

THE HIGH COURT

[No. 2020 186 SS]

BETWEEN

TEARFUND IRELAND LTD

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 27th day of November 2020

Introduction

1. The appellant ("Tearfund") seeks "a declaration pursuant to the inherent jurisdiction of" the court that it "will have no liability for the costs" of the respondent ("the commissioner") if its position at the hearing of this case stated "does not prevail". A "protective costs order" is a term used to describe this rarely sought declaration.

Procedural background

2. The commissioner, following delivery of a judgment by the Valuation Tribunal, sought a case stated in accordance with s. 39(2) of the Valuation Act 2001 ("the 2001 Act"). In January 2020 the registrar of the Valuation Tribunal signed the case stated.

Issue in case stated

3. The court will be asked "whether the Valuation Tribunal was correct in law in holding that the meaning intended by the Oireachtas to be assigned to charitable purposes in para. 16 of Schedule 4 of the 2001 Act includes the 'advancement of religion' and whether the advancement of religion is a charitable purpose for the purposes of the 2001 Act?"

Annual rates bill

4. Tearfund originally sought exemption from rateability for its office in Dublin. There is now no dispute that the offices were used for its purposes and "otherwise than for private profit". The appeal against the revision officer's decision not to exempt the office was disallowed on the ground that the promotion of religion was not deemed to be a charitable purpose under the 2001 Act. The annual rates bill for the relevant offices is currently in the region of €4,000 in the absence of an exemption.

Judgment of Valuation Tribunal

5. The judgment of the Valuation Tribunal referred to a consensus that Tearfund is a "charitable organisation" within the meaning of s. 3 of the 2001 Act. The issue in dispute relates to whether "the advancement of religion is a charitable purpose". The Valuation Tribunal "in the interests of comity and to avoid inconsistencies in decision making" considered "that it should follow" its decision in *Veritas Company DAC v. Commissioner of Valuation*.

Veritas and no costs to be sought

6. In *Veritas*, the Valuation Tribunal found the subject premises in Sligo town to be used for mixed purposes some of which were for profit. More significantly for Tearfund it "...is of the view that the meaning intended by the Oireachtas to be assigned to 'charitable purposes' in para. 16 of Schedule 4 of the 2001 Act is the *Pemsel* [Commissioner for

Special Purposes of Income Tax v Pemsel [1891] AC 531] meaning and accordingly the advancement of religion is a charitable purpose for the purposes of the 2001 Act”.

7. The parties have agreed that these proceedings should be linked with the case also stated at the request of the commissioner in *Veritas*. The same solicitors and counsel appear in both cases. Indeed, *Veritas* and the commissioner have agreed that neither side would seek their costs from the other if their positions at the hearing do not prevail in the High Court or in any appeal therefrom. The same facility of mutuality was offered to Tearfund in reply to its request for a protective arrangement for costs.

Reply to offer of mutuality

8. By reply dated 27 July 2020, three days in advance of the issue of the notice of motion before the court now, the solicitors for Tearfund mentioned that: -

“(a) The underlying rationale of the commissioner’s position that ‘religious bodies should pay rates like everybody else’ . . . seems to be based on the repealed statutes or some wider philosophical view. However, if the Valuation Tribunal has correctly interpreted the Valuation Act 2001, then the views of the commissioner as to the desirability or otherwise of exemption from rates are irrelevant”;

(b) “. . . the circumstances of the *Veritas* case are to say the least unusual in that the commissioner won the *Veritas* case (on the question of ‘exclusive use’) but has nevertheless appealed it . . .”.

Jurisdiction to make a protective costs order

9. Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála (No. 2)* [2000] 4 IR 321 acknowledged that a pre-emptive costs order could be made although she refused to make the order. Kelly J. in *Friends of the Curragh Environment Ltd. v. An Bord Pleanála* [2009] 4 IR 451, who refused a similar application, also said at para. 5, p. 453, that the said application before Laffoy J. was the only earlier instance of such an order being sought. Kelly J. referred to the Law Reform Commission Report on *Judicial Review Procedure* (LRC 71 – 2004) where the topic was considered. Simons J. in *Heather Hill Management CLG v. An Bord Pleanála* [2019] IEHC 186 at para. 22 acknowledged the potential for making such an order under the then – O. 99(5) of the Rules of the Superior Courts before considering whether to apply the special costs rules governing environmental litigation under s. 50(B) of the Planning and Development Act 2000 (as amended in 2018) or under Part 2 of the Environmental (Miscellaneous Provisions) Act 2011.

Statutory footing

10. Since the delivery of those judgments s. 168 of the Legal Services Regulation Act 2015 (“the 2015 Act”) came into operation on 7 October 2019. It incorporated into primary legislation much of the effect relevant to this application of what was contained in O. 99(5) of the Rules of the Superior Courts prior to its replacement by the Rules of the Superior Courts (Costs) 2019 S.I. 584/2019 on 3 December 2019. Section 168 of the 2015 Act provides: -

- “(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—
- (a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or
 - (b)
- (2) Without prejudice to subsection (1), the order may include an order that a party shall pay -
- (a) a portion of another party’s costs,
 - (b) costs from or until a specified date, including a date before the proceedings were commenced,
 - (c) costs relating to one or more particular steps in the proceedings,
 - (d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and
 - (e) interest on costs from or until a specified date, including a date before the judgment.
- (3)”

11. Section 169 of the 2015 Act further provides: “A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties”
12. It is noteworthy that although the 2015 Act enables the court at any stage to award costs, it is silent about a jurisdiction to make a protective costs declaration. The old O.99(5) of the Rules of the Superior Courts provided that: - “Costs may be dealt with by the courts”, whereas s. 168 refers to “an order that a party to the proceedings pay the costs . . .”.

Inherent Jurisdiction

13. The Supreme Court addressed when a court may use its inherent jurisdiction and stated that “... inherent jurisdiction must not be used as a first port of call, when, by legislation the Oireachtas has spoken on the matter...” (*HSE v. A.M.* [2019] IESC 3 (Unreported, Supreme Court, 29 January 2019), MacMenamin J., at para. 89).
14. The judgment of Irvine J. in *Dorgan v. Spillane* [2016] IECA 84 (Unreported, Court of Appeal, 14 March 2016) clarified that the inherent jurisdiction of the court in the context of taxing a solicitor client bill runs parallel to the statutory jurisdiction and that the statutory jurisdiction should not be usurped lightly.
15. Clarke J., in *Mavior v. Zerko Ltd.* [2013] 3 I.R. 268, at paras. 17 and 18, reiterated the caution of Murray J. in *G. McG. v. D.W. (No. 2) (Joinder of Attorney General)* [2000] 4 I.R. 1, at pp. 26 and 27, against “the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. ... Sometimes, however, a relevant

jurisdiction may not be the subject of any, or at least any complete, delineation by statute. ...”.

16. The above case law is cited lest it be understood that the court is ever ready to invoke its inherent jurisdiction. The difference between inherent jurisdiction and inherent power may also be relevant whenever the courts are asked to consider this rare type of application in the future. Counsel were focussed on applying recognized criteria and were not asked to address whether the court may now have a more limited inherent jurisdiction to grant protective costs declarations than before the change of rules in December 2019. The Court can decide the application as a result of the approach taken for the parties without making a conclusion on the question which could arise again. I acknowledge the assistance of counsel in identifying ss. 88 to 90 of the Criminal Justice and Courts Act 2015 in the United Kingdom which provides a basis for courts to make a “costs capping order” in judicial review proceedings. It was also noted that s. 50B of the Planning and Development Act 2000 (as amended) relates to areas such as those addressed by Simons J. in *Heather Hill Management CLG v. An Bord Pleanala* [2019] IEHC 186. Therefore, I limit this part of the discussion to express an obiter view that new legislative provisions could limit the instances for invoking the inherent jurisdiction of the court.
17. Counsel agreed for the purposes of this application that the granting of a protective costs order: -
 - (1) Occurs only in exceptional circumstances;
 - (2) Seeks to ensure that a relevant issue of public importance is litigated;
 - (3) Must work within the legal framework outlined in *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA CIV 192, 2005 1 WLR 2600, where the Court of Appeal of England and Wales set out the following principles adopted by Kelly J. in *Curragh Environment Ltd. v. An Bord Pleanala* [2009] 4 IR 451 at para. 41: -
 - “(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: -
 - (i) the issues raised are of general public importance;
 - (ii) the public interest requires that those issues should be resolved;
 - (iii) the applicant has no private interest in the outcome of the case;
 - (iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and
 - (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
 - (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a protective costs order.

- (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above".

Clarifications given

18. The grounding affidavit sworn on 27 July 2020 by the secretary of Tearfund did not address two questions which I asked. It emerged during the hearing following receipt of instructions that: -

- (1) Counsel as opposed to the solicitors for Tearfund had accepted a "no foal, no fee" arrangement with Tearfund for the hearing of the case stated. It is accepted by solicitors and counsel for Tearfund that they will only be fully remunerated for their work if the position for Tearfund's resistance to the Commissioner's stance in the case stated prevails and an order for costs is ultimately made in favour of Tearfund by the Judge who hears the case stated;
- (2) Irrespective of the outcome of this application, Tearfund will have legal representatives at the hearing of the case stated, which may be heard by the same judge who will decide the similar case stated in the Veritas appeal.

Submissions

19. Counsel for Tearfund submits that there is an overlap between "general public importance" and having "a public interest in resolution". Whether advancement of religion gives rise to a charitable purpose was, according to the grounding affidavit, decided pursuant to s. 63 of the Poor Relief (Ireland) Act 1838, and this case stated will be the first opportunity for the court to consider the interpretation and application of the 2001 Act on this issue. Furthermore, counsel emphasises that there is only one immediate issue for resolution in the case stated, and that it will have significant implications for many charities with objectives similar to those of Tearfund.
20. The gravity and importance of the issue do not transcend the interests of the parties according to the submissions for the Commissioner. Tearfund falls within a narrow class of religious bodies which own and operate premises. Houses of worship are already exempt from rates under the 2001 Act. If Tearfund succeeds, it will require other ratepayers to pay higher rates for the advancement of a religion which they may not wish to support.

Private interest

21. It is contended for Tearfund that this requirement should be applied flexibly. Jones LJ. in *R (Roszkowsky) v. Secretary of State for the Home Department* [2017] EWCA CIV 412 at para. 8 explained that cases subsequent to *Corner House* have emphasised that the private interest requirement was more of a guideline. The Upper Tribunal (which according to s. 3(5) of the Tribunals, Courts and Enforcement Act 2007 is "a superior court of record") in *Drummond v. Commissioners for Her Majesty's Revenue and Customs* [2016] UK UT 369 (TCC) at para. 11 considered ". . . that the level of private interest i.e. the potential financial gain, should be viewed in the context of the other criteria and the overriding objective . . .". In the case of Tearfund, it will only save €4,000 per annum as against a multiple of that figure if costs are awarded ultimately by the trial judge against Tearfund.

22. Counsel for the Commissioner submits that the proof of not having a private interest is critical to the truly exceptional circumstances where a protective costs order will be granted. Here Tearfund has exhibited financial statements showing an income of over €1 million in 2016 and €800,000 in 2017 with further funding from other organisations.

Probability of discontinuance

23. According to counsel for Tearfund, there is no question of a discontinuance of the appeal by way of case stated because it is the Commissioner who has appealed. Usually it is a proactive claimant which seeks a protective costs order. The Commissioner submits that Tearfund opted to engage legal representation for the six – day hearing in the Valuation Tribunal and has more recently confirmed its intention to retain legal representation at the hearing of the case stated. Moreover, an unopposed ruling will not preclude another religious charity from contesting the point which, in any event, is going to be the subject of the Veritas case stated.

Fair and just

24. Tearfund submits that the declaration sought will enhance the presentation of the case stated by involving it as a critical party or as a legitimus contradictor. The Commissioner replies to the effect that the majority of appeals on points of law from the valuation tribunal concern exemptions and their interpretation. How is it that Tearfund, as opposed to other potential parties in a case stated, should be protected?

Decision

25. The Court is slow to anticipate what the trial judge will consider relevant to the awarding of costs. There is much force in the submission of Counsel for the commissioner that the judge who hears the case stated will be in a better position than me to adjudicate on any application for costs. That judge will have the statutory power under s. 168 of the 2015 Act and it could be invidious for this Court to exercise an inherent jurisdiction to inhibit the exercise of a statutory power by the trial judge.
26. Accepting the common ground put forward by the parties about the continuing existence of an inherent jurisdiction outside the area of environmental law for the granting of a protective costs order in the form of the declaration sought, Tearfund has not satisfied the court that there is a large group of charities with an interest in advancing religion which merits a finding that the point to be decided in the case is of general public importance and interest. The commissioner has decided that the differences between the 2001 Act and the Poor Relief (Ireland) Act 1839 merits a review and a decision on the law. Tearfund and Veritas are in a catchment of charitable organisations which have the advancement of religion as one of their objectives. If this Court decided that these common law requirements of public importance and interest applied here, much would be taken from the consensus that exceptional circumstances must be present for the exercise of this jurisdiction. The “gravity and importance as to transcend the interests of the parties actually before the court . . . are not met” as set out in *Village Residents Association Ltd. v. An Bord Pleanala (no. 2)* [2000] 4 IR 321 at 333.
27. As for not having a private interest, Tearfund may risk a significant multiple of the relatively small annual exemptions (€4,000 per annum) to pay the legal costs of the

commissioner (yet to be estimated) if Tearfund's position does not prevail at the hearing of the case stated. Nevertheless, it has a financial interest and is not leading a group of charitable organisations having the advancement of religion as one of its objectives. If it was leading such a group, the risk of an adverse costs order could be reduced by an agreement to share that contingent liability. Tearfund decided with the benefit of legal advice to engage with the appeal. It fails to meet the criterion of not having a private interest even if one applies the condition flexibly according to the two English authorities cited by counsel for Tearfund.

28. In addition, the justification for not accepting the offer of the Veritas type mutual arrangement on going back to back on costs does not withstand reasonable scrutiny. Clarke J. in *Rosborough v. Cork City Council* [2008] IEHC 94 when considering the levying of waste collection charges discussed the limited insulating effect of a protective costs order at para. 2.4 following his noting of the confirmation given by the defendant that it would not seek its costs if successful. In the circumstances presenting to this Court now, Tearfund has an offer of limited protection but is holding out for what might be described as an each-way bet so that it can apply to recover its costs if its position prevails.
29. In *Corner House*, a similar situation was discussed at para. 50 when a protective costs order was made by consent on the understanding that the applicant would not seek costs against the Secretary of State in the case discussed there. The rejection by Tearfund of the Veritas type arrangement in order to pursue this application detracts from the merits of its application.
30. The probability of discontinuance condition is not met in view of the confirmation given during the hearing of this application. The court might benefit from having a legitimus contradictor but it will have assistance in the hearing of the Veritas case stated even if Tearfund was not represented.
31. For all of these reasons, I refuse the principal declaration sought in the notice of motion dated the 30 July 2020. The other declarations were not actively pursued.
32. This judgment is delivered electronically due to the COVID-19 restrictions. In order to limit the number of appearances in court, the court requests that Tearfund deliver short written submissions within two weeks from today's date concerning the costs of this application, taking account of O. 99(2)(3) of the Rules of the Superior Courts. The Commission is requested to deliver a short reply if the issue of costs for the application cannot be agreed. Any request for an oral hearing should be included in the submissions. In the absence of an oral hearing the court will deliver its decision on the question of costs by electronic communication. The order will be perfected as soon as the issue of costs of this matter are agreed or decided upon.

Counsel and solicitors for the appellant: James Devlin SC and Catherine Donnelly instructed by Mason Hayes Curran LLP.

Counsel and solicitor for the respondent: David Dodd instructed by the Chief State Solicitor.