78TACD2021

BETWEEN/

[redacted]

Appellant

AND REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against Revenue assessments to Income Tax in relation to the tax years of assessment 2014 – 2016 inclusive, raised in accordance with the provisions of Section 1025 Taxes Consolidation Act (TCA) 1997.

2. The appeal concerns the denial by the Respondent of the Appellant's claim for relief from income tax pursuant to Taxes Consolidation Act 1997 (TCA), section 1025, in respect of the payment of spousal maintenance made to his former spouse for the years 2014, 2015 and 2016. The amounts claimed by the Appellant are as follows:

   €7,000 for 2014
   €18,500 for 2015
   €18,500 for 2016.

3. Following enquiries by Revenue, it was determined that the payments made by [redacted] were not legally enforceable and the relief was withdrawn. Assessments issued to Mr. Appellant on 18th June 2018 reflected the withdrawal of the relief. It is these assessments that are the matter of this Appeal.

4. This Appeal was determined with a hearing held remotely on 12 February 2021.

Background

5. The Appellant and his spouse are separated since late May 2014.

6. The Appellant's spouse sought maintenance from him. The Appellant was advised by his solicitor that if the spouse went to court for maintenance she would probably get something.

7. The Appellant's solicitor had earlier referred him to Mr. [redacted], a professional family counsellor, in order to resolve a dispute about access to the children.

8. Following a mediation session with Mr. [redacted] the Appellant made an agreement with his spouse and began making a payment to her in the sum of €1,500 on a monthly basis. Under the verbal agreement, €1,000 was to be paid directly into her bank account and the remaining €500 was to be in the form of vouchers to a local supermarket.

9. This arrangement continued for some time but ultimately the Appellant at some stage began to deposit the entire €1,500 into the bank account of his spouse each month.

10. The Appellant also discharged some of the expenses of the children by paying these directly, or reimbursing his spouse upon presentation of receipts. At one point, the Appellant voluntarily increased the amount of the payment by approximately €200 a month. He did not claim relief from income tax in respect of those payments.

11. On 15th May 2017, the Appellant received correspondence from Revenue advising of a verification enquiry into his tax affairs. Among the items enquired of were the Appellant's deductions for maintenance made pursuant to his agreement with his spouse. He continued the maintenance payments as usual.

12. In January 2018, he was informed that the verification enquiry was over and the maintenance deductions were no longer a concern. Six months later, Revenue raised the amended assessments seeking additional tax due arising from the denial of the above maintenance payments as a deduction from his income.

13. In September 2018, the Appellant stopped making the payments to his spouse. She petitioned for maintenance to the Circuit Court, where the divorce was (and remains)

pending. This resulted in a written settlement agreement being entered into by the parties, which was subsequently on consent, made an order of the Court, in which the Appellant agreed to pay €1,000 a month. This remains in effect.

14. These background facts are not in dispute between the parties.

Legislation

15. Section 1025 Taxes Consolidation Act 1997 (TCA),

(1) In this section –

"maintenance arrangement" means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a legally enforceable obligation and made or done in consideration or in consequence of –

(a) the dissolution or annulment of a marriage, or

(b) such separation of the parties to a marriage as is referred to in section 1015(2),

and a maintenance arrangement relates to the marriage in consideration or in consequence of the dissolution or annulment of which, or of the separation of the parties to which, the maintenance arrangement was made or arises;

"payment" means a payment or part of a payment, as the case may be;

a reference to a child of a person includes a child in respect of whom the person was at any time before the making of the maintenance arrangement concerned entitled to [relief under section 465]1.

(2) (a)This section shall apply to payments made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage for the benefit of his or her child, or for the benefit of the other party to the marriage, being payments –

(i)which are made at a time when the wife is not living with the husband,

(ii)the making of which is legally enforceable, and

(iii)which are annual or periodical;

but this section shall not apply to such payments made under a maintenance arrangement made before the 8th day of June, 1983, unless and until such time as one of the following events occurs, or the earlier of such events occurs where both occur –

(I) the maintenance arrangement is replaced by another maintenance arrangement or is varied, and

(II) both parties to the marriage to which the maintenance arrangement relates, by notice in writing to the inspector, jointly elect that this section shall apply,

and where such an event occurs in either of those circumstances, this section shall apply to all such payments made after the date on which the event occurs.

(b) For the purposes of this section and of section 1026 but subject to paragraph (c), a payment, whether conditional or not, which is made directly or indirectly by a party to a marriage under or pursuant to a maintenance arrangement relating to the marriage (other than a payment of which the amount, or the method of calculating the amount, is specified in the maintenance arrangement and from which, or from the consideration for which, neither a child of the party to the marriage making the payment nor the other party to the marriage derives any benefit) shall be deemed to be made for the benefit of the other party to the marriage.

(c) Where the payment, in accordance with the maintenance arrangement, is made or directed to be made for the use and benefit of a child of the party to the marriage making the payment, or for the maintenance, support, education or other benefit of such a child, or in trust for such a child, and the amount or the method of calculating the amount of such payment so made or directed to be made is specified in the maintenance arrangement, that payment shall be deemed to be made for the benefit of such child, and not for the benefit of any other person.

(3) Notwithstanding anything in the Income Tax Acts but subject to section 1026, as respects any payment to which this section applies made directly or indirectly by one party to the marriage to which the maintenance arrangement concerned relates for the benefit of the other party to the marriage –

(a) the person making the payment shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment,

(b) the payment shall be deemed for the purposes of the Income Tax Acts to be profits or gains arising to the other party to the marriage, and income tax shall be charged on that other party under Case IV of Schedule D in respect of those profits or gains, and

(c) the party to the marriage by whom the payment is made, having made a claim in that behalf in the manner prescribed by the Income Tax Acts, shall be entitled for the purposes of the Income

Tax Acts to deduct the payment in computing his or her total income for the year of assessment in which the payment is made.

(4) Notwithstanding anything in the Income Tax Acts, as respects any payment to which this section applies made directly or indirectly by a party to the marriage to which the maintenance arrangement concerned relates for the benefit of his or her child –

(a) the person making the payment shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment,

(b) the payment shall be deemed for the purposes of the Income Tax Acts not to be income of the child,

(c) the total income for any year of assessment of the party to the marriage who makes the payment shall be computed for the purposes of the Income Tax Acts as if the payment had not been made, and

(d) for the purposes of [section 465(6)]2, the payment shall be deemed to be an amount expended on the maintenance of the child by the party to the marriage who makes the payment and, notwithstanding that the payment is made to the other party to the marriage to be applied for or towards the maintenance of the child and is so applied, it shall be deemed for the purposes of that section not to be an amount expended by that other party on the maintenance of the child.

(5) (a)Subsections (1) and (2) of section 459 and section 460 shall apply to a deduction under subsection (3)(c) as they apply to any allowance, deduction, relief or reduction under the provisions specified in the Table to section 458.

(b)Subsections (3) and (4) of section 459 and paragraph 8 of Schedule 28 shall, with any necessary modifications, apply in relation to a deduction under subsection (3)(c).

Evidence

16. The Appellant gave evidence before me at the hearing of this appeal and his evidence is summarised below.

17. The Appellant outlined his personal background as a [redacted] lawyer working and living in Ireland. He stated that he was married for 18 years and that he has been separated from his wife since June 2014.

18. The separation was in acrimonious circumstances and communications between the parties was difficult.

19. His wife sought financial support and he was advised by a solicitor that she would receive such support if she formally sought such support from the Courts.

20. In the fall (autumn) of 2014, following a meeting with the mediator, he agreed to pay maintenance to the value of €1,500 per month to his wife. This agreement was not put in writing as he felt it was unnecessary to do so.

21. The Appellant provided further evidence of the enquiries made by the Respondent in the matter of his tax returns for the years under appeal which culminated in the assessments under the instant appeal.

22. He outlined the *"nature of the thing"* [the agreement] as an arrangement between two people where his wife was not cooperative. He referred to the already provided evidence from the mediator of the arrangement and commenced payment from September 2014.

23. He also referred to the evidence provided in relation to emails dated 7th and 8th February 2015 in which both parties refer to a meeting with the mediator on 6 February 2015. The email from the Appellant dated 7 February 2015 refers to the session with the mediator and states that he (Appellant) agreed to give to his wife (for as long as he can do so) €1,500 per month.

Cross-examination

24. Counsel for the Respondent cross-examined the Appellant on a number of issues as follows.

25. In cross-examination, counsel for the Respondent referred the Appellant to a letter written on 28th April 2020 to the Respondent outlining the history of the maintenance payments and his (Appellant) views on the nature of the contract between the parties.

26. The Appellant confirmed that he had only briefly engaged the assistance of a family lawyer for one hour, that he went to the mediator in late summer 2014, that he had visited the mediator as required 4 or 5 times, that his wife and children had attended 1 or 2 times and that he had attended with his wife once. The Appellant advised that the matter of the maintenance agreement had developed organically with the ultimate goal being achieved to pay €1,500 monthly in the way outlined in the correspondence of 28th April 2020.

27. Counsel addressed the veracity of the existence of the maintenance agreement for 2014 by examining the evidence adduced from the emails between the parties on 7th and 8th February 2015. The Appellant in reply advised that he had searched all his records and that the emails presented represented all the evidence he had available as to the existence of the maintenance agreement. Counsel suggested to the Appellant that any agreement to pay maintenance was completely informal.

28. Counsel outlined the necessary elements of an agreement that make such an agreement enforceable in Irish law and suggested that the Appellant as a lawyer ought to be aware of these. Counsel also outlined the mechanism whereby the Appellant gets a tax deduction for maintenance payments whilst at the same time the recipient of the payment has an obligation to pay tax on its receipt. Counsel suggested that it was only after the Respondent commenced enquiries that the Appellant sought to have the matter of the agreement formalised with his wife.

29. The Appellant stated that he was not thinking as a lawyer in relation to his personal family dispute and that he simply regarded the payment as a binding contract in his mind.

30. In further cross-examination, the Appellant conceded that he had not and was not aware whether his wife discussed the maintenance agreement with a lawyer and that the agreement was never put in writing.

31. The Appellant admitted that the matter of maintenance payments was formally addressed in an agreement by both parties after he stopped making the payments sometime in 2018, but consequent to his wife seeking such maintenance payments through the courts. The Appellant agreed that the formal agreement reached in 2018 amounted to a monthly payment of €1,000 by the Appellant to his wife.

32. The Appellant acknowledged in cross-examination that his wife never sought to sue for specific performance or breach of contract in relation to the maintenance payments provided for under the agreement reached between the parties in 2015, but instead sought maintenance payments through her own lawyers in 2018.

33. Counsel for the Respondent put the distinction between a formal and informal agreement to the Appellant and opined that:

"It is only a contract if the parties are engaged in a process that the intent gives rise to legal relations, rather than a process which, for example, includes counselling or mediation or something else that they intend to be a negotiation or that is a family situation."

34. Counsel asked the Appellant what his wife thought about the agreement. The Appellant confirmed that he was not aware of what his wife thought in the matter. Counsel also asked if the Appellant or his wife were aware of the tax consequences and put it to the Appellant if the tax planning was an afterthought following the Revenue intervention.

35. The cross examination continued wherein counsel for the Respondent sought to portray a situation whereby the Appellant had entered a voluntary agreement to pay his wife €1,500 a month. Counsel put the probable grossed up figures to the Appellant if the arrangement was to last one year or 20 years and sought to draw the conclusion that the arrangement was voluntary rather than enforceable.

36. The Appellant at all times considered the agreement as a formal voluntary contract and emphasised that he was not aware of the views of his wife in the matter.

Submissions of the Appellant

37. The Appellant and his spouse separated in late May, 2014 in what were very acrimonious circumstances, and she left the family home of her own volition. Because of the circumstances, the Appellant was disinclined to provide the spouse with any maintenance whatsoever, although the Appellant would (and did) support all the needs of the couple's two children, wherever they resided. They were both teenaged at the time.

38. After a short period, the Appellant's spouse decided she needed maintenance and the Appellant was advised by his solicitor that despite the applicable facts, if the spouse went to court for maintenance she would probably get something. The Appellant's solicitor had earlier referred him to Mr. [redacted], a professional family counsellor, as the Appellant's spouse was being very uncooperative regarding the children and it was hoped that Mr. [redacted] could help resolve that dispute.

39. At the Appellant's request, Mr. [redacted] agreed to mediate a session with the Appellant and his spouse to agree a maintenance arrangement. Both were present in Mr. [redacted]'s office for the mediation, and Mr. [redacted] asked the spouse what

her expenses and income were and ultimately recommended a maintenance payment of €1,500 a month, to which the Appellant and his spouse both agreed.

40. The parties further agreed that of the €1,500, €1,000 would be paid directly into her bank account and the remaining €500 would be in the form of vouchers to a local supermarket. This arrangement continued for some time, although ultimately at the request of the Appellant's spouse, he ended up just depositing the entire €1,500 into her bank account each month.

41. The Appellant met all of these obligations fully and timely. At the same time, he also paid all of the children's expenses for school supplies, fees, doctor visits, clothes, medicines, mobile telephone service and everything else. The Appellant would either pay these directly, or reimburse his spouse upon presentation of receipts. At one point, the Appellant voluntarily increased the amount of the payment by approximately €200 a month, but as this was voluntary the Appellant never sought a tax deduction for this amount.

42. On 15th May 2017, the Appellant received correspondence from Revenue advising of a verification enquiry. Among the items enquired of were the Appellant's deductions for maintenance made pursuant to his agreement with his spouse.

43. When his accountants informed the Appellant that Revenue would be looking for a written agreement regarding the agreed maintenance arrangement, he decided it might be a good idea to memorialise in writing the maintenance arrangement as well as other matters around the separation.

44. The Appellant accordingly presented his spouse with a draft of a comprehensive separation agreement. After some amount of time, the Appellant's spouse notified him that she would prefer that the written agreement address nothing but the maintenance issue. The Appellant prepared a draft that did just that, but after some time his spouse told the Appellant that, her solicitor advised her not to sign anything.

45. Shortly before the Appellant's submission of materials was due to Revenue in connection with the verification enquiry, he was informed by his spouse's solicitor that they would agree to let her sign something detailing all of the maintenance payments that had been paid by the Appellant in the preceding years, and that he could come to their office and collect it late one Friday afternoon.

46. When the Appellant went to the solicitor's office, he was told that his spouse had failed to come in and sign the document. Hence, when the Appellant made his submission to Revenue, the best he could do was recite the facts as he knew them, and include a brief letter from Mr. [redacted] to confirm that he did mediate the maintenance arrangement back in 2014.

47. Regardless of the failure of Appellant's spouse to cooperate, he continued the maintenance payments as usual, and was delighted to learn in January 2018 when the verification enquiry was over and the maintenance deductions were no longer a concern.

48. The Appellant submitted that six months later, Revenue reversed itself on the issue without any discussion or communication other than an assessment of further tax due. Upon learning that Revenue would not allow the maintenance deduction, the Appellant once again asked his spouse to sign a document evidencing their agreement of years back. This email was unanswered.

49. In September 2018, the Appellant stopped making the payments to his spouse. She then promptly petitioned for maintenance to the court where the divorce was (and remains) pending. This resulted in a settlement at the courthouse before the matter was heard where the Appellant agreed to pay €1,000 a month. This remains in effect.

50. The Appellant's spouse has never disavowed the maintenance agreement, contradicted it and said it was voluntary or anything contrary to the Appellant's view of the matter at all. She simply refused to cooperate or do anything that might assist the Appellant in any manner whatsoever. Although her silence is problematic, the fact that she petitioned the court for maintenance when the Appellant stopped making payments in September 2018 ought to be interpreted as a concession by her that an agreement had been in place.

Legal issues raised by the Appellant

51. The Appellant submitted the following in relation to the legal issues under discussion.

52. The sole, primary issue is whether an oral agreement to pay maintenance is enforceable for the purposes of section 1025 TCA 1997. A sub issue is whether the Appellant's statement regarding the facts underpinning the maintenance agreement

and his intentions at the time the agreement was entered into can be accepted under circumstances where the other party to the agreement refuses to say anything at all.

53. By its language, section 1025 TCA 1997 does not require a written agreement and it is very well established under law that most agreements do not have to be in writing to be enforceable. Where a written agreement is required, there is a statutory provision that clearly says so–for example, a contract of marriage or for the sale of an interest in land. The plain language of section 1025 TCA 1997 is very clear that it contemplates more than just an instrument in writing or a court order. To view it otherwise would make the language of the statute absurd:

> *'In this section- "maintenance arrangement" means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a legally enforceable obligation …' (emphasis added)*

54. The four elements required to create a binding contractual obligation–whether a contract is written or oral–are (i) an offer; (ii) acceptance of an offer; (iii) consideration; and (iv) intention to create legal obligations. In the Appellant's circumstances:

    - An offer was made by him to pay his spouse €1,500 a month in maintenance
    - That offer was accepted by the spouse in the presence of the Appellant and the mediator, Mr. [redacted].
    - The consideration on both sides is self-evident, as each party could have gotten better or worse treatment in court, so an agreed arrangement was bargained for by and acceptable to both of them
    - The Appellant's intention is demonstrated by his words and the fact that he made the payments as and when agreed over a period of years. The intention of the Appellant's spouse can be inferred not only from her acceptance of the payments over a period of years, but also by her petitioning the court when the Appellant stopped making payments.

55. Although Revenue appear to argue that the Appellant's ceasing payments in September, 2018 following four full years of payment, indicates its belief that the agreement to pay maintenance was voluntary, it is anything but. The ceasing of the payments came only after repeated failures of Appellant's spouse to acknowledge the agreement and Revenue's insistence that the payments were 'voluntary'. It was designed to get his spouse's attention, which it did. The failure of a party to a contract

to adhere to the contract is a breach, not a repudiation of the validity of the contract–unless expressly communicated as a repudiation. The Appellant has never disavowed the 2014 mediated agreement.

56. The Appellant will rely on the same cases as Revenue has identified, i.e. *Balfour v Balfour* [1912] 2 KB571, *Courtney v Courtney* (1923) 57 ILTR 42 *and Merritt v Merritt* [1970] 1 WLR 1211. Another case of relevance is *O'D. (P.) v O'D. (A.).* Viewed together, all of the cases support the Appellant's perspective in this matter in that they stand for the proposition that arrangements made in a family context involving financial matters of separating couples are generally enforceable, regardless of the form. There are no apparent cases requiring a maintenance agreement to be in writing, which comes up in none of the cited cases. It is also interesting to note that in none of the reported cases on the enforcement of a separation agreement was the payee contesting the agreement–it seems to always be the case that the payor is trying to reject a promise made.

Submissions of the Respondent

57. The following relevant details were included in the submissions of the Respondent:
    - Mr. Appellant separated from his spouse, Ms. Appellant on 1 June 2014.
    - Mr. Appellant claimed credit for legally enforceable maintenance payments in his 2014 (€7,000), 2015 (€18,500) and 2016 (€18,500) Returns of Income.
    - As part of a Revenue initiated enquiry - Aspect Query into Mr. Appellant's tax affairs on 15 May 2017, Revenue requested that Mr. Appellant provide a copy of the "legally enforceable document" under which the maintenance payments were made.
    - Mr. Appellant's agent informed Revenue on 05 October 2017 that Mr. Appellant *"did not sign a document on the maintenance payment"* and that Mr. Appellant and his former spouse had met "with an independent third party and reached an agreement for him to pay her maintenance of €1,000 per month".
    - Revenue then requested on 13 November 2017, that Mr. Appellant *"forward any written agreement of the terms of separation between yourself and your spouse when both parties attended the Independent Third Party which may be held either by yourself or the Independent Third Party."*
    - Mr. Appellant provided Revenue with a memo from a Consultant Clinical Psychologist, Mr. [redacted], as the basis for his claim to the maintenance payments. The memo, which is, dated 20 November 2017 details a brief recount by Mr. [redacted] of the financial arrangement negotiated in 2014,

along with a disclosure that any formal notes taken at the time had since been destroyed.

- Mr. Appellant paid his former spouse maintenance of €1,000 per month evidenced on his bank statements.
- At that point, in time – given Mr. Appellant's assertions, Revenue accepted the documentation supplied by Mr. Appellant in relation to his maintenance payments deductions and the Revenue enquiry was closed on 10 January 2018.
- However, following successive enquiries into the matter, Revenue subsequently concluded that the purported maintenance agreement did not meet the definition of a legally enforceable agreement under section 1025 TCA 1997.
- The relief was subsequently withdrawn and the following assessments to Income Tax issued to Mr. Appellant on 18 June 2018:
  - €3,639 – 2014
  - €10,174 – 2015
  - €25,447 – 2016
- [redacted] - Agent to Mr. Appellant - submitted a Notice of Appeal to the Tax Appeals Commission on behalf of Mr. Appellant on 18 July 2018. These assessments are the matter of this appeal.

58. It is argued by the Appellant that the agreement negotiated by the independent third party, Mr. [redacted], was a negotiated compromise and agreement, and was viewed from the beginning by all parties as a binding arrangement. He argues that this oral contract is legally enforceable. On this basis, he considers that he is entitled to a deduction for the maintenance payments made to his former spouse.

59. Revenue are of the view that the relevant agreement is not a legally binding agreement but rather a mediated voluntary agreement with his estranged spouse. On this basis, Revenue argue that as Mr. Appellant does not meet the requirements for relief under section 1025 TCA 1997 then he is not entitled to the relief for maintenance payments made.

60. Under section 1025, if legally enforceable maintenance payments are made from one spouse to another they are allowed as a deduction from the income of the payer for tax purposes. These payments are chargeable to income tax in the hands of the recipient under Case IV of Schedule D.

61. It is the Appellant's case that there was a legally enforceable oral contract to pay maintenance and that this contract was entered during a meeting with Mr. [redacted], a clinical psychologist.

62. The fundamentals of contract law require that before a contract can be formed there must be –

    a. An offer;
    b. Acceptance of that offer;
    c. Consideration;
    d. An intention to create legal relations

63. Offer and Acceptance - With regard to the requirements of offer and acceptance, very little information is provided in the Appellant's submission. The Appellant sets out that Mr. [redacted] came up with the figure and both parties agreed.

64. Robert Clark in Contract Law in Ireland (7th edition) set out that – *'An offer may be defined as a clear and unambiguous statement of the terms upon which the offeror is willing to contract, should the person to whom the offer is directed decide to accept.'* Based on the very limited information available, it is not possible to conclude if there was a valid offer made in this case and if there was unequivocal acceptance of that offer.

65. Consideration – We now refer to the requirement for consideration for a contract to be valid. It is usual in enforceable agreements to pay maintenance that the consideration be the altering of, by parties, of their legal positions.

66. Intention to Create Legal Relations - It must be considered if there was an intention to create a legal contract when the parties attended for mediation before Mr. [redacted], a clinical psychologist. It is noted that Mr. [redacted] does not have any records of what occurred at the mediation sessions. He did set out his recollection as to what was agreed concerning maintenance. This was that Mr. Appellant would transfer €1000 a month and €125 a week in either cash of supermarket vouchers to his ex-spouse.

67. A contract can only come into existence if the parties intend to enter legal relations. The only information provided by the Appellant to demonstrate the intention to create legal relations is that in his opinion the parties considered that the agreement would be 'binding'.

68. It is not enough that the Appellant considered that the agreement would be binding. The objective facts must support this contention. The Appellant has not provided any account of the circumstances, which would support a conclusion that there was an intention to enter legal relations. His account is that he 'can't recall how it came about' that there would be discussion concerning maintenance. (See letter dated 28 April 2020 from Mr. Appellant to Revenue.)

69. Thereafter, the Appellant set out that after he learned Revenue 'had reversed itself' on the issue, the Appellant 'stopped making the payments figuring if Revenue weren't going to allow the deduction as it was 'voluntary'' and my spouse had failed or refused to acknowledge in writing the agreement we had, then why should I keep paying her?' The estranged spouse of the Appellant petitioned the court for maintenance. Therefore, the wife of the Appellant did not take an action to court seeking that the agreement made be enforced which leads to the conclusion that she did not consider it to be legally binding. However, more the Appellant also at this point must not have considered that the agreement was legally binding as he decided also not to continue to comply with the terms of the agreement.

Case law submitted by the Respondent

70. In the decision of *Balfour V Balfour*, an agreement was reached between a husband and wife. The wife was unable to return to her husband's place of work in Ceylon due to ill health. The husband agreed to pay the wife £30 a month while he was away. Sometime later the marriage broke down. When this case came before the court on an application of the wife to require the husband comply with the agreement, the court decided that the agreement was not enforceable as there was a lack of consideration on the part of the wife. In addition, the Court went on to say that there was no intention to create legal relations.

71. In the Irish High Court case of *Courtney v Courtney*, the court held that the parties to an agreement made where due to marital difficulties, they were living apart, would have the requisite intention to create legal relations.

72. This distinction was made in the case of *Merritt v Merritt*. In this case, following the breakdown of a marriage a couple entered an agreement whereby the husband was to pay the wife £40 a month and she was to agree to pay the mortgage on a house that was in their joint names. The husband agreed that once the mortgage was paid off, the house would be transferred to the wife. The agreement was reduced to

writing and was considered by the court to be legally enforceable. Lord Denning, in distinguishing the Balfour decision, set out – *'It is altogether different when the parties are not living in amity but are separated, or about to separate. Then they bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relation.'* However, in the *Merritt* case the wife had insisted that the agreement be put in writing.

73. Lord Bingham in *Edwards V Lawson* [2000] 1 ELR 1091 set out – *'Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by inquiring into their respective states of mind.'*

74. In the case of *Soulsbury v Soulsbury* [2007] EWCA Civ 969 following the end of a 20-year marriage, the court made a periodical payments order requiring the husband to pay the wife £12,000 a year, less tax. The wife agreed to waive her entitlement to the periodical payments based on the husband's promise to leave her £100,000 in his will. This agreement between husband and wife was not put before the court, and therefore was never approved by the court. However, in accordance with the agreement, the husband changed his will and stopped making the periodical payments, while the wife made no attempt to recover the arrears that began to accrue. The husband had remarried and upon his death, his second wife refused in her capacity of personal representative of her deceased husband's estate to make any payment to the first wife on the basis that the agreement was unenforceable, applying *Xydhias v Xydhias* [1999] 1 FLR 683. The decision turned on whether the agreement between the deceased husband and his first wife sought to oust the jurisdiction of the court in the matter of ancillary relief. The court held that as the wife had not attempted to pursue any ancillary relief through the courts, the court's jurisdiction had not been usurped. The agreement was therefore upheld. The case did not concern the question of whether or not an agreement had been reached. It turned on whether the agreement reached was legally enforceable.

75. Burden of Proof – It is noted that before the Tax Appeals Commission, the burden of proof rests on the Appellant. In appeals against assessments, the Appellant must prove on the balance of probabilities that the assessments are incorrect.

In the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another,* [2010] IEHC 49, at para. 22, Charleton J. stated: '*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing.*

It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable.'

Analysis and Findings

76. In the outline of relevant facts provided by the Respondent, it is illustrated that the Respondent commenced enquiries into the Appellant's tax returns on 15 May 2017. Following various assurances provided by the Appellant the enquiry was closed on 10 January 2018. However, the Respondent subsequently concluded that the purported maintenance agreement did not meet the definition of a legally enforceable agreement as defined in section 1025 TCA 1997.

77. The Respondent raised the assessments the subject of this appeal on 18 June 2018. The TAC queried why the Respondent had raised the assessments in these circumstances and were advised as follows:

> *"Following the closure of Mr. Appellant's Revenue enquiry, further third-party information came to light which for GDPR (General Data Protection Regulations) reasons we are unable to share. On foot of this third-party information and further Revenue enquiries, Revenue subsequently determined that Mr Appellant had not provided sufficient proof to show that the payments made were legally enforceable as required by the Section 1025 TCA 1997. Therefore, the relief claimed for them was not due. Revenue then concluded that the purported maintenance agreement did not meet the definition of a legally enforceable agreement under Section 1025 TCA 1997".*

78. Notwithstanding the circumstances in which the assessments were raised by the Respondent, the question to be answered in this case is whether or not a maintenance arrangement that created a legally enforceable obligation existed for the years 2014, 2015 and 2016 and that that arrangement met the requirements for relief under section 1025 TCA 1997.

79. Section 1025 (1) TCA 1997 states:

> *In this section – "maintenance arrangement" means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a* ***legally enforceable obligation*** *and made or done in consideration or in consequence of* – [**emphasis added**]

80. Counsel for the Respondent helpfully provided the guidance from the 4th edition of Shatter's Family Law and referred me to the guidance on page 302 of that publication.

81. At paragraph, 7.05 Shatter points out that discussions or negotiations leading to the conclusion of a separation agreement can be conducted by estranged spouses directly with each other, or by them with the assistance of a mediator or through lawyers representing each spouse independently. Shatter points out that the Judicial Separation and Family Law Reform Act 1989 imposes a duty on the solicitors acting for estranged spouses, prior to initiating or defending judicial separation proceedings, to discuss with their clients the possibility of engaging in mediation or legal negotiation to affect separation on an agreed basis. Where matters in dispute are first resolved at mediation, a mediation agreement usually expressly states that it is not legally binding on the couple who have agreed to the arrangements contained in it. In order to become legally enforceable it must be transformed into a formal legal separation agreement.

82. At paragraph 7.06 Shatter says a separation agreement is subject to the ordinary law of contract. Proof that either or both spouses did not obtain independent legal advice prior to entering into a separation agreement is not, of itself a sufficient ground to invalidate an agreement. In *VW v JW,* a wife who deliberately chose not to obtain such advice was unsuccessful in her application to have an agreement declared void. In *LM v M,* the husband was similarly unsuccessful in relation to an agreement concluded with the assistance of a solicitor who was a long-standing friend of both spouses and who acted as an intermediary and honest broker. Shatter goes on to say that to ensure the validity of an agreement cannot be challenged, it is preferable that each spouse obtain independent legal advice from their own solicitor.

83. It is clear that the family Law Reform Act of 1989 imposes certain burdens on mediators and legal advisers in relation to separation agreements. However, this does not mean that the instant separation arrangement as purportedly in place for the years 2014, 2015 and 2016 does not meet the requirements for relief in accordance with section 1025 TCA 1997.

84. In order to meet the conditions for relief the arrangement in place must meet the fundamental principles of contract law requiring that before the contract can be formed there must be:
    1. An offer;

2. An acceptance of that offer;
3. Consideration; and
4. An intention to create legal relations.

85. In the instant appeal, there is no disagreement raised by the Respondent in relation to the consideration paid by the Appellant for the years in question. The Respondent raised no issue about the supermarket vouchers being part of the €1,500 monthly payment. Furthermore, the Respondent did not object to the suggestion that there is an arrangement in place whereby the Appellant paid the sums involved to his spouse. The Respondent has confined its objections to the legally enforceable element of the arrangement and has opined that the arrangement is not legally enforceable and therefore does not meet the criteria laid down in section 1025 (1) for relief.

86. The evidence provided by the Appellant in support of the existence of the arrangement is provided in the emails between him and his spouse on 7th and 8th February 2015 and in the letter from the mediator, a clinical psychologist, dated 20 November 2017.

87. The only witness to the agreement was the mediator. The mediator has supplied a written note of his recollection of the events that took place which differ from the views of the Appellant insofar as both the date of the agreement as supplied in the emails between the Appellant and his wife and the consideration payable are not the same as opined by the Appellant. The mediator's recollection of the arrangement was that the Appellant agreed to pay €1,000 per month and provide vouchers to the value of €125 per week. The mediator confirmed that the Appellant and his wife attended him for mediation in 2014, but having shredded his notes, has no contemporaneous records of his meeting.

88. In order to prove the existence of an enforceable verbal contract, one would expect to have it witnessed in some way, to have some evidence of its existence and to demonstrate its physical results. The Appellant has demonstrated an offer and payment of consideration for €1,500 per month and indeed his own intention to create legal obligations. However, he has failed to provide any evidence of his spouse's intention to create legal obligations.

89. The emails of 7th and 8th February 2015 between the Appellant and his wife clearly postdate the supposed legally enforceable arrangement for 2014 and are fatal in my view to the Appellant's claim for relief in respect of payments made under an

arrangement for 2014. Accordingly, I find as a fact that the Appellant did not have a legally enforceable arrangement in 2014 to pay maintenance to his wife for that year.

90. The failure of the spouse to seek to enforce the terms of an alleged arrangement whereby she was entitled to receive €1,500 per month indicates to me that neither she nor her legal advisers were confident or aware of the terms of the arrangement under which the Appellant seeks relief. Instead of seeking to enforce the arrangement concluded in February 2015, she settled for a lesser formal maintenance arrangement of €1,000 per month.

91. In considering whether the Appellant is entitled to relief for 2015 and 2016 in accordance with the arrangement entered into following the mediation meeting of the parties on 6 February 2015, I must consider whether the arrangement entered into, fulfils the requirements for relief, in accordance with section 1025 TCA 1997.

92. The Appellant has not in my view provided sufficient evidence of the legal enforceability of the arrangement in which he made the payments to his spouse and thus fails to meet the specific requirement in s 1025 (1) TCA 1997 concerning the arrangement being a *legally enforceable obligation* on him.

93. In appeals before the Appeal Commissioners, the burden of proof rests on the Appellant who must prove on the balance of probabilities that the relevant tax is not payable. In the High Court judgment of *Menolly Homes Limited -v- The Appeal Commissioners and The Revenue Commissioners* [2010] IEHC 49 (at paragraph 22) Charleton J. stated:

> "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*".

94. The Appellant has failed to provide the necessary evidence to enable me to conclude that he is entitled to the relief sought and I have concluded that he has not met the burden of proof in relation to proving that he had entered into a legally enforceable obligation as required by section 1025 (1) TCA 1997.

> *"maintenance arrangement" means an order of a court, rule of court, deed of separation, trust, covenant, agreement, arrangement or any other act giving rise to a* ***legally enforceable obligation****……*[**emphasis added**]

95. I have determined and found as a matter of fact that the arrangement in place is a voluntary arrangement between individuals without any legally enforceable obligation and consequently the Appellant is not entitled to the relief sought in accordance with section 1025 (1) TCA 1997.

Determination

96. I have determined that the assessments for 2014, 2015 and 2016 shall stand.

97. As such, this appeal is therefore determined in accordance with Taxes Consolidation Act 1997, section 949AK.

CHARLIE PHELAN
APPEAL COMMISSIONER
16 MARCH 2021

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997.