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IN THE CROWN COURT IN NORTHERN IRELAND

R

v.

GERALD MURRAY

Her Honour Judge Smyth

Ruling on an abuse of process application

Introduction

[1] This is an application to stay the proceedings as an abuse of process on the grounds of breach of promise. The following facts are not in dispute:

(a) In 2012, HMRC received information that the defendant had fraudulently evaded income tax in respect of rental income from properties he owned in the Czech Republic.

(b) HMRC Criminal Investigation Policy (King 0053) in force at that time stated that "*it is HMRC's policy to deal with fraud by use of the cost-effective Civil Investigation of Fraud (CIF) Procedures, wherever appropriate. Criminal investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate.*"

(c) There were essentially three ways in which an investigation into fraudulent tax evasion could be progressed:

- a criminal investigation.
- an investigation under code of practice 9 (COP 9) where a suspect wished to make a full disclosure of tax fraud. In such circumstances HMRC would give

an undertaking not to prosecute the suspect for any tax offences but reserved the right to prosecute for offences (other than the tax offences) if the suspect lied in the course of the investigation.

- A civil tax investigation involving monetary penalties only.

(d) On the basis of the information received, HMRC decided to progress the matter by way of a civil tax investigation. On 15 August 2012, the defendant was invited to attend an interview and informed that an investigation was being carried out with the aim of achieving a civil financial settlement. A number of fact sheets were enclosed providing further information. Three years later, updated versions of those fact sheets were sent to the defendant. There are some significant differences between the two versions, and for the purposes of this application I refer to the relevant portions of the fact sheets which accompanied the initial HMRC letter:

- FS 1 states that the defendant could be prosecuted if he lied to HMRC during their investigation into his tax affairs.

- FS 6 refers the reader to FS 7 for further information about penalties and how they may be calculated. FS 7 states: "when we find out about an error, we work with you to find out what caused it and what type of error it is. If we decide that you took reasonable care but still made an error, we will not charge a penalty. *We will charge a penalty if the error was: careless, deliberate, or deliberate and concealed. The type of error will affect the amount of the penalty. If you disagree with our decision about the type of error you made, you can appeal."*

- FS 7 deals specifically with "*deliberate and concealed errors"* and states: "if you knowingly give us an inaccurate return or document and take active steps to hide the inaccuracy from us, either before or after you sent the return or document, we will treat the error as deliberate and concealed. *Deliberate and concealed errors are the most serious type of error and lead to the largest penalties."*

(e) It is significant that the updated FS 7 document sent out three years later (FS 7 a), contains different information with regard to deliberate errors. Under the heading "*what happens if you have deliberately done something wrong*" FS 7 a states "we may carry out a *criminal investigation with a view to prosecution* if you: give us information that you know to be untrue, whether verbally or in a document [or] dishonestly misrepresent your liability to tax or claim payments to which you are not entitled".

(f) The interview was conducted on 24 August 2012 without a caution being administered and the defendant was told that the interview was civil in nature, was **"***not being conducted with a view to prosecution"* and the extent of his cooperation would inform the level of financial penalty to be imposed.

(g) In the course of that interview, in which he was unaccompanied, the defendant was asked to sign two documents, one being a statement of assets and liabilities and the other being a certificate of disclosure. He was specifically told that he would be prosecuted if he made false statements in either of those documents. The defendant did complete and sign the statement of assets and liabilities in due course and there is no suggestion of any falsehood. The certificate of disclosure has not been signed because it is intended to be signed at the end of the investigation and in light of the turn of events, that has not occurred. In short, none of the charges on the indictment relate to the documents in respect of which specific warnings about prosecution were given.

(h) The defendant provided information regarding his financial affairs in the course of the meeting. At its conclusion, and as advised by HMRC he instructed an accountant to prepare the information requested for the statement of assets and liabilities. There was no suggestion that he should consider instructing a solicitor.

(i) In the course of correspondence and communications from the accountant, HMRC were informed about a property at 30 St George's Harbour which the defendant had owned previously. HMRC knew nothing about this property until they were provided with the information. Issues arose regarding rental income in relation to this property, specifically whether the defendant had failed to declare rental income, whether he had been entitled to receive rent-a-room relief and whether he had been entitled to claim 100% private residence relief (PRR) for capital gains tax upon sale of the property.

(j) HMRC did not accept information provided by and on behalf of the defendant regarding his residence during the relevant period. Consequently, the defendant was asked to sign mandates permitting HMRC to seek information from the defendant's employer because it was understood that the defendant was obliged to provide accurate information concerning his residence to his employer.

(k) It is accepted that information held by the employer regarding the defendant's residence was changed at his request. It is the prosecution case that this action was deliberately taken to mislead HMRC and amounted to the falsification of documentation. The defendant denies the allegation and indeed all of the allegations. For the purposes of this application it is not necessary to deal with the detail of the allegation and the defence that has been put forward, save to say that counts 3 and 4 on the indictment arise out of these allegations.

(l) As a consequence of the view taken by HMRC that the defendant had lied and caused documents to be falsified, a decision was taken to progress the investigation

by way of a criminal investigation. The defendant was interviewed under caution in the presence of his solicitor.

Breach of Promise

[2] The leading authority is R v Abu Hamza [2007] 1 Cr App R 27, approved by the NICA in R v McGeough [2013] NICA 22. At paragraph 50 of Hamza, Lord Phillips LCJ acknowledged the difficulties in formulating a proper test for abuse of process applications based on breach of promise: *"As the judge held, circumstances can exist where it will be an abuse of process to prosecute a man for conduct in respect of which he has been given an assurance that no prosecution will be brought. It is by no means easy to define a test for those circumstances, other than to say that they must be such as to render the proposed prosecution an affront to justice. The judge expressed reservations as to the extent to which one can apply the common law principle of 'legitimate expectation' in this field, and we share those reservations. That principle usually applies to the expectation generated in respect of the exercise of an administrative discretion by or on behalf of the person whose duty it is to exercise that discretion. The duty to prosecute offenders cannot be treated as an administrative discretion, for it is usually in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only in rare circumstances will it be offensive to justice to give effect to this public interest."*

[3] At paragraph 57 Lord Phillips reviewed the earlier authorities and held: *"These authorities suggest that it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation."*

[4] In McGeough, Morgan LCJ stated at paragraph 24: *"There was no issue about the test which should be applied in relation to the submission…*

> *"In R v Abu Hamza [2007] QB 659 Lord Phillips emphasised that it is only in rare circumstances that it would be offensive to justice to give effect to the public interest that those who are reasonably suspected of criminal conduct should be brought to trial."*

He then referred to Lord Phillips' test set out at paragraph [3] above.

[5] There has been critical academic commentary of the Hamza judgment and in particular what has to be shown by way of detriment. Professor Choo (Abuse of Process and Judicial Stays of Criminal Proceedings [2nd Edition Oxford University Press, 2008]), discusses this issue in particular. He says: *"What, then, does the requirement of detriment entail? In Dean the Defendant clearly acted on the representation*

to his detriment, as 'he gave repeated assistance to the police'. Equally, a Defendant may have acted to his detriment by providing, as a potential prosecution witness, a witness statement implicating someone else. In Bloomfield, however, it does not seem possible, to isolate from the decision any hint of what tangible 'detriment' the Defendant may have been considered to have suffered. Perhaps the best approach may be to treat the 'detriment' requirement as superfluous and to remove it all together as otherwise there is a danger that in time it may come to be misinterpreted as a requirement for a showing of forensic prejudice or disadvantage."

[6] In the 3rd edition of "Abuse of Process in Criminal Proceedings" the authors comment at paragraph 2.44 that *"whilst there is no doubt a judicial trend towards requiring proof of detrimental reliance, courts must be wary not to see this as a pre-requisite for a stay. There will be cases in the future where there is no obvious, tangible, or discernible prejudice, which nevertheless strike at the core of justice and the heart of unfairness. In these instances, the judiciary will have the ever continuing challenge of exercising their judgment as to whether the "exceptional" threshold has been breached."*

[7] On behalf of the prosecution, reliance is placed on the judgments in R v Allen [2001] All ER (D) 159 and R v Gill [2003] EWCA Crim 2256. These cases concerned section 20(1) of the Taxes Management Act 1970 under which the Revenue had requested the Defendant to provide certain information using what is known as the 'Hansard procedure'. The arguments related to the privilege against self-incrimination and whether evidence should be excluded on the basis of the 'promise' included in the Hansard procedure. However, on behalf of the defence it is submitted that these authorities are irrelevant since this is an application to stay the proceedings as an abuse of process and unlike the inducement contained in the Hansard procedure, the promise in this case was unequivocal (except with regard to the statement of assets and liabilities and the Certificate of Disclosure).

The Submissions of the Parties

[8] The prosecution now concedes that HMRC did make an unequivocal promise to the defendant that he would not be prosecuted in respect of counts 1 and 2 ('the tax offences'). However, it is submitted that as a consequence of the Defendant's conduct in the course of the investigation, HMRC is not bound by that promise.

[9] Count 3 and Count 5 are charges of fraud. Count 3 relates to the allegation that the defendant deliberately did not tell HMRC of the existence of St George's Harbour during the initial meeting of August 2012. Count 5 relates to the allegation that the Defendant wrote to HMRC stating that St George's Harbour was his main residence when this was allegedly not the case. It is alleged that the intention was to defraud HMRC. The prosecution submits that the defendant was never given a promise that he would not be prosecuted for telling lies to HMRC.

[10] Count 4 is an allegation of fraud and relates to the allegation that the Defendant caused his employment records to be changed to record inaccurate information which was then used to mislead HMRC. The prosecution submits that the defendant was never given a promise that he would not be prosecuted for creating a false document and then using it to mislead HMRC.

[11] The defence submit that the defendant was expressly promised that he would not be prosecuted subject to two narrowly defined exceptions relating to the signing of a statement of assets and liabilities and the declaration of disclosure. Since neither of those two exceptions arises in this case, it is submitted that this was an entirely unconditional promise and the decision to bring a prosecution constitutes an abuse of process.

[12] The defence also rely on the information contained in the fact sheets which expressly set out the consequences of errors that are deliberate and concealed, namely that it will be relevant to the extent of monetary penalties.

[13] Furthermore, the defence rely on the oral evidence of Nuala McNamee (who invited the defendant to the meeting of August 2012) in which she explained the three potential routes of investigation open to HMRC at that time. Although FS 1 (which states that he could be prosecuted if he lied to HMRC during their investigation) was enclosed along with the other factsheets in August 2012, she accepted that the decision to send out FS1 was not because it warned the defendant that telling lies may lead to prosecution, but because it put the defendant on notice that in certain circumstances, defaultors would be subject to the additional punishment of publication (naming and shaming).

[14] Ms McNamee also accepted that FS 7 specifically refers to the '*creation of false paperwork'* as a particular form of deliberate concealment and that even in such circumstances the civil investigation procedure will result in a monetary penalty. Furthermore, she accepted that the clear assurance that the investigation was being conducted with a view to civil penalty and not with a view to prosecution is an inducement to encourage people to co-operate in the sense that the degree of co-operation will determine the level of penalty.

Consideration

[15] Before turning to the legal test, it is important to note the options available to HMRC where they have grounds to carry out a tax investigation. There are three potential investigation routes and the decision is taken on the basis of the Criminal Investigation Policy in force at that time "*to deal with fraud by use of the cost-effective Civil Investigation of Fraud (CIF) Procedures, whenever appropriate. Criminal investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where the*

conduct involved is such that only a criminal sanction is appropriate" (see paragraph 1(b) above).

[16] However, the choice of route has important consequences for the individual concerned. If HMRC chooses to follow the CIF procedure, no caution is administered, unlike the COP 9 procedure and the criminal investigation procedure. The inducement offered to obtain co-operation, in every sense of that word, is a reduction in monetary penalties. There is no threat of criminal sanction unless the statement of assets and liabilities or the Certificate of Disclosure contained inaccuracies.

[17] I turn now to the legal test set out by Lord Phillips and approved by Morgan LCJ in McGeough:

Has there been an unequivocal representation by those with the conduct of the investigation that the defendant will not be prosecuted?

The prosecution now concedes that an unequivocal promise was made in respect of tax offences. Whilst FS 1 alone warns of potential prosecution for telling lies in the course of the investigation, that was contradicted by the explicit information in FS 7. It was further contradicted by Ms McNamee's express statements that the investigation was not being conducted with a view to prosecution except in circumstances relating to signing of the two documents. In those circumstances, I am satisfied that there was an unequivocal representation that subject to the statement of assets and Certificate of Disclosure being accurately completed, the penalty, even for a "*deliberate and concealed error " including the creation of false paperwork"* was monetary.

Has the defendant relied on that representation to his detriment?

[18] The defendant clearly relied on that representation by co-operating with the investigation and providing HMRC with information regarding his assets which included St George's Harbour. It is accepted that HMRC had no knowledge of that property until the defendant volunteered it and therefore, co-operation has been to his detriment.

[19] Had HMRC chosen to follow the COP 9 procedure or the criminal investigation procedure, the defendant would have been cautioned and no doubt would have obtained and relied on legal advice as to how he proceeded.

Even then, did facts come to light which were not known when the representation was made so as to justify proceeding with the prosecution despite the representation?

[20] What are the facts that are said to have come to light since the representation was made? The prosecution alleges that the defendant told lies and in so doing, made "*deliberate and concealed errors* ", and caused "*false paperwork to be created*". Both of those potential scenarios are clearly envisaged by the fact sheets issued along with the Civil Investigation, FS 7 in particular. No doubt, these are always potential scenarios when a tax inquiry or investigation is underway.

[21] HMRC were aware from the outset of the defendant's employment and status so it cannot be said that this factor justified changing the investigation for reasons of deterrence (see the policy set out at paragraph 1 (b) above).

[22] The question for this court is whether this is an exceptional case where it would be offensive to justice to give effect to the public interest that those reasonably suspected of criminal conduct should be brought to trial? In my view it is such a case. HMRC made an informed, deliberate decision to purse an investigation into fraud by way of a civil procedure and sought the defendant's co-operation by making clear representations to that effect. He has acted to his detriment in circumstances where he has been denied basic legal protection against self-incrimination. Nothing has occurred since then to justify a criminal prosecution in circumstances where the defendant was denied basic safeguards and clearly relied on those representations to his detriment. The public interest is served by the system of penalties set out in the fact sheets, with recourse to a tax tribunal.

[23] I accept the defence submission that the judgments in Allen and Gill have no relevance to this decision because the Hansard procedure was not followed and therefore the terms of the promise are not the same.

[24] I therefore accede to the application.