UNAPPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

Court of Appeal Record Number: 2024/83

Court of Appeal Record Number: 2024/84

Woulfe J. **Neutral Citation Number [2024] IECA 288**

Binchy J.

MacGrath J.

BETWEEN/

JOSEPH HOWLEY

PLAINTIFF/RESPONDENT

-AND-

CECELIA ONYENEMEZU

DEFENDANT/APPELLANT

Judgment of MacGrath J. delivered on the 27th day of November 2024

1. On the 12th February 2024, Barr J. granted summary judgment in favour of the respondent, the Collector General, in two related proceedings concerning the tax liabilities

of the appellant for the years ending December 2015 and December 2016. The first, which is the subject of appeal no. 2024/83, concerns a claim for arrears of PAYE/PRSI (the "PAYE/PRSI proceedings"), in which the trial judge gave judgment in favour of the plaintiff for €225,401.42 plus costs. In the second proceedings, appeal no. 2024/84, judgment was entered in the sum of €150,790.27 plus costs, relating to a claim for income tax arrears for the same years ("the income tax proceedings"). Proceedings in both cases were instituted by way of summary summons following the earlier service of Notices of Estimation of Amounts Due.

2. The main ground of appeal in both cases is that the claims were confused and not properly pleaded in accordance with the requirements of the Rules of the Superior Courts, O. 4, r. 4, as discussed in *Bank of Ireland Mortgage Bank v O'Malley* [2019] IESC 84. The contention of the appellant may be summarised as follows. There are discrepancies between the amounts contained in the Notices of Estimation of Tax Due and the amounts claimed in the summary summons in each case. In the PAYE/PRSI proceedings the total amount claimed in the summons for the years 2015 and 2016 is €225,401.42. For 2015 the amount claimed is €108,112.86, being principal of €98,307.93 and interest of €9,804.36; and for 2016 the amount is €117,288.56, inclusive of interest. In a Notice of Estimation of Income Tax issued on the 28th November 2017, the amount due for 2015 is stated to be €109,333 before interest. In respect of the year ending 2016, the amount in the relevant notice is €106,625. Thus, a discrepancy of €11,025.07 arises in respect of the year 2015. The basis for the appeal is that the trial judge erred in rejecting the appellant's submission that the respondent was not entitled to judgment where no explanations had been given for the discrepancies.

3. The PAYE/PRSI proceedings were grounded on the affidavit of Ms Carmel Wright, an officer with the Revenue Commissioner, and supported by an affidavit sworn on the 8th September 2022 by Ms Fiona O'Carroll, also an officer with the Revenue Commissioner. She avers that, following her review of the relevant books and records, the breakdown in respect of the total due and owing by the plaintiff for PAYE/PRSI and the interest outstanding in respect of each of tax amount was as per the amount claimed in the summary summons. Ms O'Carroll also avers that a letter of demand was issued on the 7th August 2019 in the amount of €98,307.93, and that no payment had been received. The appellant points out that insofar as this might be said to constitute a letter of demand, the description provided in that letter was "*Tax Type*" "*P 35 Inspector"*. On the 12th May 2022, the respondent issued a Notice of Estimates of Income Tax which included a sum for the year 2015 of €52,404.47, whereas the amount subsequently claimed was €52,393.47, a discrepancy of €11. Barr J. noted the discrepancy and observed in his ruling:

> *"One has to live with these things with a degree of reality, rather than coming at it and it's trying to avoid a liability to pay tax or to suffer summary judgment on the basis of a tiny discrepancy which is actually in favour of the taxpayer, of €11."*

Noting that once the assessment had been raised the appellant had a right of appeal which was the time to raise issues of accuracy or miscalculation, Barr J. found that blame fell upon the appellant for not being proactive in making proper returns within the designated period, or in appealing the estimate when furnished. He was not satisfied that the discrepancies provided a basis on which to resist the claim.

4. The appellant relies on the provisions of O. 4, r. 4 RSC and *dicta* in *Bank of Ireland v O'Malley* [2019] IESC 115. She contends:-

"[T]he requirement to calculate, with sufficient particularity, the amount said to be due is fundamental in proceedings brought by the Revenue, given that the proofs required to be exhibited in such proceedings are minimal, as compared to summary proceedings brought by financial institutions. For the present case, the Revenue was required only to exhibit the assessment and the letter of demand.

Despite that, the Revenue failed to explain the discrepancy in the amount sought for 2015 in the assessment and in the summons and as a result, the appellant was not in a position to know specifically the claim being made against her." (paras. 11-12 of written submissions)

5. It is accepted by the respondent that discrepancies exist between the amount claimed in the summary summons and that which had been previously notified to the appellant. The amount claimed in the summons is less than had been previously notified to the appellant. If necessary, the respondent wishes to adduce additional evidence on the appeal to explain this discrepancy. Leave is sought pursuant to the provisions of O. 86A, r.4 RSC to admit fresh evidence to explain the discrepancy, if necessary. The respondent submits as follows:

(i) By virtue of s. 959AF (3) of the Taxes Consolidation Act 1997 (as amended), the Collector General's tax liability determinations are deemed to be final and conclusive where they are not appealed. These assessments were not appealed. In *Gladney v Coloe* [2021] IECA 115, this Court recognised the established position that the entire structure of the tax system has evolved on the basis of self-assessment. A court challenge to a revenue assessment is generally only available in a constitutional action or by way of judicial review: *"…issues of fact arising between a taxpayer and the Revenue Commissioners are decided in accordance with the framework and appeals process established under the*

statutory scheme" (para. 77 of *Coloe*). It is well recognised that a taxpayer cannot raise issues concerning the correctness of the tax liability determination in enforcement proceedings. This is reflected in *Coloe* at paras. 79 – 80:

> *"It is clear it was not open to the High Court judge nor is it open to this court to engage in a review of the tax assessment and liabilities of the appellant in contradistinction to the Administrative Tribunal established under statute for this very purpose."*

(ii) Reliance on *Bank of Ireland v O'Malley* is misplaced. There are important and significant differences between a bank lender seeking judgment on foot of the contractual debt and the Collector General enforcing a tax obligation which is final and binding. In *O'Malley,* no distinction was made between principal and interest, nor was there an explanation of how the sums claimed were arrived at. A distinction was made in this case between tax liability and statutory interest. The basis upon which the tax liability arose was clearly particularised. The test set out in *O'Malley* has been satisfied as sufficient particulars were given to ensure that the defendant knew the case she was required to meet. Further, the contention that *O'Malley* principles apply where the Collector General's judgment is for a sum less than that which had been previously calculated, on foot of payments received, is misconceived. The appellant was fully aware of the extent of the tax liabilities in consequence of the service of notices of assessment and her specific liability on foot of demand in writing.

Order 4, rule 4 of the Rules of the Superior Courts

6. The procedures envisaged by O. 4, r. 4 RSC apply. The plaintiff/appellant has sought to recover sums due by way of summary proceedings. The requirements for such an

application are set out in O. 4, r. 4 RSC. There is no separate rule of court imposing less demanding particularisation requirements in summary proceedings brought by the Collector General.

Application to Admit Fresh Evidence

7. In circumstances where (i) there are admitted discrepancies, (ii) they are stated to be capable of relatively straightforward explanation and (iii) where it is conceded by the appellant that there are no other grounds on which the claims might be resisted, I am satisfied that I should, in the first instance, consider the applications to admit fresh evidence in both appeals.

(a) The PAYE/PAYE Proceedings (Appeal 2024/83)

8. Application is brought by way of notice of motion dated the 17th June 2024 grounded on the affidavit of Ms Anne Keane, solicitor, sworn on the 13th June 2024. She refers to an affidavit prepared on the 14th May 2004 by Mr John Cross, an Officer of the Revenue Commissioners. He explains that payments were received from the appellant in the amount of €8,740 on the 24th October 2017 and €2,285.07 on the 21st March 2018. These were credited to her liabilities and thereby reduced the outstanding debt to €98,307.93 in respect of her PAYE/PRSI liability for 2015. This in turn reduced the overall sum due to the amount claimed, €225,401.42. On the 24th October 2017, the appellant paid €75,000 by cheque. This was assigned to liabilities based on antiquity of debt, or as described, in order of aged tax debts. The oldest debts were dealt with first. Mr Cross avers that only part of the sum paid became available to be assigned to the debt which is the subject of the PAYE/PRSI proceedings. Thus, €8,740 was assigned in respect of outstanding PAYE/PRSI liabilities for

2015. A payment of €2,285.07 was received on the 21st March 2018 following a notice of attachment which issued on the 26th February 2018. Mr Cross accepts that no contemporaneous correspondence was sent to the appellant on foot of such receipts.

(b) The Income Tax Proceedings

9. Application is brought by way of notice of motion also dated the 17th June 2024 and grounded on an affidavit of Ms Keane sworn on the 13th June 2024. Again, she refers to an affidavit prepared on the 14th May 2004 by Mr Cross. He accounts for the discrepancy of €11 and exhibits a letter dated the 25th November 2022 sent to the appellant. The discrepancy is explained on basis that a VAT claim in the sum of €11 was made by the appellant for the period September/October 2022. On the 25th November 2022, this was offset against her income tax liabilities, thereby reducing the outstanding debt by €11. The letter dated the 22nd November 2022 which was addressed to the appellant describes the adjustment of €11 made to her VAT account.

Particularisation

10. *Prima facie,* given the accepted discrepancies, it may be said that the claims were not sufficiently particularised in the pleadings or affidavits grounding the application for summary judgment. The reality, however, is that such discrepancies are capable of explanation. It is candidly conceded on behalf of the appellant that should this court accede to the applications and admit the evidence, the objections raised, or which might otherwise arise, will be answered; and that there are no further grounds for defending the application.

Admission of Fresh Evidence on Appeal

11. In *Murphy v. The Minister for Defence Ireland and the Attorney General* [1991] 2 IR 161, it was held by the Supreme Court that in deciding whether fresh evidence should be admitted on appeal the following criteria must be satisfied:

(1) Whether the evidence sought to be introduced was in existence at the time of the trial but could not have been discovered with the exercise of reasonable diligence;

(2) Whether the evidence is such as would probably have had an important influence on the outcome of the trial, and;

(3) Whether the evidence is credible, or as Denham C.J. observed in *Lough Swilly Shellfish Growers Co-operative Society Ltd & Atlanfish Ltd v. Bradley & Ivers* [2013] IESC 16, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible.

12. The appellant accepts that she cannot gainsay what is averred to by Mr Cross. The discrepancies are accounted for by payments which were assigned or attributed by the Collector General. No challenge is made to Mr Cross' credibility. It is undoubted that, if admitted, his evidence will have an important influence on the outcome of the claim and the appeal. We are satisfied that the contents of Mr Cross' affidavit clarifies any discrepancy and, in conjunction with the other affidavits on which the respondent relies, provides a level of detail which satisfies the requirements of particularisation of O.4, r.4 RSC. If this evidence is admitted, then it may safely be said that it will be determinative of the outcome.

13. Counsel on behalf of the respondent accepts that the application to admit fresh evidence is made with diffidence in circumstances where the evidence could have been obtained for use at the hearing before the trial judge. It is submitted, however, that as the

appellant had not complained of discrepancy on affidavit prior to the day on which the motion was heard, the respondent did not have an opportunity to respond.

14. As the evidence now sought to be admitted was in existence at the time of the trial, a strict application of the *Murphy* criteria gives rise to difficulty from the respondent's perspective. The 'new' evidence could have been discovered with the exercise of reasonable diligence.

15. Through a series of decisions, including, *McMullen v. Kennedy* [2012] IESC 56, *Emerald Meats Ltd v. Minister for Agriculture, Ireland and the Attorney General* [2012] IESC 48, *Lough Swilly Shellfish Growers Co-operative Society Ltd & Atlanfish Ltd*, and *Ambrose v. Shevlin* [2015] IESC 10, appellate courts have highlighted the importance of finality of litigation and have re-emphasised the limited basis on which fresh evidence might be admitted where that evidence was in existence at the time of trial. In *Emerald Meats Ltd*, O'Donnell J. observed at para. 36: -

> *"The rules on the admission of fresh evidence on an appeal are quite strict. This is as it should be. There are very few cases in which the losing side does not regret that different witnesses were called, evidence given, or points made either in cross-examination or in submission. But a trial is not a laboratory experiment where one element can be substituted, and all other elements maintained, and a different outcome obtained. It is important that parties are aware of the finality of litigation and bring forward their best case for adjudication. Cases develop organically and unpredictably. One of the benefits which litigation brings at some cost is certainty. A party may reasonably dispute the merits of a conclusion but cannot doubt that it is a conclusion. The court must make its decision on the evidence and case advanced on the day, or in this case, over the 17 days. It is*

partly for this reason that the rules and practice of the courts go to such elaborate lengths to attempt to ensure that both sides are fairly apprised of what is in dispute and have an adequate opportunity to prepare for the litigation. It is also why appellate courts have developed rigorous tests on applications to admit fresh evidence. There are few cases which in hindsight could not be rerun with different witnesses, evidence, arguments, or advocates, but to consider that such a course is in the interests of justice is to engage in the delusion that endless litigation is a desirable rather than a tormented state."

16. The discretion of the court is not an inflexible one. Of relevance in considering how to exercise it is the nature and type of the proceedings. In *Ennis v. Allied Irish Bank Plc* [2021] IESC 12, MacMenamin J. considered the approach to be adopted in an appeal against a summary judgment. He emphasised the duty which is on litigants *"...whether represented or not, to ensure that both legal and evidential issues should be raised first in courts of first instance where conflicts of evidence are best dealt with in their appropriate context, and where parties have the right to testify and cross-examine".* MacMenamin J. affirmed that in summary proceedings, the criteria outlined in *Murphy* apply, but he accepted that greater latitude may be given to admitting new evidence/arguments in such appeals. He observed: -

"Drawing these strands together, it can be said that the general criteria applicable to admitting new arguments in appeals proceedings are as outlined in K.D., but as developed in Emerald Meats, Lough Swilly, and Ambrose. Admission of new evidence is governed by the principles in Murphy v. Minister for Defence, as explained in subsequent case law. In proceedings where the procedure is akin or analogous to interlocutory proceedings, such as in Lopes, and including judgments in summary proceedings, courts will be somewhat more flexible in admitting new

arguments on appeal, and may consider new evidence, but exercise caution because of the potential consequences. (para. 39)

17. In *Promontoria (Arrow) v Mallon & anor* [2021] IECA 130, summary judgment was granted in the High Court. Noonan J. in considering an application to amend the grounds of appeal observed: -

> *"I accept of course that the threshold for introducing new evidence and arguments on appeal in summary judgment cases is probably somewhat reduced beyond that which applies in plenary proceedings, as the recent decision of the Supreme Court in Ennis v Allied Irish Bank plc [2021] IESC 12 makes clear* (para. 27)
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> …
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> *However, lest it be thought that the Ennis decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the K.D. principle remained "the general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must be "clearly required in the interests of justice". McMenamin J. viewed the Ennis case as falling within the category of "truly exceptional"."* (para. 31)

Thus, the decision in *Ennis* does not constitute a significant departure from existing jurisprudence.

18. The principles which underpin the exercise of the court's discretion are based on the overarching requirements of the interests of justice, good administration, and finality of litigation. In accordance with the procedures envisaged in *O'Malley,* if the judgments are

set aside by this court, it is highly likely, if not inevitable, that the proceedings will be remitted to the High Court, where it is almost certain that any necessary application to amend will be granted. Considering submissions and arguments advanced and concessions made before this court, it is also inevitable that judgment will be granted in the sums claimed in both cases.

Prejudice

19. No prejudice of an evidential nature is alleged. The payments which led to the adjustments were made by the appellant and she ought to have been aware of them. It is submitted by counsel for the appellant, however, that had appropriate steps been taken by the respondent to accurately particularise the amounts due and had there been proper notification of the manner in which payments had been distributed on an "aged basis", a different position might have been taken by her at trial. No other form of prejudice is suggested. There exists, therefore, the potential for prejudice arising in that context and, in consequence, potential exposure to costs/further costs.

20. I am satisfied, however, that any such stated or alleged prejudice is not irremediable and is capable of being addressed in the context of orders for costs.

Conclusion

21. I am satisfied that, taking into consideration the nature of the proceedings before the court, the nature and extent of the defence advanced, the absence of other grounds of defence, the applications to admit fresh evidence on these appeals come within those few situations where special grounds exist justifying the admission of fresh evidence on appeal.

22. While nothing in this judgment should be taken as detracting from the importance of compliance with the provisions of O.4, r.4 RSC, nevertheless, I am satisfied that in

accordance with the interests of justice, good administration, the proper and efficient use of court resources, and the absence of irremediable prejudice, the applications to admit the new evidence in each case, being the affidavits of Mr Cross, ought to be acceded to.

23. I conclude as follows:

(1) Pursuant to O. 86, r. 4 of the Rules of the Superior Courts, leave is granted in both proceedings to the respondent to admit into evidence on appeal the affidavits of Mr John Cross sworn on the 14th May 2024.

(2) Mr Cross' affidavits explain any deficiency in the particularisation of the respondent's claim. That being so, and there being no other defence advanced or available, the appeals are dismissed.

24. As this judgment is being delivered electronically, the court invites the parties to make written submissions on costs within 21 days of its delivery, following receipt of which the case will be allocated a for mention date for finalisation.

25. Woulfe J. and Binchy J. have indicated their agreement with this judgment and with the orders proposed.