

THE HIGH COURT

1995 No. 1988 P

BETWEEN

USED CAR IMPORTERS OF IRELAND LIMITED

PLAINTIFF

AND

THE MINISTER FOR FINANCE, THE REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 1st March, 2006.

The proceedings

1. In these proceedings the plaintiff, which carries on the business of importation and sale of used motor vehicles, particularly from Japan, but also from Member States of the European Union, challenges the manner in which and the extent to which the second defendant assesses Vehicle Registration Tax (VRT) on used motor vehicles imported by the plaintiff on the basis that it is contrary to the relevant statutory provision (s. 133 of the Finance Act, 1992, as amended), the Constitution and European Community Law, including the Sixth VAT Directive 388/77. It also impugns the constitutionality of s. 133 and its validity under European Community Law. One of the reliefs sought is a mandatory injunction directing the return of all excess VRT paid by the plaintiff.

2. The history of the proceedings has some relevance to the matter now being considered. The proceedings commenced on 15th March, 1995. In May, 1995 the plaintiff issued a motion seeking an interlocutory mandatory injunction directing the second defendant to publish to the plaintiff the values for VRT purposes of the full range of new and used motor vehicles and to publish revised values from time to time as they should occur. An order was made on foot of the motion by Costello P. on 17th July, 1995, wherein, as the order indicates, by consent of the parties a timeframe was fixed for delivery of pleadings. It was further ordered that each side should make discovery within six weeks from the delivery of the defence "of the documents which are or have been in their respective possession or power relating to the matters in question" in the action. Unfortunately, the enthusiasm for a speedy resolution of the matter which obviously inspired that order appears to have dissipated. Three years later, by order of this Court (Geoghegan J.) dated 22nd June, 1998, the first and second defendants were ordered to make further discovery of specific documentation.

This application

3. The matter the court is now concerned with is an appeal from an order of the Master on foot of a motion for further and better discovery which the plaintiff issued on 17th May, 2004. The items which the plaintiff sought in that notice of motion were:

(a) further and better discovery on oath of all documents and records in whatever format they are held of all surveys, internal reviews and market research of whatever kind relating to all aspects of the VRT valuation system, including its development and operation, since its inception item (a);

(b) a working copy of the desktop version of the Vehicle Registration Tax valuation programme used by the second defendant to calculate VRT as referred to in paragraph No. 5 of a letter of 12th May, 2003 from the second defendant (item (b));

(c) all data – in relation to each vehicle registered by the plaintiff – necessary to enable the plaintiff and its experts to perform and validate the valuation determined by the defendants applying the methodology used by the defendants, either in Microsoft Excel spreadsheet file or a Microsoft Access database file or at a minimum a CSV (comma separated value) in ASCII format file (item (c)), and

(d) access for the plaintiff and its experts to the full database of all vehicles registered for VRT, as will allow them to conduct such studies as are necessary to establish the manner in which the tax has been administered (item (d)).

4. By order of the Master made on 10th December, 2004, item (b) was ordered. This appeal is concerned with items (a), (c) and (d).

5. On the basis of the evidence before the court there was something of an hiatus in the correspondence between the solicitors in relation to discovery between the autumn of 1999 and the spring of 2003. However, from 25th February, 2003, when the plaintiff's solicitors sought to follow through on an offer made by the second defendant in May, 1997 to provide a "record dump" of a certain database, to which I will return later, the correspondence between the plaintiff's solicitors and the solicitor for the second defendant became very technical. While I have read the correspondence carefully, I do not profess to have any real understanding of the technical material.

6. In a letter date 6th August, 2003 the plaintiff's solicitors sought voluntary discovery of the valuation programme, database and related documentation. In that letter, the reason why the valuation programme and the database were relevant to the issues in the case and why it was necessary for the plaintiff to have access to them was set out. The "related documentation" was not specified nor was any reason given why it was necessary. The related documentation was specified by the plaintiff's solicitors in a letter of 18th February, 2004, where it was explained that related documentation was intended to mean market research and surveys conducted by the second defendant to validate the valuation system. This was the genesis of item (a). Although voluntary discovery was sought in that letter of those documents invoking O. 31, r. 12(4) of the Rules of the Superior Courts, 1986, I do not think that the plaintiff can be said to have furnished any reason why this category of documents was required to be discovered in that letter. However, the letter did raise the issue of the adequacy of the discovery already made by the second defendant.

7. Not overlooking that, on the authority of the decision of the Supreme Court in *Ryanair Plc v. Aer Rianta Cpt.* [2003] 4 I.R. 264, under the current O. 31, r. 12 an applicant for discovery must discharge the *prima facie* burden of proving that discovery sought "is necessary for disposing fairly of the cause or matter", the approach I propose adopting is to consider the arguments advanced by counsel for the defendants as to why the orders sought should not be made. It was submitted that the plaintiff's case is about the legality of the tax; that it does not go to the calculation of VRT. I do not accept that argument and I am satisfied from reading the pleadings that the calculation of VRT due and paid by the plaintiff on used vehicles imported by it is an issue in the case.

Item (a)

8. In relation to item (a), it was submitted on behalf of the second defendant that the letter of 18th February, 2004 did not comply with O. 31, r. 12(4) because no reasons were set out why this category of documents was sought. As I have already indicated, I think that is correct. The point was not taken before the Master, but it was submitted that this appeal is a hearing *de novo* and it is

open to the defendant to argue it. It was submitted that the absence of reasons in the letter seeking voluntary discovery deprives the court of jurisdiction. Even if the court has jurisdiction, it was submitted, the court cannot surmise why discovery is necessary. In an affidavit sworn on this application, albeit in response to affidavits sworn on behalf of the defendants, Niall O'Dowling, on behalf of the plaintiff, specified the type of material which is being sought and he referred to an affidavit of Moore McDowell sworn subsequently as setting out in further detail the class of material sought and the reasons why it is relevant to the issues in these proceedings.

9. VRT is charged on the open market selling price (OMSP) of the vehicle. In the case of a used vehicle the OMSP is the price, inclusive of all taxes and duties, which, in the opinion of the second defendant, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the State by retail. In its statement of claim the plaintiff has effectively adopted the statement of the system of valuing imported used vehicles set out in paragraphs 6 to 11 of the affidavit of John Leonard, a surveyor of Customs and Excise, sworn on 7th July, 1995 in response to the plaintiff's application for an interlocutory injunction. This discloses that when VRT was introduced in 1992 the second defendant compiled a database of the range of available vehicles which were likely to be presented for registration in the State to categorise the vehicles into one of the categories established by the Act of 1992, to estimate values for particular makes/models over the years of their availability and then to apply VRT at the specified rate as a percentage of the OMSP, having regard to the category of vehicle concerned. As to how the OMSP of a used vehicle is arrived at, what is disclosed is that the second defendant takes the OMSP of the new equivalent as a benchmark. It then allocates a valuation depreciation category from 23 depreciation tables, which are drawn up to reflect the realities of the market. In each case the choice of benchmark and of valuation depreciation category is made by an officer of the second defendant who allocates a specific statistical code. This information is then inputted to a computer database maintained by the second defendant. This exercise will prompt an OMSP reflecting market conditions. The system also allows for reductions in the OMSP to compensate for excessive mileage and poor condition.

10. In paragraph 10 of Mr. Leonard's affidavit he averred that the second defendant continuously reviews the allocated OMSPs utilising all available data from distributors, internal sources on market prices, for example, research carried out by the Appeals Section, advertising in the media and free sheets and published guide prices, for example, the guide to second hand car prices used by members of the Society of the Irish Motor Industry and other motor dealers. Mr. O'Dowling explained in his affidavit that the type of market research material sought is material of the type referred to in paragraph 10 of Mr. Leonard's affidavit. Mr. McDowell, an economist, focused on the depreciation tables in his affidavit and averred that the plaintiff's experts could only determine whether the second defendant's system is grounded on a reliable and objective method for estimating depreciation if the data, the functional forms, the statistical measurement procedures, and the calculation program and its associated databases were made available for independent critical analysis. I understand the reference to data to mean the underlying data actually used by the second defendant.

11. In relation to item (a), I have come to the conclusion that the court has jurisdiction to determine whether an order for discovery should be made, notwithstanding that the current O. 31, r. 12 requirements were not complied with either in relation to the letter seeking voluntary discovery or the original affidavit grounding the motion. The basis on which I have reached this conclusion is that an order for discovery of all relevant documents was made in 1995 before the current rule came into operation in 1999 and, accordingly, I believe the proper approach to be adopted on this application is whether the plaintiff has established that the defendants have not complied with that Order. I am not satisfied that the plaintiff has established that, because I do not see the relevance of the general data in relation to used car prices which the second defendant has accumulated over the years is relevant to the issues in this case, nor am I satisfied that it is necessary to fairly disposing of the issues between the parties.

Item (c)

12. Counsel for the plaintiff indicated that from the plaintiff's perspective the crucial category of documentation on this application is item (c). In the hope of bringing some clarity to the parties' current position in relation to item (c), I think it would be useful to summarise the interaction between them, starting with the letter of 6th August, 2003. The position as disclosed by the documents exhibited by the parties is as follows:

- As I stated earlier, after an apparent hiatus, in a letter dated 25th February, 2003, the plaintiff's solicitors sought to follow through on an offer made by the second defendant to provide a "record dump" of the database of statistical codes and their associated OMSPs and appreciation table categories proffered by the second defendant in a letter of 13th May, 1997 and listed five prerequisites to taking the "record dump" and to its use in a meaningful way. The fourth and fifth prerequisites were respectively the functional specification document and the test/validation documentation for the VRT application that utilises the database. At the hearing in this court, counsel for the plaintiff indicated that the fourth prerequisite (the functional specification document) is essential. The plaintiff's request was dealt with in a letter of 12th May, 2003 from the second defendant's solicitors. In relation to the fourth prerequisite, certain documentation was furnished. In their letter dated 6th August, 2003, the plaintiff's solicitors asserted that the documentation furnished did not go nearly far enough. What the plaintiff required was not just a partial documentary description of the calculation system but "access to the system itself in a functioning electronic format". They explained that the plaintiff wants to discover how in fact VRT was calculated on each one of the vehicles it has registered. It disputes the amount calculated, which it asserts it paid under protest. As I stated earlier, invoking O. 31, r. 12(4) the plaintiff sought voluntary discovery of the valuation programme and the database.
- The defendants' solicitors' response was dated 18th March, 2004 and in it, after describing the VRT computer system in technical terms, it was stated that, given the uniqueness of the technical development, it was not feasible to run the VRT system outside the environment for which it was designed and that providing copies of the programme would be unlikely to be of any practical use.
- In their next letter, a letter of 8th April, 2004, while not accepting the second defendant's response, the plaintiff's solicitors, without prejudice to their request for "a copy of the actual valuation programme" sought the data, which became item (c) on the subsequent notice of motion.
- In fact, the notice of motion had issued before the plaintiff's solicitors had received the response of the second defendant's solicitor, which was dated 13th May, 2004. In that response the second defendant proffered –

(i) a CD-Rom of all data still held by the second defendant in relation to each vehicle imported by the plaintiff and registered for VRT over the period 1993 to 1997;

(ii) twelve sample calculations in twelve representative cases selected from the plaintiff's cases showing in a step-by-step fashion the procedure followed in calculating the VRT;

(iii) a copy of a VRT calculation CD, designed to run on a standard PC, which was available to the motor trade which dated from 2001, when production of the CDs was discontinued, and reflected values as at that time.

- Two affidavits were sworn on behalf of the second defendant in response to the motion for discovery on 29th June, 2004. One was sworn by Patrick Barrett, an assistant principal officer in the National Excises Branch of the second defendant. The thrust of Mr. Barrett's averment reflected the letter of 13th May, 2004: it was not possible for technological reasons to provide a working copy of the Revenue's mainframe VRT calculation system, but the data promised, the twelve representative samples and the CD would be furnished. The second affidavit was sworn by Frank Burns, an assistant principal in the computer division of the second defendant. He averred that it was not possible, for technological reasons, to provide a working copy of the Revenue's mainframe VRT calculation system and he went on to explain why. He further averred that, even if it were possible to produce a desktop copy of the mainframe system, it would be of little practical use for retrospective analysis because the system used the current date to calculate the age of the vehicle and the database containing the OMSP and the depreciation changes are subject to change over time.

- Following the filing of the second defendant's affidavits there was further correspondence between the plaintiff's solicitors and the solicitor for the second defendant over the long vacation. On 27th August, 2004 the CD-Rom containing the data in relation to the vehicles registered by the plaintiff was furnished to the plaintiff's solicitors but was not found to be satisfactory because, as set out in the plaintiff's solicitors' letter of 9th September, 2004, the database did not contain the depreciation profile or table assigned to each vehicle. By that letter the plaintiff's solicitors requested an MS Access version of all VRT depreciation tables for the years 1993 to 2003 inclusive, plus all information required associating each vehicle record with the appropriate depreciation file.

- The response of the solicitor for the second defendant, which was dated 17th September, 2004, stated as follows:

"The depreciation code is not stored as traders data and it does not exist on any trader records. The data does not exist in the form requested, namely 'all information ... associating each vehicle record with the appropriate depreciation profile'. To create the information requested, will require specially-written software including a new Cobol program. You will appreciate that this requires a lot of significant resources. There are practical difficulties in fitting this unplanned work into an extremely heavy schedule of other work. However, priority has been assigned to the matter. My clients hope to have the matter completed within two weeks from today's date and the data forwarded quickly to you."

- In fact, the data was not furnished and ultimately, in a letter dated 14th October, 2004 to the plaintiff's solicitors, the solicitor for the second defendant stated the second defendant's position as follows, referring to the letter of 17th September, 2004:

"No undertaking was given by my client in relation to same and I am somewhat taken aback by this assertion. Having consulted my clients, I confirm that they shall not be discovering this data on a voluntary basis. Having regard to the pleadings, this information is neither relevant nor necessary and is superfluous."

- Separately the second defendant furnished thirteen representative samples of the VRT calculation to the plaintiff's solicitors.

- Following that correspondence, on 2nd November, 2004 the plaintiff filed an affidavit sworn by Michael Loftus, a lecturer in computer software engineering at Cork Institute of Technology. Mr. Loftus averred that the absence of the depreciation tables constitutes an immovable impediment to the analysis of the VRT calculations performed by the second defendant on vehicles imported by the plaintiff, including repeating the VRT calculation and testing the methodology and accuracy of the defendants' calculation of VRT for each vehicle imported by the plaintiff. Mr. Loftus averred that there is no serious technical impediment to the production of the data beyond the development of an appropriate Cobol program. Mr. Loftus commented in his affidavit that the database on CD-Rom produced by the second defendant contained data columns relating to depreciation calculations for a subset of vehicle records contained therein. The values in those columns showed zero and, as I understand his affidavit, he assumed that this had been done deliberately.

- No further affidavits were filed on behalf of the defendants.

13. On the basis of the foregoing rather tortuous outline of the affidavit evidence and the correspondence, as I understand the position, the issue between the parties is the failure of the second defendant to furnish the depreciation data relative to each vehicle registered by the plaintiff. As I understand it, it is common case that the data does not currently exist; that it will have to be re-generated. Counsel for the defendants stated that it is not a case of the data having been deleted; it is a case that it is not available to be discovered.

14. This is a case in which the plaintiff alleges that the tax charged by the tax authorities was not charged in accordance with law. At the core of that allegation is the issue as to how the tax was calculated. The evidence before the court indicates that the depreciation tables and their association with each vehicle valued are an essential component to the analysis which is necessary to resolve that issue. Therefore, in my view, the plaintiff is entitled to discovery of this data, which, on the evidence, is capable of being re-generated. The order I propose making is an order in the terms of paragraph (c) of the notice of motion. What I intend is that the second defendant will be under an obligation to furnish the data necessary to enable the plaintiff's experts to test the methodology and the accuracy of the second defendant's calculation of VRT for each vehicle imported by the plaintiff. On the hearing of the appeal counsel for the plaintiff indicated that, apart from the depreciation tables, another necessary component is absent from the data furnished by the second defendant to date, which was variably referred to as price or value. This was not alluded to in the affidavits or in the correspondence. My understanding, and I am conscious that I may have misunderstood the submissions, is that the component in question is the benchmark value inputted by the officer. It clearly is a necessary component in the exercise the plaintiff wishes to be in a position to carry out. Therefore, the order will encompass that data, if it not already been furnished. Similarly, it will encompass the VRT calculation rules referred to in Mr. Burns' affidavit and requested in Mr. O'Dowling's final affidavit filed on 2nd November, 2004 if, and I am by no means sure that this is the case, they constitute necessary data distinct from the material already furnished by the second defendant.

Item (d)

15. In relation to item (d), counsel for the defendants submitted that the application in relation to this item is moot because access was offered prior to the notice of motion being issued. That is the case. Therefore, there will be no order in relation to item (d).

Order

16. There will be an order for discovery in the terms of paragraph (c) of the notice of motion .