants contend that the assessments were not validly raised, Revenue's position is that an argument of that ilk is a classic matter for determination by way of application for judicial review an avenue, however, that was not availed of by the appellants.

89. Counsel for Revenue further points to the fact that the core argument advanced by the appellants in the High Court in respect of the assessments was not that they did not owe tax, rather it was that they did not know the basis upon which the assessments were raised. In particular, the fundamental submission advanced on the part of the first appellant was that Revenue was estopped from pursuing him, not that a tax liability *per se* did not arise.

90. Furthermore, by way of preliminary objection, Revenue takes issue with the appellants raising arguments in this Court which were not advanced before the High Court.

91. It is a fact that the case now being made in the within appeal has been considerably expanded compared to the arguments advanced before the trial judge. As correctly observed by counsel for Revenue, in the court below, the focus of the appellants' arguments was on alleged breaches of the Revenue's Codes of Practice, in particular its failure to provide the first appellant with information said by the first appellant to have been promised by Revenue such that a breach of the appellants' legitimate expectation arose. It was asserted to the trial judge that it was the provision of the promised documentation that would have enabled the appellants to avail of the statutory appeal mechanisms.

92. The primary focus of the appellants' arguments in this Court is that insofar as the trial judge considered himself bound by *Deighan* and *Di Murro*, the law fails to provide

them with a constitutionally adequate, appropriate and effective remedy. It is asserted that the trial judge has erroneously interpreted *Deighan* and *Di Murro* as authority for the proposition that a Revenue assessment may only ever be challenged by way an appeal to the TAC or judicial review.

93. I note that, in the court below, unlike the argument that is now being made to this Court, the case was not made to the trial judge that he should not accept what counsel for Revenue asserted was the import of *Deighan*. Nor was the argument advanced that Hunt J., in *Di Murro*, had erroneously applied *Deighan* to applications for summary judgment thereby resulting in the ouster of the inherent jurisdiction of the High Court in summary judgment matters.

94. There is well established authority to the effect that the Court should not hear and determine an issue which has not been tried and decided by the High Court. Of course, as observed by Finlay C.J. in *K.D. v. M.C.* [1985] IR 697, “*to that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice...*”. (at p. 701)

95. The principles applicable to the exercise by an appellate court of its entitlement to entertain, on appeal, a point not argued at first instance are authoritatively set out by O’Donnell J. in *Lough Swilly Shellfish Growers Co-op Society Limited v. Bradley* [2013] 1 I.R. 227. He stated:

“There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K. D. (otherwise C.) v. M.C. [1985] I.R.697 for example); or where a party seeks to make an argument which was actually abandoned in the High Court... or, for example where a party sought to make an argument which

was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made". (at para. 28)

96. Notwithstanding that the very specific argument now sought to be made by counsel for the appellants was not one that was advanced before the High Court, I am satisfied that given that both *Deighan* and *Di Murro* were cited to the trial judge, the appellants' argument can be viewed as being in the nature of a refinement of the arguments already made in the High Court. Furthermore, and in any event, the evaluation by this Court of the argument as to whether the approach of the trial judge here amounted to an ouster of the inherent jurisdiction of the court in summary judgment matters does not require and is not in any way dependent upon the advancement of evidence. Accordingly, since no prejudice can be said to arise to Revenue, I am satisfied that the argument which counsel for the appellants seeks to make falls (perhaps just about) within the proper end of the spectrum referred to by O'Donnell J. in *Lough Swilly*.

97. I turn, therefore, to the question of whether the trial judge's refusal to remit the cases to plenary hearing was based on an erroneous reliance on *Deighan* and *Di Murro*.

98. I am not persuaded by the appellants' submission that the trial judge erred or that he somehow failed to exercise his inherent jurisdiction in determining the applications for summary judgment. The fact that the appellants were found to be precluded from challenging the figures arrived at in the assessments does not equate to the summary judgment jurisdiction of the High Court having been set at nought, or that the appellants have been deprived of an appropriate or effective opportunity to litigate their grievances. The trial judge's determination, in the first instance, was made in the context of the appellants' failure to appeal the assessments and the legal consequence that arose as a result, namely that the assessments were rendered "final and conclusive". As said by Murray J. in *Deighan*, "*the court has an inherent jurisdiction to decline to entertain certain issues where legislation has prescribed other suitable and appropriate machinery to resolve them*". (at para. 47) To my mind, this *dictum* is as apt to the within cases as it was to the circumstances which arose in *Deighan*.

99. I cannot accept the appellants' contention that what is at issue in the present case is not on par with *Deighan*. In *Deighan*, the certification process pursuant to the 1967 Act became final and conclusive in the absence of an appeal. As we have seen, the Supreme Court found the 1967 Act to be constitutional. The statutory provisions in issue in the within proceedings are analogous to those in issue in *Deighan*. Moreover, they are the self-same statutory provisions that were in issue in *Di Murro* and *Forte* and in respect of which Hunt J. and Birmingham P. (who unambiguously endorsed the approach of Hunt J.), respectively, found the ratio in *Deighan* was applicable.

100. While it is the case that the relevant statutory codes in issue here, by precluding a challenge to an assessment which has been deemed "final and conclusive", have eliminated a certain defence that might otherwise have been available to the appellants in the within applications for summary judgment, that, however, has not been done in a vacuum. The bar

to being able to challenge the assessments at enforcement stage arises in circumstances where the self-same statutory codes make extensive provision for a statutory appeal to the TAC from the assessments, and thereafter make provision for an appeal on a point of law to the High Court, with a further right of appeal to this Court. In those circumstances, it is not sufficient for the appellants to seek to distinguish their circumstances from *Deighan* by pointing out that the decision in *Deighan* did not emanate from an application by Revenue for summary judgment.

101. I am also satisfied that the appellants' argument that the approach of the trial judge amounted to an abdication of the inherent jurisdiction of the courts in summary judgment applications is without merit. The fact that, in arriving at his decision, the trial judge took account of specific statutory provisions which removed a defence which the appellants might otherwise have had does not, in my view, equate to a disregard by the trial judge of the court's inherent jurisdiction. In exercising that very jurisdiction in the within applications for summary judgments, the trial judge was entitled to arrive at the decision he did, absent any other factor or factors arising in the evidence and/or the submissions of the appellants such that, applying the principles enunciated by McKechnie J. in *Harrisrange*, might otherwise have impelled the trial judge to remit the cases to plenary hearing. Clearly, the trial judge did not find factors arose such as those that arose, for example, in *Irwin v. Grimes* and *Gladney v. Lambe*.

102. Insofar as the appellants rely on *Irwin v. Grimes* as an example of a case which was permitted to go to plenary hearing, the first thing to be observed is that the basis upon which it was remitted did not concern the issue of the "final and conclusive" nature of assessments raised in the absence of recourse to the appeal mechanisms set out in the relevant tax codes (the issue which is germane to the within appeals), but rather whether

the defendant could be said to be subject to the tax codes at all based on his contention that he was resident outside of the jurisdiction at the relevant time period.

103. It is undoubtedly the case that the “final and conclusive” nature of an assessment for tax was sought to be relied on by Revenue in *Gladney v. Lambe*, a case which Barton J. permitted to go to plenary hearing. The “arguable case” basis was whether certain letters constituted valid notices of appeal of assessments within the meaning of s.957(4) of the 1997 Act, as was contended by the defendant. If the resolution of that issue went in favour of the defendant/taxpayer, that would offer her a complete defence to the summary summons proceedings since her statutory appeal would then be considered pending and, indeed, any decision of the Appeal Commissioners, would itself, thereafter, be capable of an appeal (then extant) to the Circuit Court and thereafter capable of being the subject of a case stated to the High Court, as the law then stood. Thus, in *Gladney v. Lambe*, the live controversy which required to be determined as a matter of fact and law was whether the defendant/taxpayer had actually availed of the statutory appeals procedure. That was the pivot on which the matter was remitted to plenary hearing. In the instant cases, that is not the position as there is no dispute but that the statutory appeal mechanism was not availed of by the appellants.

104. It is, I believe significant that at all relevant times, the first appellant was aware of Revenue’s intention to raise assessments in respect of the tax year 2007. In this regard, Revenue wrote to the first appellant’s accountant, Mr. Walsh, on 4 July 2014 in respect of the proposed assessments for income tax and VAT to be raised on the first appellant. When the assessments were duly raised in October 2014, the notices of assessment apprised the first appellant of his entitlement to review those assessments within thirty days. The notices of assessment in respect of the second appellant were sent to her on 8 and 14 October 2014 and copies were also sent to her agent. She too was advised that she could

appeal the assessments to the TAC. Furthermore, documentation put before the Court shows that as late as 11 November 2016, at a meeting which both appellants attended, they were reminded by Revenue that they had been told at various times that they could appeal the assessments of October 2014 or indeed make a late appeal. Accepting, however, that the appellants in their affidavits sworn, respectively, on 8 March 2018, deny that they were so advised, it is the case that in his affidavit, the first appellant accepts that he was verbally advised of his right to appeal on 18 June 2016.

105. Insofar as the second appellant claims she could not mount her statutory appeal without knowing the basis of the assessments raised with respect to her, it is, I believe, noteworthy that on 7 October 2016 she was provided with a summary statement for the tax year in issue (2008). I also note that there was no formal request made by her for any further information regarding her assessment until after the commencement of the summary proceeding, albeit she exhibits in her first affidavit a letter written by her solicitors to Revenue on 7 December 2016 raising queries in respect of the assessment raised on the first appellant for the tax year 2007.

106. As to the availability to the appellants of the statutory appeals mechanism including the facility for a late appeal, and in circumstances where, at the relevant times, both appellants had tax advisors (and, latterly, solicitors acting on their behalf) I consider the words of Hunt J. (echoing the *dictum* of Gilligan J. in *T.J. v. The Criminal Assets Bureau* [2008] IEHC 168) in *DiMurro* apposite:

“...nobody is better placed than the taxpayer himself to know what income was received or what gains were made is particularly applicable to the position of the defendant in this case. I can see no practical reason why the defendant could not attempt to discharge the burden of proving that the assessed tax is not payable in a hearing before the Appeal Commissioners.” (at para. 24)

107. It is also the case that if at any time the appellants had sought to avail of the provisions of s.933(7)(d) of the 1997 Act and s. 111(2) of the 2010 Act, the High Court proceedings (or indeed the within appeals) could have been stayed, yet the appellants chose to wait until Revenue issued its summary summons, and thereafter sought summary judgment, to try and challenge the assessments by then deemed “final and conclusive” and/or “due and payable” by operation of law. I am satisfied that the path upon which the appellants now wish to embark is not open to them, given (i) the provisions of s.933(6)(a) of the 1997 Act and s.111(2)(b) of the 2010 Act; (ii) their failure to avail of the statutory late appeal provisions; (iii) their failure to challenge the validity of the assessments by way of judicial review insofar as they seek to impugn the validity of the assessments in reliance on the absence of an audit (an argument, incidentally, not canvassed in the High Court) or on the basis that an estoppel arises; and (iv) absent “*the most exceptional circumstances*” (per Murphy J. in *Deighan*) such that notwithstanding the “final and conclusive” nature of the assessments, to paraphrase Murphy J. in *Deighan*, the court should determine the liability of a taxpayer to tax outside of the statutory framework.

108. As said by the trial judge, “the Courts do not provide a parallel system of enquiry into the calculation of tax assessments”.

Judicial Review as an inadequate remedy?

109. By way of alternative submission, counsel for the appellants contended that if the Court was satisfied that the assessments in issue in the proceedings could only have been challenged by the appellants *via* a statutory appeal to the TAC, or by way of judicial review if the validity of the assessments was being challenged, then judicial review was not an appropriate mechanism for the appellants in circumstances where the appellants’ challenge to the assessments was merit-based, in particular the first appellant’s contention that no audit was ever conducted by Revenue prior to the assessments being raised, and/or

their contention that the basis for the assessments was not clear. Counsel asserts that for that reason, a plenary hearing, with the right on both sides to adduce oral evidence and avail of cross-examination, is the appropriate forum for the appellants' challenge particularly where they may require discovery.

110. To my mind, the appellants have not advanced any persuasive argument that judicial review would not have been an appropriate remedy. Insofar as they maintain that their contention that no audit took place is an issue of fact and thus unsuitable for judicial review, I am satisfied that that particular argument cannot avail them in light of the *dictum* of Finlay C.J. in *Deighan* to the effect that "*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*". (at para. 26) Thus, the appropriate forum to litigate this factual issue was before the TAC and, if necessary, *via* the further appellate structure provided for in the relevant legislation. Furthermore, even taking the first appellant's claim that his assessments were unlawful because the claimed Revenue audit never in fact took place at its height, in my view, this is an argument eminently suitable for judicial review since the lawful basis of the assessments is being impugned. In this case, the trial judge had ample authority, from *Deighan* and *Di Murro*, to conclude that if the validity of the assessments was being put in issue, the jurisdiction of the High Court on judicial review should have been invoked.

The alleged inappropriateness of an appeal to the TAC

111. The appellants otherwise contend that in the circumstances of their cases, where the issue (their claim that no audit took place) they raise goes to the validity of the assessments, an appeal to the TAC could never have been appropriate. In aid of his argument in this regard, counsel relied on the *dictum* of Barron J. in *The State (Calcul International Limited) v. The Appeal Commissioners* (Unreported, High Court, 18

December 1986), [1986] JIC 1802 to the effect that the essential function of the Appeal Commissioners “*is to decide whether the assessment raised by the Tax Inspector should be reduced or increased*” and, therefore, by implication, the Appeal Commissioners have no function where the validity of the assessments is in question. Counsel further relied on the *dictum* of Peart J. in *Stanley v. Revenue Commissioners* [2017] IECA 279. There, Peart J. opined, at paras. 33-34:

“The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.

A lawful assessment is a pre-requisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment. As the appellant has submitted, it is only where the notice is a valid notice of assessment that the issues of quantum of tax fall to be determined by the Appeal Commissioners on appeal. Where as in this case the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to seek to have that issue determined by way of the present judicial review proceedings...”

112. Before commenting on the appellants’ reliance on the aforesaid jurisprudence, the first thing to be observed is that an appeal to the TAC could have set the appellants’ tax liability at nought, were they to prevail before the TAC in any argument to the effect that they had no tax liability to Revenue. As said in *The State (Whelan) v. Smidic* [1938] ITR 571, [1938] IR 626 in relation to the powers of Appeal Commissioners (then Special

Commissioners), those powers include an order directing (1), that the assessment shall abate altogether, or (2), that it be varied by increasing or diminishing it to a definite amount to be fixed by them, or (3), that the appeal be dismissed, in which event the original assessment stands good.

113. Incidentally, from their submissions in the High Court, it does not appear, at first blush, that the appellants' objective was a nil tax assessment, but insofar as that might have been their objective, the powers of the TAC include, as we have seen, the power to direct that the assessment would be abated.

114. That observation aside, again, taking the appellants' contention that the assessments were not validly entered into at its height, that, to my mind, is not, at this remove, an arguable basis upon which to permit the appellants to go to plenary hearing in these cases since, as I have already observed, any challenge to the validity of the assessments is more properly to be made by way of judicial review if the validity of the assessment is to be impugned. The appellants have chosen not to avail of judicial review.

115. Insofar as the appellants, in aid of their submission that an appeal to the TAC would not have been the appropriate forum through which to vent their challenge to the assessments, rely on the *dictum* of Peart J. in *Stanley*, it must be observed that *Stanley* in fact concerned *judicial review* proceedings which were initiated by the taxpayer challenging the validity of the assessments raised. There, Peart J. accepted the entitlement of the taxpayer to utilise judicial review for such purpose. Here, however, in my view, the appellants cannot hold up the decision in *Stanley* as somehow bolstering their entitlement to challenge (by way of plenary hearing of Revenue's enforcement proceedings) the validity of the assessments levied on them in circumstances where they have not sought judicial review. They cannot, *willy nilly*, cry foul *vis-a-vis* the assessments and assert that an appeal to the TAC would have been inappropriate, in circumstances where they

themselves did not use the appropriate avenue (judicial review) to challenge the validity of the assessments.

Alleged breach of the RCSC and the CRRA

116. In the court below, the trial judge described the appellants' submissions that they could not exercise their statutory right of appeal because of their uncertainty at what transpired at meetings, and their assertion that promised documents had not been supplied by Revenue, as "a legal issue arising on foot of the Revenue Charter, which has clearly been held by the Supreme Court to have legal effect".

117. However, as we have seen, the trial judge determined that the appellants' assertion that the relevant Codes of Practice were breached was not a basis for remittal to plenary hearing in circumstances where they had bypassed the statutory appellate machinery and where the alleged invalidity of the assessments (i.e. the appellants contending that no audit took place) had not been challenged by way of judicial review.

118. In this Court, counsel for the appellants asserts that the procedures provided for in the relevant Codes of Practice were breached by Revenue including that the audit was not conducted "as quickly as possible". Counsel also points to the fact that the assessments were raised by Revenue some four years after the audit which Revenue asserts occurred.

119. Albeit, as observed by Pilkington J. in *Murphy v. The Revenue Commissioners* [2020] IEHC 295, that neither the RCSC nor the CPRA "*is a legally binding document...[or] constitute a rule of law*", but, for present purposes, accepting the fact (if it be a fact) that Revenue breached the provisions of the RCSC and the CPRA by its failure to provide promised documentation, it seems to me that the alleged failure of Revenue to comply with either the CPRA or the RCSC cannot give rise to a defence to a claim for summary judgment in circumstances where the appellants have not sought to impugn the validity of the assessments by way of judicial review unlike the position in the case (*Keogh*

v. Criminal Assets Bureau [2004] 2 I.R. 159 (at paras. 33-42) upon which the appellants place reliance. Here, the appellants contend both that no audit took place (arguing that the audit was a precondition for the raising of the assessments), and that they had a legitimate expectation of receiving certain documents. They say that their legitimate expectation became the fulcrum upon which they chose to await certain expected actions of Revenue rather than seeking to appeal their respective assessments to the TAC. As is by now well-rehearsed in this judgment, all of the foregoing arguments were matters that should have been articulated by way of judicial review.

The alleged failure on the part of Revenue to comply with the time limits provided for in s.955 of the 1997 Act

120. The appellants submit that they have an arguable defence to the proceedings on the basis that Revenue, when raising the subject assessments, did not comply with the time limit required by s.955 of the 1997 Act. Counsel submits that this is precisely the type of issue that merits a remittal to plenary hearing. Revenue objects to the appellants advancing this argument on the ground that it was not a matter that was canvassed in the court below, nor was it cited as a ground of appeal in the appellants' Notices of Appeal.

121. In its submissions, Revenue points out that for it to dispute the assertion that the assessments in respect of income tax were raised outside the permitted time limit, it would need to adduce evidence regarding whether or not full and honest returns were made by the appellants in advance of the assessments and, if not, what other circumstance arose which entitled Revenue to raise the assessment more than four years after the chargeable period. Revenue contend that these are issues of fact which it cannot deal with on appeal.

122. I am satisfied that Revenue's objection is well made. The Court cannot ignore the fact that this proposed defence was not set forth in the Notices of Appeal or that the

contention that the requisite time limit was breached was first made in the first appellant's submissions which were delivered some sixteen months late.

123. In the absence of the matter having been raised or litigated in the court below, that the time bar argument is not one that can be made at this late stage. Even taking account of the flexibility which should be afforded to cases where the new arguments are sought to be introduced in the context of an appeal from a summary judgment application, it seems to me that that factor notwithstanding, the Court's discretion should not be exercised in favour of the appellants by allowing them to argue that they have an arguable defence to the summary judgment proceedings on the basis that Revenue did not raise the assessments within the requisite time limit. I so find for the reasons already set out above and having regard to the fact that the appellants were legally represented in the High Court at which they could have raised the time bar issue. In the court below, their arguments in favour of remittal to plenary hearing were on the basis that the assessments raised had not crystallized because information they alleged they had been promised was not provided to them and that Revenue was estopped from raising the assessments by virtue of the fact that the first appellant had obtained a tax clearance certificate after the period for which the assessments were later raised.

124. In all of the circumstances, the time bar issue now sought to be ventilated is at the wrong end of the spectrum to which O'Donnell J. referred in *Lough Swilly Shellfish Growers Co-op Society Limited v. Bradley*.

Summary

125. For the reasons set out in the judgment, I would dismiss the appeals of the first appellant and the second appellant.

126. The appellants have not succeeded in their appeals. Accordingly, it follows that the Revenue should be entitled to its costs. If, however, any of the parties wish to seek a

different costs order to that proposed they should so indicate to the Court of Appeal Office within 21 days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the Orders of the Court, including the proposed costs order, will be drawn and perfected.

127. As this judgment is being delivered electronically, Donnelly J. and Pilkington J. have indicated their agreement therewith and the orders I have proposed.