

THE HIGH COURT

[2021] IEHC 646

[Record No. 2020/186 SS]

BETWEEN

TEARFUND IRELAND LIMITED

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

RULING of Mr. Justice Barr on final order and costs.

1. By a determination issued on 5th April, 2019, the Valuation Tribunal held that Tearfund was exempt from the obligation to pay rates as the premises were used for the advancement of religion.
2. On the application of the Commissioner of Valuation, the tribunal stated a case for the opinion of the High Court.
3. In a written judgment delivered on 28th July, 2021 (2021 IEHC 534), the court answered the questions of law posed to it by the tribunal to the effect that the Valuation Tribunal was not correct in law in holding that the meaning intended by the Oireachtas to be assigned to charitable purposes in para. 16 of Schedule IV of the Valuation Act 2001 included the "advancement of religion" and that the tribunal was incorrect to find that the advancement of religion was a charitable purpose for the purposes of the 2001 Act. Accordingly, the Commissioner was successful on the appeal.
4. Following the delivery of that judgment, the parties were invited to make written submissions in relation to the issue of costs and on any other matters that may arise. The parties furnished written submissions on the issue of costs.
5. In seeking payment of its costs, the Commissioner submitted that in advance of the hearing of the appeal by way of case stated before the High Court, it had made an offer of mutuality in respect of costs, namely that each party would bear their own costs of the appeal to the High Court. That offer was rejected by Tearfund.
6. Instead, Tearfund brought an application seeking a protective costs order from the High Court, pursuant to its inherent jurisdiction. That application resulted in a written decision by O'Connor J, wherein he refused the order sought by Tearfund. That judgment is reported at 2020 IEHC 621.
7. The Commissioner submitted that because Tearfund had elected to leave the issue of costs at large, in the hope that they might recover an order for costs in the event that they were successful at the hearing of the appeal; and as they in fact lost on the appeal and the Commissioner was entirely successful in its appeal; the Commissioner is entitled to an order for payment of its costs by Tearfund having regard to the provisions of ss. 168 and 169 of the Legal Services Regulation Act 2015.

8. It was submitted that insofar as it was argued by Tearfund in its submissions on costs following delivery of the substantive judgment, that the case was one of public importance and that therefore the court should make no order as to costs; that issue had already been determined by O'Connor J at the interlocutory stage, when he had held that the proceedings did not have a sufficient element of public interest to entitle Tearfund to a protective costs order. Accordingly, it was submitted that the issue of public interest, or the lack thereof, had already been determined by the High Court.
9. In the alternative, the Commissioner submitted that as Tearfund had a commercial interest in the outcome of the appeal, it did not meet the criteria necessary for public interest litigation as set out in the authorities.
10. In its submissions, Tearfund submitted that the appeal involved the interpretation of Schedule IV to the 2001 Act. The outcome of that litigation would clarify the law, not just for Tearfund, but for a large number of other organisations and bodies who are engaged in the advancement of religion. As such, it was submitted that the action could be said to have had a much wider impact than for the parties to the appeal.
11. Tearfund referred the court to the decision of Sanfey J in *Dumitran v. Ireland* [2021] IEHC 623 and to the judgment of Simons J in *Ryanair DAC v. An Taoiseach* [2020] IEHC 673, in support of its submission that the present appeal had a sufficient element of public interest to warrant the court departing from the usual order that costs should follow the event.

Conclusions

12. The court has considered the helpful written submissions of the parties and the cases referred to therein.
13. The court is of the view that different considerations arise when it is considering the making of a protective costs order and the awarding of costs at the conclusion of the proceedings. In the former, the court is exercising its inherent jurisdiction. More importantly, it is considering whether the moving party should be insulated from an order for costs in futuro.
14. Consideration of such an application involves the court looking at the factors which have been laid down in the relevant cases: see *Rosborough v. Cork County Council* [2008] IEHC 94; *Curragh Environment Limited v. An Bord Pleanála* [2009] 4 IR 451 and *Tearfund v. Commissioner of Valuation* [2020] IEHC 621.
15. The court is satisfied that when considering the issue of costs at the conclusion of the proceedings, different considerations apply. At that stage two important things have changed. Firstly, all the facts and arguments in the case have been heard. Secondly, the court is exercising its statutory jurisdiction pursuant to ss. 168 and 169 of the 2015 Act and O.99 (as amended) of the Rules of the Superior Courts.
16. Section 169 makes it clear that while the default position is that a party who has been entirely successful in the action, is *prima facie* entitled to an order for payment of its

costs against the losing party; the court can have regard to the “particular nature and circumstances of the case” and can have regard to the matters set out in subs. (a) – (g) in that section. However, the court is not limited to a consideration of those matters when reaching its decision.

17. In considering whether the present case can be said to contain a sufficient element of public interest litigation to merit a departure from the default position in relation to costs, the court has had regard to the judgment in the *Ryanair* case, where Simons J analysed the costs regime under the 2015 Act. He stated as follows in relation to the issue of public interest litigation at paras. 15 and 16:

“15. Notwithstanding the commencement of Part 11 of the LSRA 2015, I am satisfied that the pre-2019 case law continues to have relevance. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general 7 rule that a successful party is entitled to its costs. One of the factors to be considered, under section 169(1), is the “particular nature and circumstances of the case”. The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful— nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.

*16. In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant’s case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights. In this last connection, see *Collins v. Minister for Finance* [2014] IEHC 79, [13], citing *Norris v. Attorney General* [1984] I.R. 36 (sexual orientation); *Roche v. Roche* [2006] IESC 10 (the constitutional status of human embryos); and *Fleming v. Ireland* [2013] IESC 19; [2013] 2 I.R. 417 (assisted suicide).”*

18. Insofar as it was argued that because Tearfund had a financial interest in the outcome of the appeal, they should not be entitled to rely on the so called public interest litigation exception, the court is of the view that one must approach that criterion with some care. Where a party which is resisting a costs order has no financial interest in the outcome of the proceedings, obviously their argument that the action was genuinely brought on the basis of public interest, is considerably strengthened.

19. However, the court is of the view that it would be going too far to say that if the party has any financial interest at all in the outcome of the proceedings, that of itself would automatically bar them from relying on what may loosely be termed the public interest litigation exception.
20. The better approach is that it is a matter that must be considered in the individual circumstances of each case. Some financial interest in the outcome of the proceedings would not per se prevent the party from making the public interest argument.
21. That approach was adopted by Simons J in the *Ryanair* case, where he found that because Ryanair was a well-resourced corporate entity and had a significant financial interest in the outcome of the proceedings, they could not rely on the public interest litigation exception to resist an order for costs against them: see para. 34 of the judgment.
22. In the present case, while Tearfund stood to save approximately €4,000 per annum if it could bring itself within the rating exemption, the court does not view that financial advantage as being sufficient of itself to prevent Tearfund from making the argument that the appeal herein had the necessary element of public interest to warrant a deviation from the usual costs order.
23. In considering the issue of costs, the court has had regard to a number of matters: Firstly, the issue was an important issue involving interpretation of the 2001 Act. Secondly, the argument put forward by Tearfund was not a weak or unstateable one, as is shown by the fact that it prevailed before the Valuation Tribunal.
24. Thirdly, the outcome of the appeal herein will have considerable effect in the community, in that it has settled the issue for all premises and bodies who are involved in activities coming under the rubric of "advancement of religion" for rating purposes. Indeed, there was another appeal involving a unit owned by Veritas in Sligo, which was expressly awaiting the outcome of the appeal in this case.
25. Fourthly, Tearfund is a charity which brought an appeal under the Valuation Act before the tribunal where it was successful. While the Valuation Tribunal can award costs, I understand that they do so infrequently. Furthermore, I presume that where costs are awarded, they would be considerably less than the costs of an action in the High Court.
26. Thus, Tearfund had embarked on a relatively cheap method of determining the question of what rates it was obliged to pay under the Act. When the Commissioner appealed by way of case stated by the High Court, Tearfund was left in the position that they had to act as *legitimus contradictor*, or let the appeal go unopposed and thereby lose what they had achieved before the Valuation Tribunal. In order to protect what they had gained, they had to incur the considerable extra expense of hiring a legal team to appear for it before the High Court. Tearfund was not bringing the appeal to the High Court, they were only resisting the Commissioner's appeal so as to protect what they had gained. They

were not the parties who brought an unsuccessful appeal and then sought to avoid paying the costs thereof.

27. In relation to the offer that was made by the Commissioner prior to the hearing of the appeal before the High Court, that was a reasonable offer in all the circumstances. However, the refusal of it by Tearfund, did not lengthen the hearing before the High Court, or put the Commissioner to any extra expense. Accordingly, the court is of the view that the refusal of that offer is not relevant to the issue which it must determine on this ruling.
28. The court is satisfied that there was sufficient public interest in the outcome of the appeal to make it just that each party should bear their own costs of the hearing before the High Court.
29. The court is not aware of what order may have been made by O'Connor J in respect of the costs of the interlocutory application. Whatever order was made by the judge on that application, will stand.
30. However, if the costs of that application were reserved to the trial of the action, there shall be no order in respect of that application.
31. The final order of the court shall be as set out in the substantive judgment at para. 66 thereof. There shall be no order as to costs on the appeal to the High Court; save as to the costs of the interlocutory application, if dealt with separately by O'Connor J.

Dated this 12th day of October, 2021.