

THE HIGH COURT

COMMERCIAL

REVENUE

[2024] IEHC 15

[2021/66R]

[2021/76R]]

BETWEEN

JOSEPH HOWLEY

PLAINTIFF

AND

PAUL HOWARD

DEFENDANT

-AND-

BETWEEN

JOSEPH HOWLEY

PLAINTIFF

AND

UNA McCLEAN

DEFENDANT

JUDGMENT of Mr. Justice Michael Quinn delivered the 16th day of January, 2024

1. The plaintiff is the Collector General and an officer of the Revenue Commissioners. The claim against the defendant in the first action Mr. Howard is for unpaid taxes, principally tax assessed on rental income and capital gains derived from a portfolio of residential properties, together with surcharges and interest. The amount claimed in the Summons for taxes is €1,210,704.32. Interest thereon was claimed in an amount of €1,103,106.76, making a total sum of €2,313,811.08. The claim for interest was updated in the Statement of Claim, delivered on 19 December 2022, bringing the total as of that date to €2,419,603.64. Statutory interest is claimed from that date onwards.

2. The claim against Ms. McClean is for taxes in the amount of €302,535.41, together with interest in an amount of €297,006.34 making a total of €599,541. Calculation of interest was updated in the Statement of Claim delivered on 19 December, 2022, bringing the total to €625,513.76. Statutory interest is claimed from that date onwards.

3. The defences delivered in each case raise identical issues and the matters were heard together. I propose in the first instance to consider the issues as regards Mr. Howard, to whom I shall refer as “the defendant”. I shall refer also in my conclusions, and from time to time during the judgment, to the proceedings against Ms. McClean.

4. The proceedings were issued on 8 November, 2021. After service of the proceedings the plaintiff applied for entry in the Commercial List and for summary judgment. On 8 April, 2022, the court (McDonald J.), granted summary judgment against the defendant for a sum of €2,353,582.71 and costs. That judgment was appealed. The appeal was allowed and the proceedings remitted to plenary hearing.

5. The principle ground on which the defendants sought and were granted leave to defend was an assertion by the defendants, now pleaded in their defences, that the terms of

engagement agreed between the plaintiff and his solicitors in the proceedings, Messrs Ivor Fitzpatrick and Company, constitute a champertous agreement such that the plaintiff is not entitled to maintain the action.

6. The tort of champerty arises where a third party, having no interest in the litigation, gives assistance to a party in litigation, in return for a share in the proceeds of the litigation.

In *Persona Digital Telephony Ltd and Sigma Wireless Networks Ltd v. Minister for Public Enterprise and Ors* [2017] IESC). Denham C.J. concisely defined champerty as follows:

“Maintenance may be defined as the giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation. Champerty is where the third party, who is giving assistance, will receive a share of the litigation proceeds.”

7. Maintenance and champerty are offences which evidence a public policy against the encouragement of or trafficking in litigation. Denham C.J. observed that while the court had not been given any evidence of a prosecution for champerty in recent times, the offence is still extant.

8. I shall return later to the detail of the solicitor’s engagement terms and to the submissions as to champerty and other allegations made by the defendants which include an allegation that the costs structure agreed between the plaintiff and his solicitors is fraudulent.

9. Although the taxes were the subject of Revenue Assessments which were confirmed by the Appeals Commissioner, the defendants do not accept the validity of the amounts claimed. Therefore, the court heard evidence and submissions in relation to the amounts claimed. In this judgment I consider firstly the issues concerning the amount of the taxes, and later return to the allegation of champerty and related questions.

Assessments

10. On 30 August 2012, the Inspector of Taxes issued to the defendant notices of amended assessment of income tax in respect of each of the three years ending 31 December 2007, 31 December 2008 and 31 December 2009.
11. On 2 December 2015, the Inspector issued to the defendant a notice of assessment for income tax for the year ended 31 December 2002.
12. On 2 December 2015, the Inspector issued notices of amended assessments for income tax to the defendant in respect of each of the years ended 31 December 2003, 2004, 2005, 2006, 2010, 2011, 2012, 2013 and 2014.
13. The aggregate amount of these assessments was €1,119,286.63. Surcharges were added in an amount of €99,257.41, bringing the total of assessments to €1,218,544.04.
14. The defendant made payments totalling €7,839.72, leaving a balance according to the plaintiff of €1,210,704. 32.
15. Corresponding assessments were raised against Ms. McLean, for a total of €317,918. Payments were made by her of €15,382.59, leaving a balance claimed of €302,535.

Tax Appeals Commission

16. The assessments were appealed. On 26 August 2021, the Appeal Commissioner, Mr. Kennedy, issued his Determination. In respect of three of the relevant years namely 2002, 2013 and 2014 he found that no valid appeals had been made. In respect of the remaining years, he determined that the assessments should stand.
17. The Determination runs to 33 pages. It records the assessments, the extensive submissions of the parties, and the Commission's decision in respect of jurisdiction, validity of the appeals, hearsay and the burden of proof.

Application for Case Stated

18. After the determination by the Appeal Commission, the defendant made a request to the Appeal Commissioner to state a case to the High Court on a point of law.

- 19.** The Appeal Commissioner held a case management conference on 24 September 2021.
- 20.** By letter dated 6 October 2021, the Appeals Commission refused the request for a case stated. This letter addressed fourteen grounds which had been advanced by the defendant in the request to state a case.
- 21.** The defendant applied to the High Court for leave to bring judicial review proceedings to set aside the refusal of the Appeals Commission to state a case. That application for leave was refused by the court (McDonald J.) and no appeal from that decision was made.
- 22.** On 14 October 2021, the plaintiff served on the defendant a “Final Demand” for the amount of €1,210,704.32 and giving seven days to pay.

Phased payment application

- 23.** On 27 October 2021, the defendant submitted a Form PPA 1, which is an application for phased payment of a debt. Section B of the Form requires the applicant to insert “Details of Tax Debts”. The defendant stated that the relevant amount of income tax was €1,210,704.32. He proposed a down payment of €302,676.07 and monthly payments of €25,223 over a period of 36 months thereafter.
- 24.** The payment application Form stated: - “We intent (sic) to pay €302,676.07 as 25% upfront payment”.
- 25.** In Section D of the application Form, the defendant stated: “The €25,223 per month payment will be easy and I will not have any problem to pay this amount”.
- 26.** Under the heading of “Demonstration of Business Viability” the defendant stated “My current business activity as cleaning services is expecting an increase in revenue and respect of cash flows soon”.

27. The stated reason why the taxes had not been paid as they fell due was “A cash deficit was caused due to low sales activity”.

28. The defendant then completed the required form of Declaration in which he states the following: “I declare that all of the information provided by me is true and accurate and that I am committed to fully meeting the terms of the phased payment plan proposed, if it is agreed by Revenue”.

29. A similar phased payment application was made by Ms. McClean.

30. The applications for phased payment were not accepted and these proceedings were commenced on 8 November 2021.

31. Mr. Patrick Purtill, an officer of the Revenue Commissioners, was questioned under cross-examination about the phased payment application. He confirmed that the plaintiff would not seek to enforce collection of Revenue debt if an instalment arrangement was in place, and that if there were an instalment arrangement in place which failed or was not implemented, enforcement would be pursued or would resume.

32. Evidence was given also by Mr. Paul O’Gara, a Principal Officer at the Revenue Commissioners. Mr. O’Gara confirmed that the defendants’ applications for phased payment were not accepted by Revenue.

33. The following facts are not disputed: -

(a) that the assessments were raised and notified;

(b) that the assessments were appealed and that on 26 August 2021 the Tax Appeals Commission determined that they should stand;

(c) that on 14 October 2021 a Final Notice of Demand was made;

(d) that on 27 October 2021 the defendants submitted Phased Payment Applications;

(e) that no payment has been made in respect of the balance now claimed.

34. The defendants do not accept or admit that the amounts assessed have become payable or that the assessments have become final and conclusive pursuant to the provisions of the Act.

35. As regards the application for phased payments, the defendant pleads:

“If the Defendant made any offer as set out in Paragraph 12 of the Statement of Claim (which refers to the phased payment application) such was made in an attempt to delay enforcement pending agreement of the actual sums due and to permit the Defendant to dispose of assets.” (Paragraph 12 of Defence)

36. As regards payment, the defendant pleads as follows:

“The Defendant admits that he has not discharged any sums due to the Plaintiff owing to the Plaintiff’s refusal to engage with him in seeking to resolve the true amounts due and to permit the Defendant to dispose of assets”. (Paragraph 13 of Defence)

37. Neither of the Defendants gave their own evidence.

Plaintiff’s Evidence

38. Section 960 (J) provides as follows: -

“(1) In proceedings for the recovery of tax, a certificate signed by the Collector-General to the effect that, before the proceedings were instituted, any one or more of the following matters occurred:

(a) the assessment to tax, if any, was duly made,

(b) the assessment, if any, has become final and conclusive,

(c) the tax or any specified part of the tax is due and outstanding,

(d) demand for the payment of the tax has been duly made,

shall be evidence until the contrary is proved of such of those matters that are so certified by the Collector-General”.

39. Section 933 governs the procedure for appeals against assessments. Section 933 (4) provides as follows: -

“All appeals against assessments to income tax or corporation tax shall be heard and determined by the Appeal Commissioners, and their determination on any such appeal shall be final and conclusive, unless the person assessed requires that that person's appeal shall be reheard under section 942 or unless under the Tax Acts a case is required to be stated for the opinion of the High Court”.

40. Evidence was given at the hearing by Mr. Patrick Purtill, an Officer of the Revenue Commissioners. He verified that in accordance with s. 960 (B) of the Taxes Consolidation Act 1997 (as amended), the Collector General had on 9 June 2023 nominated him to discharge the functions of the Collector General by his powers pursuant to s. 960 (J) of the Act, which concerns the giving of evidence and related matters in proceedings instituted for the recovery of taxes.

41. Mr. Purtill gave evidence that the assessments in respect of the relevant thirteen years had been made and notified to the defendant. He confirmed that each of the notices of assessment for the thirteen years is the notice of assessment referred to in a Certificate issued by him on 20 June 2023 pursuant to s. 960(J) of the Act. By that certificate, Mr. Purtill referred to the assessments in each case, the determination made by the Tax Appeals Commission on 26 August 2021 and stated that as of the commencement of these proceedings, the sum of €1,210,704.32 continued to be due and outstanding by the defendant.

42. Mr. Purthill verified that in a certificate also dated 20 June 2023 he had certified that the amount of €302,535.41 continued to be due and outstanding by Ms. McLean.

43. Mr. Purtill referred also to a demand having been made for these amounts together with interest by Final Notice on 14 October 2021.

Evidence of Mr. Michael O'Reilly

44. Mr. Michael O'Reilly is a Chartered Accountant. He was retained by the defendants to carry out an investigation of their tax affairs.

45. Mr. O'Reilly stated that his calculation is that the tax owed by the defendant is not the amounts claimed in these proceedings, but a sum of €188,570 for income tax and a sum of €37,644 for capital gains tax.

46. On 8 June 2022, 10 months after the determination of the Appeals Commission, Mr. O'Reilly wrote to the Inspector of Taxes submitting returns for each of the years from 2003 to 2020. In his evidence he referred to that letter and further letters written by him to the Inspector of Taxes on 8 September 2022 and 24 January 2023. In this correspondence, he made extensive submissions grounding his request that the assessments be amended.

47. Mr. O'Reilly referred to acknowledgments he received on 14 July 2022 from Ms. Kathleen Redmond, Branch Manager of the Inspector of Taxes indicating that she was currently considering issues raised and would respond in due course. Mr. O'Reilly said that he had never received any substantive response.

48. During his cross – examination there was put to Mr. O' Reilly a letter dated 9 August 2022 from Ms. Redmond referring to his correspondence with the enclosed amended returns for 2003 to 2020 and which stated as follows: -

“Tax assessments for the years 2002 to 2014 are final and conclusive. As you are aware, income tax assessments were raised for the years 2002 to 2014, due to a lack of cooperation and engagement from your client, Mr. Howard. Subsequently, a judgment was obtained on these assessments in the High Court and Revenue would therefore not be processing the amended returns for these years”.

49. Reference was made also to returns submitted by Mr. O'Reilly in respect of the years 2015 to 2020, but the returns and taxes in respect of those years are not the subject of these proceedings.

50. Mr. O'Reilly stated his opinion that the assessments served by Revenue in respect of the years 2003 onwards were excessive. He said that he had engaged with Revenue, and they had cooperated with him by providing copies of invoices, bank statements and other information. Mr. O'Reilly said that he found the position adopted in the assessments to be inconsistent. He cited among other things the treatment of certain transfers between bank accounts of the respective defendants.

51. Mr. O'Reilly placed heavy reliance on para. 34 of the Determination of the Appeal Commissioner which I quote below. In his presentation of this paragraph, he characterised it as a finding by the Appeal Commission. In fact, the Determination, which runs to 33 pages, is divided into separate sections and para. 34 is not a determination by the Appeals Commissioner but a recitation of submissions made by the defendant. Para. 34 reads as follows: -

“In the course of the appeal hearing questionable evidence was advanced by the Respondent [Revenue] that if the transfer sums from Ms. McLean to the Appellant [Mr. Howard] were not treated as taxable income, then the Respondent would deem that a further €60,000 lying elsewhere and not identifiable would serve to mitigate against this argument. This was wholly unacceptable and flies in the face of factual evidence. The Respondent in its investigations into the Appellant failed to uncover the account transfer sums, identifiable as to date, amount and bank account number. The financial detail was now brought to bear wherein there was an expectation on the part of the Respondent that such account transfer sums should be regarded as taxable income in the hands of the Appellant. This is unjust enrichment as defined in the Value Added Tax Consolidations Act 2010, s. 100, is inequitable and must fail”.

52. This submission was not accepted by the Appeal Commission.

53. Paragraphs 26 to 49 of the Determination are a recitation of Mr. Howard's submissions. Paragraphs. 50 to 106 are recitations of the submissions of the respondent, Revenue. Paras. 107 to 122 contain the Appeal Commissioners analysis addressing jurisdiction, validity of the appeals, hearsay, and the burden of proof. The conclusion of the Appeal Commissioner is contained in para. 123 which states as follows: -

“The appellant was unable to provide any cogent evidence that would have had the effect of reducing or displacing the assessments raised by the respondent, and as such has frustrated his own appeal. Therefore, in accordance with TCA Section 949 AK, I have determined that the assessments raised by the respondent in respect of the years 2003 to 2012 inclusive as set out at para. 1, shall stand. While there were no valid appeals against the assessments for the years 2002, 2013 and 2014, it is incumbent on the appellant to file returns, pay the tax on the reported income together with any associated interest for the late payment of those taxes if he intends to appeal those years of assessment”.

54. Mr. O'Reilly persisted in quoting para. 34 to ground an assertion that the Appeals Commissioner had made findings that fly in the face of “questionable evidence advanced by the respondent” and in support of his assertion that the claims made by Revenue amounted to “unjust enrichment”. That is a wholly incorrect reading of the Determination of the Tax Appeals Commission. The Commission rejected the grounds of appeal including those cited in paragraph 34. Its Determination is an exhaustive and definitive examination of the appeal and has not been challenged otherwise than by the unsuccessful application for leave to judicially review the refusal of a case stated.

55. Mr. O'Reilly characterised the approach taken by the Appeals Commissioner as “railroading the position” and precluding his clients from defending their position.

56. In the course of Mr. O'Reilly's cross – examination there was a circular and repetitive exchange in which Mr. O'Reilly claimed that it was improper for Revenue to disregard the amending returns which he had submitted on 8 June 2022, some ten months after the determination of the Appeals Commissioners. Counsel for the plaintiff put it to Mr. O'Reilly that the effect of the Appeals Commission's determination was that the assessments stand. Mr. O'Reilly persisted in his assertion that the Appeal Commissioner had erred. He acknowledged that apart from an unsuccessful application for leave to bring judicial review arising from the refusal of the Appeal Commissioner to state a case to the High Court, the matter had not been taken any further.

57. Counsel for the plaintiff put it to Mr. O'Reilly that the effect of s. 933 of the Taxes Consolidation Act was that the determination of the Appeals Commissioner meant that the assessments would stand and accordingly that Mr. Purthill's Certificate is binding and conclusive.

58. Mr. O'Reilly refused to agree with that proposition, asserting again that the Commissioner was wrong in his determination and in his refusal to state a case to the High Court.

59. Mr. O'Reilly concluded his evidence by stating that he had advised the defendant that he should appeal this matter further. He acknowledged that ultimately these were legal matters on which he could not give any further evidence.

60. Mr. O'Reilly's evidence amounted to no more than expressions of his opinion that the assessments were incorrect, that the Appeal Commission erred in its determination, and that the Plaintiff had treated the defendants unfairly and oppressively. He was unwilling to accept the legal effect of the statutory provisions rendering final and conclusive the Certificate of Mr. Purthill and the Determination of the Appeals Commission.

Conclusion as to quantum of taxes

61. The plaintiff relies on Sections 933 of the Act to establish that the Determination of the Appeals Commission is final and conclusive. He relies on Section 960 to establish that the Certificate signed by Mr. Purthill as to the amounts claimed is final and conclusive and is evidence of its contents in the absence of proof to the contrary. None of Mr. O'Reilly's evidence disproves the contents of the Certificate of Mr. Purthill.

62. Despite the protestations of Mr. O'Reilly, it is not disputed that the Appeal Commission made a Determination pursuant to s. 933 of the Act, which by virtue of subs. (4) of that section is final and conclusive.

63. The certificate of Mr. Purthill on 20 June 2023 certifying the tax due in the amount of €1,210,704.32, and his certificate also made on 20 June 2023 as to the amount of interest accrued as of that date, totalling then €1,259,276.74 are conclusive as to the amounts due pursuant to s. 960 of the Act.

64. The returns submitted by Mr. O'Reilly on 8 June 2022 and submissions made by him in the following correspondence do not affect the final and conclusive nature of the Determination of the Appeals Commission and of the Certificate of Mr. Purthill.

65. The application for a phased payment made by the defendant openly and unconditionally acknowledged the amount due in respect of taxes.

66. In *Deighan v. Hearne* [1990] 1 IR 499, Finlay C.J. made it clear that *"the court cannot 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."*

67. As regards the fairness of the procedure, which featured at the heart of Mr. O'Reilly's evidence and the defendant's submissions, the following remarks of Finlay C.J. are apposite:

"... 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 tax payer. This Court in McLoughlin v. Tuite [1989] IR 82 has already indicated the importance within the constitutional framework of the revenues of the State and that has bearing upon the powers properly and necessarily vested in the Inspector of Taxes in this context.”

68. The defendant exercised the right to appeal the Inspector’s Assessments and the judicial review remedy was exhausted when leave was refused and that decision not appealed.

69. The amount due by the defendant in respect of taxes and surcharges is the certified amount of €1,210,704.32.

70. The amount due by Ms. McClean in respect of taxes is €302,535.41. No different submissions or issues arose in respect of Ms. McClean, save that the court was informed that in her case no application was made for leave to challenge by way of judicial review the decision of the Appeal Commissioner refusing to state a case to this Court.

The Contract of 29 January 2020.

71. Evidence was given on behalf of the plaintiff by Mr. Michael Commons, a partner of the firm of Ivor Fitzpatrick, solicitors for the plaintiff.

72. Mr Commons verified the Contract which is described as Contract for the Provision of Legal and Related Services in the Collection of Certain Revenue Debt between the Office of the Revenue Commissioners, Dublin Castle, Dublin 2, represented by Mr. Joseph Howley, Collector General and Ivor Fitzpatrick and Company Solicitors of 44-45 St. Stephens Green, Dublin 2. The Contract is dated 29 January, 2020.

73. Messrs. Fitzpatrick are one of six firms on a panel retained by the plaintiff for the collection of unpaid taxes.

74. The provisions of the Contract on which the defendants place reliance are all contained in clause 5 headed “Remuneration Structure.” Clauses 5.1, 5.2 and 5.3 are relevant:

5.1 *The major portion of the remuneration under this contract will be in form of commission expressed as a percentage of amounts collected. Legal costs shall be recovered from the debtor to the greatest extent possible. Revenue acknowledges that in the nature of the work, there will be some cases where costs will be incurred but no recovery is possible.*

5.2 (This clause is written as one paragraph, but I have inserted numbers before each sentence for ease of reference later in the judgment – and added certain emphasis).

- i. *In cases where an Order for Judgment in the relevant Court is obtained, Revenue may also seek an order of the Court for costs to be taxed in default of agreement.*
- ii. *The Firm shall, in such cases, be entitled to charge for its services and outlay incurred.*
- iii. *For the purposes of taxation of such costs Revenue shall be entitled to claim costs on the basis of work done, time spent and other factors found in O.99 r.37(22) of the Rules of the Superior Courts ordinarily addressed in the taxation of such costs.*
- iv. *On completion of taxation of costs the Firm shall be entitled to render an account and Invoice to Revenue calculated on the basis set out in this paragraph, but the Firm shall take into account such sums as have already*

been billed and paid by the Collector General pursuant to the provisions of clause 5.3 below.

- v. *The amount due on the Invoice will become payable by Revenue to the Firm insofar as Revenue is successful in recovering those costs from the defaulting taxpayer pursuant to the order for costs or pursuant to the agreement for payment of costs by the defaulting tax payer.*
- vi. *For the avoidance of doubt if Revenue is not successful in recovering costs as taxed or as agreed from the defaulting taxpayer then the remuneration of the Firm will be limited to those payments set out in clause 5.3 below.*
- vii. *Any excess due to the Firm over and above this will be waived by the Firm.*

5.3. *The following table sets out details of the remuneration payable under this contract.*

Action stage	Fee payable	Commission excluding VAT at 23% payable if collection is completed after the action stage shown and before further action.
Issue of a demand.	€27 plus VAT.	2% of the first €4,000 and 0.5% of the balance of tax and interest collected.
Issue of proceedings.	€145 plus VAT plus outlay, less fees and outlay already paid in respect of this referral.	4% of the first €4,000 and 2% of the balance of tax and interest collected.
Judgment obtained (including registration of a judgment, where required)	€210 plus VAT plus outlay less fees and outlay already paid in respect of this referral.	

For enforcement of judgment where collection is achieved.	€270 plus VAT plus outlay less fees and outlay already paid in respect of this referral.	7% of the tax and interest collected.
For enforcement of judgment where enforcement is completed (case withdrawn from solicitor) without collection; or where enforcement is terminated by Revenue before completion and before collection is achieved.	2.75% of the first €4,000 and 2% of the balance, to a maximum fee of €5,000 plus VAT plus outlay, less commission and outlay already paid in respect of this referral (or revised referral if appropriate).	Withdrawal Fee can only be claimed where the Firm has brought the case to enforcement stage and advised Revenue of same. All withdrawal applications must be claimed the month following the withdrawal.
For complex work where input to cases at Senior/Partner level is necessary.	€210 plus VAT per hour.	€210 plus VAT per hour where interpretation of the law requires senior/partner input.

75. Mr. Commons said in his evidence that, in his experience, the provisions of Clause 5.2 had never been applied.

Amendment Agreement: 14 February 2023

76. On 14 February, 2023 the parties agreed to delete clause 5.2 of the Contract. The Amendment Agreement recites that Revenue and the firm are parties to the contract of 29 January, 2020 and wish to amend the contract. Clause 2 provides as follows:

“Amendment.

On and with effect from the date of this Agreement, the Parties agree that clause 5.2 of the contract be deleted in its entirety. This variation retrospectively applies to all cases, to cases currently in progress including any cases commenced prior to the signing of the agreement, and to future cases.”

77. The Amendment Agreement was entered into on 14 February 2023 after the Court of Appeal had granted the appeal against summary judgment in these proceedings, deciding that the defendants should have leave to defend on the ground of their argument that the contract between the plaintiff and Ivor Fitzpatrick and Company was champertous.

78. In submissions the plaintiff stated that he had entered into the Amendment Agreement in circumstances where he remains of the view that it was not champertous, but to ensure that no further controversy on the subject would arise in this or cases against other taxpayers for summary judgment. It was submitted that the effect of the amendment is to render the champerty question moot in these proceedings.

79. The Defendant submits that the Amendment Agreement is unenforceable for want of consideration.

Defence

80. Paragraphs 14 and 16 of the Defence relate to the Contract: -

“14. The Plaintiff is not entitled to maintain the within proceedings by virtue of a champertous agreement made on the 29th of January 2020 with the solicitors instructed by him in the within proceedings.

...15. [Quotes clause 5 of the Contract].

16. It is also the case that the contract between the Plaintiff and his solicitor instruction (sic) in the within proceedings is contrary to public policy in that it provides for a scheme of remuneration where the solicitor is paid a fee for work done but then represents then to the Defendant that work has been done on a different basis and seeks a higher payment. Such payment amounts to a contingency fee arrangement and provides that the solicitors remuneration is only paid if the sums alleged to be due if actually collected and amounts to a fraud on the paying party since he is being informed that a particular sun (sic) is due to the Plaintiff when that is not the case

since the Plaintiff will never collect any sum greater than the sums actually paid out by him prior to the order for costs". (Emphasis added)

81. The words underlined are a misdescription of the indemnity principle which applies to adjudication of inter party costs. That is the principle that a party in whose favour costs are ordered may only recover costs which he has paid and costs for which he has incurred a liability. (See *Attorney General (McGarry) v. Sligo County Council & Ors* [1991] IR 99.)

82. The defence relying on the contract is twofold: firstly, that the Contract is champertous and taints the proceedings in their entirety. Secondly, that the Contract is contrary to public policy in that it “amounts to a fraud on the paying party”.

83. The questions which this court is required to determine arising from the pleadings and the submissions are as follows.

1. Is this agreement champertous or does it savour of champerty.
2. If so does that amount to a valid defence such that the defendant can avoid judgment being granted against it.
3. Does the agreement provide for or permit a plaintiff to perpetrate a fraud or misrepresentation on the defendant which for public policy reasons should deny the plaintiff of an entitlement to judgment.
4. If relevant what is the effect of the Amendment Agreement.

Champerty

84. The defendant cites the dictum of Lord Denning MR in *Wallersteiner v. Moir (No. 2)* [1975] QB 373 as follows: -

“English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a ‘contingency fee’ that is, that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds (campi partitio) an

agreement by which a lawyer, if he won was to receive a share of the proceeds was pure champerty”.

85. The defendant submits that later statutory developments in the UK have changed the law there but that there has been no such change in this jurisdiction and that champerty is still a tort and a crime in the State.

86. The plaintiff does not contest the proposition that champerty is still a tort and a crime in the State, but submits that the agreement in this case is not champertous. The plaintiff also submits that even if it were champertous this is not a good defence to the underlying claim for unpaid taxes.

87. There is no reported case in which a fee structure of the type contained in the Contract was considered. Nonetheless, a number of the judgments of the courts in this jurisdiction are of assistance. The only reported Irish case directly concerning legal costs, as distinct from other litigation “support” which may include legal costs, is *O’Keefe v. Scales*, considered below. Even it does not concern the provision of assistance in the form of an agreement corresponding to the contract in this case.

***O’Keefe v. Scales* [1998] IR 290**

88. The plaintiffs’ claims against their original solicitor included a claim for special damages, being costs which they had incurred with a successor firm, which was now acting for them in the proceedings.

89. The defendant claimed that the inclusion of this claim had the effect that the plaintiffs’ new solicitor was assisting in the promotion of litigation in which he had an interest in order to receive a share of the award. The defendant applied for an order to dismiss or stay the action on the ground that the proceedings had been commenced or continued in consequence of an unlawful agreement or arrangement with the new solicitor which the defendant alleged savoured of maintenance and/or champerty.

90. The application was dismissed in the High Court and that decision was upheld on appeal.

91. Having referenced *McElroy -v- Flynn* (1991) ILRM294 (High Court) and *Fraser -v- Buckle and Ors* (1994) 1 IRI (High Court) and (1996) 1 IRI (Supreme Court), (so called “heir locator” cases) Lynch J. said the following: -

“It is clear from these authorities that the law relating to maintenance and champerty still exists in this State. A person who assists another to maintain or defend proceedings without having a bona fide interest independent of that other person in the prosecution or defence of those proceedings acts unlawfully and contrary to public policy and cannot enforce an agreement with that other person for any form of benefit whether it be a share of the proceeds of the litigation or a promise of remuneration such as money or a transfer of property if the claim is successfully defended.

While the law relating to maintenance and champerty therefore undoubtedly still subsists in this jurisdiction it must not be extended in such a way as to deprive people of their constitutional right of access to the Courts to litigate reasonably stateable claims.

In this case, even assuming that Mr. Murnaghan is maintaining the Respondent's action in a champertous and unlawful manner I doubt if that would in itself amount to a defence to the Respondent's action much less entitle the Appellant to stifle the Respondent's claim in limine on this motion to stay or dismiss in advance of a plenary trial”.

92. Lynch J. concluded by stating the following: -

“If at the plenary trial, however, the Appellant was successful in her defence and it was established, notwithstanding this judgment on the motion to dismiss or stay in

advance of the plenary trial, that these proceedings had been maintained in a champertous manner by Mr. Murnaghan then it would be open to the Appellant to sue Mr. Murnaghan for all the damage suffered by her including any costs awarded to her and not recovered or recoverable from the Respondents owing to their want of means”.

93. It is clear from this judgment that the court regarded the tort and crime of maintenance and champerty as alive and well in this jurisdiction. Nonetheless, the court was not willing to dismiss or stay the proceedings on this ground. This was of course no more than a refusal to dismiss or stay the proceedings at an interlocutory stage, but it is very clear from the dictum of Lynch J. quoted above that he did not regard the assertion of champerty as a defence to the substantive action.

Greenclean Waste Management Limited v. Leahy & Ors [2014] IEHC 314

94. In this case, Hogan J. was required to determine whether a policy of insurance taken out after the event giving rise to the proceedings, commonly known as “ATE” insurance, amounted to maintenance or champerty. He concluded that it was neither maintenance or champerty and that the insurance policy was valid.

95. Hogan J. considered the history and the present status of the tort of champerty. He continued as follows: -

“Maintenance may be defined as the improper provision of support to litigation in which the supporter has no direct or legitimate interest. Champerty, on the other hand: ‘is an aggravated form of maintenance and occurs when a person maintaining another’s litigation stipulates for a share of the proceeds of the action or suit’:
Camdex International Ltd. v. Bank of Zambia [1998] Q.B. 22, 29, per Hobhouse L.J.
Champerty may thus be described with only a little exaggeration as a secular form of

simony within the legal system, for, as Hobhouse L.J. aptly put it in Camdex International, what 'is objectionable is trafficking in litigation''

96. Hogan J. considered *O'Keeffe v. Scales and Thema International Fund plc v. HSBC International Trust Services Ireland Limited* [2011] IEHC 654 [2011] 3 IR 654.

97. Hogan J. stated that it followed from *O'Keeffe* that: -

".... even a champertous law suit should not be struck out on that ground, as the remedy in that situation is for the injured party to sue for damages for the tort of champerty".

98. Hogan J. also considered the judgment in *Thema* where Clarke J. had identified an important distinction between a third party making a commercial decision to "invest" in litigation in the hope of making a profit, on the one hand, and a funder which had a sufficient connection with the plaintiff so as to take that funding outside the scope of maintenance and/or champerty. Having considered the judgment in *Thema*, Hogan J. continued: -

"Viewed thus, the principle expounded by Clarke J. in Thema International is really about trafficking in litigation"

Hogan J. then concluded: -

"Against this background it can be said that agreements which involve the trafficking in litigation or - as in Simpson - which concern the assignment of a bare cause of action for purposes which the law does not recognise as legitimate will be held to be void as contrary to public policy on the ground that they savour of champerty. That, in my opinion, is true leitmotif which runs through all of this case-law in this area".

99. In *Persona*, the court was asked to make a declaration that a litigation funding arrangement entered into between the plaintiffs and Harbour Fund 3 LP, a litigation funding specialist, was not an abuse of process and did not contravene rules on maintenance and champerty. The agreement was an arrangement whereby Harbour would provide financial

backing for the plaintiff's legal costs and disbursements, including the purchase of adverse costs insurance, in return for a security agreement in a form satisfactory to the funder.

100. The Supreme Court concluded that the funding agreement in that case was champertous as an agreement whereby the funder assisted the proceedings without a bona fide independent interest in the subject of the proceedings.

101. In the judgments of Denham C.J. and of Clarke J. in *Persona* a number of references were made by the court to the existing long established practices of counsel and solicitors taking cases on a “no foal no fee” basis, and the court recognised that such agreements are unobjectionable.

102. Before I turn to the evidence in this case and the proper construction of the Contract, I draw from the above the following principles which are relevant to this case.

1. Champerty is still a tort and an offence in the State (see *Persona*, *Greenclean* and *O’Keeffe*).
2. Champerty is the giving of assistance to a party to litigate in return for a share of the proceeds. The phrase “*campi partitio*” (“division of the field”) was used by Lord Denning MR in *Wallersteiner* (op cit).
3. The fundamental “leitmotif” of champerty, as Hogan J. put it in *Greenclean*, is the policy of avoiding trafficking in litigation.
4. The rule cannot be invoked as a bar to the pursuit of an otherwise sustainable or statable action (*O’Keeffe v. Scales*).
5. If a defendant succeeds in its defence and establishes that the action has been maintained in a champertous manner then it may have a remedy against the party, such as in this case the solicitor, who has provided the offending assistance. (*O’Keeffe v. Scales* and *Greenclean*)

Evidence of Mr. Brendan Walsh

103. Mr. Brendan Walsh was called by the defendants. Mr. Walsh was a solicitor in practice for 39 years. He said that he had extensive experience of conducting cases on a “no foal no fee” basis, most commonly personal injury and public law cases. He said that such agreements are invariably made in cases where:

“(a) The case has a reasonable prospect of success.

(b) Counsel is prepared to act on the same basis and

(c) It is virtually certain that the proposed defendants are in a position to pay any award of damages and costs which may be made. Thus such cases are mostly taken against persons indemnified by insurance companies and/or emanations of state.”

104. Mr. Walsh said that the fees in such cases are agreed at the outset and there is only a fee payable in the event of success in the action. In his experience costs were never paid out of the amount of any settlements achieved or awards made, but paid only when recovered against the defendant.

105. In such cases his firm would typically fund the conduct of the case as it progressed, with no additional monies being paid up front. If a result were achieved at the end of the matter costs would be paid typically from an insurance company on the defendant’s side. Mr. Walsh said that “it is never the case that a bill of costs presented to the paying party on the basis of a fee different to that agreed with the plaintiff”.

Construction of the Contract

106. Having regard to the evidence of Mr. Commons that in his experience the provisions of clause 5.2 of the Contract were never in fact operated, the court is faced with the challenge that to consider the defence made in this case requires construing that clause in the abstract. It was acknowledged by the plaintiff that the clause itself is not a model of good drafting.

107. It is also unfortunate that despite the fact that the Contract was entered into on 29 January 2020, it refers in clause 5.2 to the factors in respect of costs referred to in O.99 r.37(22), but makes no reference to the provisions of the Legal Services Regulation Act, 2015, albeit that Part 10 of that Act which relates to Legal Costs come into operation only on 7 October 2019.

108. I now turn to clause 5.2 itself, quoted in full at paragraph 74 above. Its effect is as follows.

1. If a judgment is obtained for the amount of taxes claimed Revenue may seek an order for costs “to be taxed in default of agreement” (Sentence (i)). This is no more than a statement of the fact that Revenue may in any case apply for such an order.
2. Where an order for costs is made against the taxpayer the solicitors are then entitled to charge for their services and outlays and may invoice on the basis of “O.99 costs”. In doing so it must give credit to Revenue for any amounts previously billed and paid pursuant to para. 5.3 of the Contract (Sentences (ii) and (iii)). This is no more than a statement that in such cases the firm may issue an invoice to Revenue for the full amount taxed, or now adjudicated, pursuant to O.99 and on such invoices it must give credit for previously paid costs.
3. The amount of the “O.99 invoice” will only be payable by Revenue to the solicitor if the costs are recovered from the taxpayer. If they are not so recovered then the balance or shortfall not recovered is waived. (Sentences (v), (vi), and (vii)).
4. The third sentence says that when costs have been submitted for taxation Revenue are “entitled” to claim by reference to work done by the solicitor on

the basis of the factors described in O.99 r.37. (22). This means no more than that Revenue may submit such “full” costs for taxation by reference to O.99. Whether such costs will be allowed is a matter for the Legal Costs Adjudicator. This court is required to decide a different question, namely whether these provisions in the Contract are champertous or permit, as the defendant submits, a fraud to be perpetrated on the defendant.

Order 99

109. Order 99 r.37(22) cites the matters to which the Legal Costs Adjudicator (formerly the Taxing Master of the High Court) shall have regard in exercising his discretion to determine costs namely:

- “(a) The complexity of the item or of the cause or matter to which it arises and the difficulty or novelty of the questions involved;*
- (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by the solicitor.*
- (c) The number and importance of the documents (however brief) prepared or perused.*
- (d) the place and circumstances in which the business involved is transacted.*
- (e) the importance of the cause or matter to the client.*
- (f) where money or property is involved, its amount or value.*
- (g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter though only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.”*

110. Section 155 of the Legal Services Regulation Act 2015 describes the matters to be ascertained on an adjudication of costs. They overlap with and include a number of those already stipulated in Order 99, such as the nature and extent of the work, who carries out the work and the time taken.

111. A party can only recover from the paying party those costs which he has actually occurred or those for which he is liable. This is the “indemnity” principle. See *Attorney General (McGarry) v. Sligo County Council & Ors* [1991] IR 99.

Campi Partitio

112. The defendants submit that in a case where judgment is granted and a costs order made against a defendant then, properly understood, the “fruits” of the litigation are both the tax debt and the costs and that the effect of clause 5.2 of the Contract is to confer on the solicitor a right to be paid a share of those “fruits”. They submit that this is a form of “campi partitio” and champertous.

113. The ‘proceeds’ or ‘fruits’ of the litigation are the recovered taxes, surcharges and interest and not the costs. Where judgment is obtained and an order for costs made, the obligation to pay those costs is an additional liability found by the court to be payable by the defendant so that the plaintiff may recover its debt in full. It is not an additional bonus or other benefit conferred on the plaintiff which he would ‘share’ with his solicitor. The contract in this case does not alter this description. It means simply that in a case where judgment is granted and an order for costs made the solicitor is entitled to his “ordinary” O. 99 costs subject to two limitations. The limitations are firstly that when it comes to invoicing and payment the solicitor must give credit for any payments previously made pursuant to clause 5.3. Secondly if the costs are not recovered in full the solicitor will waive any shortfall.

114. An assumption inherent in the text of clause 5.2 and, it appears, made by the parties is that amounts which would become payable following a taxation pursuant to clause 5.2 will

always be higher than the amounts already paid pursuant to clause 5.3. This would mean that such payments would in truth be no more than payments “*on account*”. Contrary to that assumption, Mr. Commons in his evidence said that this would not necessarily or always be the case. It is conceivable, he said, that the Legal Costs Adjudicator may adjudicate the costs in an amount by reference to O. 99 which is lower than amounts previously paid pursuant to clause 5.3. On its face, this must be correct, and could occur in large cases where the stated percentages could yield significant costs.

115. The correct interpretation of clause 5.2. is that if judgment is obtained and a costs order made the solicitor is entitled to charge the plaintiff his costs by reference to O. 99 but in invoicing he must give credit for any payments made pursuant to clause 5.3. The court having made an order for costs against the taxpayer, there is nothing to preclude Revenue from claiming at such an adjudication the full amount of costs which would be payable if assessed in accordance with O. 99, r. 37, subject to the indemnity principle. (See paragraph 111).

The “contingent bonus” submission

116. The defendants submit that because the solicitors’ entitlement to claim the full O. 99 costs is contingent on securing judgment and an order for costs this has the consequence that Revenue are in fact claiming at taxation a fee for which they are not liable. Instead, the submission goes, they are claiming a “bonus” or additional “profit” for the solicitor which is payable only on a contingency and accordingly is champertous. The defendants submit also that claiming costs in this fashion is misleading having regard to the terms of the contract.

117. At one level this question of interpretation is to look at two sides of the same coin. The defendant says that the true costs payable are limited by clause 5.3 and that a payment pursuant to clause 5.2 is a contingency and a form of bonus.

118. The plaintiff says that the solicitor is entitled as a matter of contract to charge the full O. 99 costs and this is reflected in clause 5.2 and that there is nothing unusual or irregular

about this and that it is entirely proper that due credit be given by the solicitor to the client for amounts previously paid pursuant to clause 5.3.

119. It seems to me that the proper construction of the Contract is that the solicitor retains the right to be paid such costs as are appropriate by reference to the criteria identified in O. 99, r. 37. There is nothing extraordinary about those costs. They cannot be characterised as some character of a bonus or an improper profit. The solicitor agrees with Revenue that if such full costs are not recovered from the defendant he will limit his costs to those provided for and paid in accordance with clause 5.3. I do not believe that this can properly be characterised as a “*division of the spoils*” or of the “*fruits*” of the litigation. It is no more than recovery and payment of the ordinary level of costs, subject to the control that insofar as they are to be recovered from the taxpayer, their quantum must be determined by the Legal Costs Adjudicator, unless of course agreed with the defendant.

120. If there were an element of an extraordinary bonus or uplift attached to the quantum of these costs by reference to some other contingency, the analysis would be different, but the amount provided for in clause 5.2 is what can properly be characterised as ordinary costs. The Contract contains no provision purporting to override O. 99 R. 37 such as would, for example, permit Revenue to seek at the adjudication an additional amount or ‘bonus’ should the operation of clause 5.3 generate an even higher amount of costs than would be adjudicated pursuant to O.99.

121. Undoubtedly clause 5.3 provides for recovery by reference to the quantum of recovery from the taxpayer. Of this, however, it is important to make two observations. Firstly it is clear from s. 149 of the Legal Services Regulation Act 2015 that such an arrangement is not prohibited. (See paragraph 127+128 below) Secondly if O. 99 costs are subsequently recovered the effect is simply that the plaintiff recovers the entire of the debt

namely the underlying tax together with surcharges and interest and secures following adjudication reimbursement of any costs previously paid or payable to his solicitor.

122. For all of these reasons the Contract is not champertous and I find that this action has not been maintained in a champertous manner.

Fraudulent misrepresentation

123. The defendants first accessed the details of the terms of the contract through the website of the plaintiff in the “*Value for Money*” section of its website. They then requested from the plaintiff a copy of the particular contract with Ivor Fitzpatrick & Company, the solicitors representing the plaintiff in this case. This was furnished immediately on request.

124. The defendants submit that the effect of the Contract is that the Legal Costs Adjudicator will be misled when presented with a bill of costs prepared in accordance with O. 99. The defendants go so far as to submit that this is to perpetrate a fraud.

125. This proposition assumes that the plaintiff would at an adjudication withhold or conceal the existence of the terms of engagement with his solicitors. I am not willing to determine this case on the basis of an assumption that the plaintiff would so mislead the Legal Costs Adjudicator, even if doing so were possible, which for other reasons described below is not the case. (See paragraphs 131+132 below).

Legal Services Regulation Act 2015

126. Very limited reference was made to this Act in submissions. But a number of its provisions are relevant.

127. S. 149 provides as follows:

“149. (1) A legal practitioner shall not charge any amount in respect of legal costs if—

(a) they are legal costs in connection with contentious business expressed as a specified percentage or proportion of any damages (or other moneys) that

may be or become payable to his or her client, other than in relation to a matter seeking only to recover a debt or liquidated demand, ...". (Emphasis added).

128. On its face s. 149 does not expressly provide that recovery of costs by way of percentage even in debt recovery matters is lawful and does not offend rules against maintenance and champerty. However, it is clear that the provisions of clause 5.3 of the Contract envisage recovery of costs by the solicitor as a percentage of the amounts recovered. It is not submitted by the defendants that clause 5.3 is of itself champertous.

129. Section 150 of the Act stipulates the obligation of legal practitioners to give notice to their client of all legal costs which will be incurred in relation to a matter or if that is not reasonably practicable to set out the basis on which legal costs shall be calculated.

130. Section 151 provides that a legal practitioner and his client may make an agreement in writing concerning the amount and manner of payment of all or part of legal costs that are or may be payable by the client to the legal practitioner for legal services provided in relation to a matter. If such an agreement is made it may include the particulars otherwise required pursuant to s. 150. Although it does not cite Section 151, the contract in this case is clearly an agreement to which s.151 applies.

131. Section 157(6) provides as follows:-

"A Legal Costs Adjudicator shall not confirm a charge in respect of a matter or item if the matter or item is not included in a notice referred to in section 150 or, as the case may be, is not the subject of an agreement referred to in section 151 , unless the Legal Costs Adjudicator is of the opinion that to disallow the matter or item would create an injustice between the parties."

132. The Legal Costs Adjudicator has power to require production of documents and the Contract is not excluded from such production. In circumstances where the terms of the

plaintiff's solicitor's engagement were accessible on a public website, and where the defendant was furnished with a copy of the Contract with Ivor Fitzpatrick & Co., the proposition pleaded by the defendant that the contract permits of a fraudulent misrepresentation is unsustainable.

133. Finally, if a defendant against whom an order for costs is made, wishes to submit to the Legal Costs Adjudicator that on a proper construction of the Contract the plaintiff's costs should be limited to those paid pursuant to Clause. 5.3 and not ordinary Order 99 costs it is open to him to make that submission at the adjudication. I do not agree with such a construction but it is not for this court to preclude such a submission to the Legal Costs Adjudicator. That will not arise in this case in light of the Amendment Agreement.

Is champerty a defence?

134. Having regard to my conclusion that the Contract is not champertous and does not savour of champerty, I am not required to decide this point. However, in deference to the submissions which were made on this issue, and in case I am wrong in my findings on the first question I have considered the point.

135. The judgment of the Supreme Court in *O'Keeffe v. Scales* was on an interlocutory application to dismiss or stay the proceedings on the ground that they were champertous. It is arguable that the high point of the decision is only that an argument regarding champerty, however strong, cannot be relied on to stifle the prosecution of an otherwise stateable action. However, the statement of the law by Lynch J. in the Supreme Court is very clear. He considered previous decisions such as *McElroy v. Flynn* and *Fraser v. Buckle*, the so-called "*heir locator*" cases in which it was said that a party who assisted putative heirs in certain estates did not have a *bona fide* interest in the prosecution of such claims and could not enforce the relevant agreement for any form of benefit "*whether it be a share of proceeds of*

the litigation or a promise of remuneration, such as money or a transfer of property if the claim is successfully defended”.

136. Having considered these and other cases, Lynch J. continued:-

“While the law relating to maintenance and champerty therefore undoubtedly still subsists in this jurisdiction, it must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims.”

137. In *Greenclean*, Hogan J. clearly regarded the decision in *O’Keefe v. Scales* as authority for the proposition that even a champertous lawsuit should not be struck out on that ground, the defendant’s remedy in such a situation being to sue the perpetrator of the champerty for damages.

138. Applying the clear statements of the court in *O’Keefe* and *Greenclean* the logical conclusion is that the allegation of champerty goes only to the defendant’s potential objection to the measurement and recovery of costs and is not a defence which can be invoked to defeat claims for assessed taxes which by statute have been certified as finally and conclusively due. I have already found that the Contract in this case did no more than permit recovery of such ordinary costs as may be adjudicated in accordance with the principles stated in O. 99.

Does the Amendment Agreement render the defence of champerty moot?

139. The defendant submits that the purported variation of the contract by the agreement of 14 February 2023 is ineffective because no consideration is provided for in that agreement. The defendant cites *Pinnel’s Case* 1602 5 Co Rep 117.

140. Although not pleaded clearly in these terms, the defendant also submits that even if the Amendment Agreement were effective, the proceedings are tainted by or “*savour of*” champerty and ought to be dismissed on that ground alone and that the subsequent variation or amendment is no answer to this fundamental defence.

141. The plaintiff submits that because the defendant is not privy to the contract it is not open to him to dispute its enforceability.

142. The plaintiff submits that it is a fundamental of the principle of privity of contract that a non-party cannot challenge the enforceability of its terms and accordingly that the Amendment Agreement is in full force and effect.

143. The plaintiff relies on the judgment of Clarke J. in *Fitzsimons v. Value Homes Ltd* [2006] IEHC 144, where a variation agreement which did not on its face recite consideration was held to be binding and enforceable, in circumstances where there was clear evidence of a benefit to each of the parties thereto.

144. Finally, the defendant submits that the actions of the plaintiff in purporting to amend the contract after the institution of the pleadings and after the decision of the Court of Appeal is an abuse of process and a sign of bad faith which would justify refusing the relief sought in the proceedings.

145. My conclusions on these questions are as follows.

146. Firstly, in circumstances where the plaintiff and his solicitors entered the Amendment Agreement on 14 February 2023 as a mutual variation of the original contract, it is not open to the plaintiff not being a party to that agreement to question the efficacy of the amendment.

147. Secondly, far from being an abuse of process or sign of bad faith, the plaintiff has openly described the circumstances in which the Amendment Agreement was made. He has not sought to pretend that it was made for any motivation other than to eliminate the controversy around champerty which has been pleaded by this defendant and that this was done in the context of not only this but future cases. That is an open and frank description of the Amendment Agreement.

148. Thirdly, although I do not find that making the amendment in the course of these proceedings, and after the Court of Appeal had determined that the matter should be remitted

to plenary hearing, is an abuse of process or evidence of bad faith I question whether the amendment would render moot the defence of champerty. The case made by the defendants is that the proceedings are tainted by champerty and that this should deprive the plaintiff of his remedy. If, contrary to all my findings earlier in this judgment, champerty were a good defence in this case, there would be some force in this submission. The rule against champerty has an important place in protecting the integrity of the conduct of court proceedings and I am not persuaded that the Amendment Agreement would render the objection moot. Nonetheless, because of my finding in relation to the nature of the Contract and the allegation of champerty in this case, this submission cannot alter the outcome of the case.

Conclusion

149. The purpose of and policy behind the tort and offence of champerty is to avoid trafficking in litigation, the stirring or encouragement of litigation for profit or intermeddling in court proceedings.

150. The court should be slow to distinguish this plaintiff from any other plaintiff who sues to recover debts. However, there is an important distinction which cannot be ignored. The plaintiff is the Collector General of Taxes charged by the Taxes Consolidation Act with the duty to collect all taxes for the benefit of the Central Fund. He does not exercise the same discretion or make the same type of profit orientated decisions which inform private parties or commercial enterprises who extend credit and make their own policy as to recovery of debt. There is no evidence that his decisions to pursue unpaid taxes are or can be influenced by the terms on which he retains solicitors to enforce collection.

151. When it comes to the appointment of agents and advisors to assist the plaintiff in the performance of this function it is appropriate that the plaintiff takes steps to ensure that value for money is achieved on behalf of the Central Fund. There is no evidence that in entering

into terms with his panel of solicitors which are directed to the objective of value for public money either the plaintiff or the retained solicitor are motivated or informed by a goal of profiting from or trafficking in litigation or that this is even a by-product of the Contract. No question of such activity arises in this case.

152. I have also found that the Contract does not facilitate or permit the plaintiff to perpetrate what the defendants have characterised as a fraud on the defendant or on the Legal Costs Adjudicator.

153. I shall grant judgment in both cases for the amounts of taxes surcharges and interest claimed in the Summons, together with interest at the rate claimed in accordance with s.1080 of the Act.