



**THE COURT OF APPEAL  
CIVIL**

**Neutral Citation Number [2021] IECA 10  
Court of Appeal Record No. 2018/1170  
High Court Record No. 1995/1988P**

**Donnelly J.  
Faherty J.  
Murray J.**

**Between:**

**USED CAR IMPORTERS OF IRELAND LIMITED**

**APPELLANT**

**- AND -**

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

**RESPONDENTS**

**JUDGMENT of Mr. Justice Murray delivered on the 20<sup>th</sup> day of January 2021**

**1.** There are three outstanding issues arising from the judgment of the Court delivered in this matter on 6 November 2020. This ruling should be read in conjunction with that judgment. Abbreviations where used in the former, have the same meaning as in the latter.

2. The first issue relates to the Order that should be made following the decision of the Court that the High Court judgment did not address the claim advanced by UCII that the defendants had failed to establish that the system put in place by Revenue for the determination of the OMSP of used imported motor vehicles in fact resulted in a valuation which would, as a general rule, be very close to their actual value. UCII says that this aspect of its claim should now be simply remitted to the High Court for determination. The defendants say that the Court should not remit any part of the claim to the High Court.

3. In that regard, the defendants say that to remit the case now would involve very significant additional time and resources. They say that in the event that UCII were to succeed in the claim, the only relief to which it would be entitled would be a declaration. Any such declaration would be addressed to issues that are entirely historic and would be directed to events occurring between 1993 and 2010. To meet such a claim Revenue would have to produce extensive evidence for a period between 1993 and 2010 of a kind that is not available to it now. It is said that one of the four Revenue witnesses who testified at the original trial has since died, and the other three have retired. Revenue stresses that the total number of vehicles registered over the period of time the subject of the claim is likely to be in the millions.

4. Noting that Murphy J. did not find any evidence that the OMSPs attributed to imported vehicles was too high, the defendants say that it would be unfair and contrary to the interests of justice for them to now have to prove that they were not too high. The defendants also refer to the findings of the trial Judge in rejecting the claim advanced by UCII in its rationality challenge, suggesting that the Court determined that the values yielded by Revenue's methodology were in fact close to the market value of the vehicles. The defendants furthermore

submit that UCII was responsible for an unreasonable and inexcusable delay in prosecuting its claim.

5. UCII emphasises that it argued in the High Court that the burden of establishing that the system for setting the chargeable base for imported second hand vehicles excluded the possibility of the imported vehicles being taxed more than the domestic product, lay with Revenue. It says that Revenue did not lead any evidence to establish this, instead challenging the evidence led by UCII. It also says that its case was prepared on the basis of the mistaken view that the OMSPs for imported second hand vehicles were set by the depreciation schedules as opposed to the Car Sales Guide. It underlines what it says is the sparsity of evidence before the Court as to how those compiling the Car Sales Guide actually collected the data used in the publication. There is, it contends, no basis on which this Court could determine the outstanding issue.

6. All of this arises (it says) in a context in which there is an important public interest in ensuring that the system of taxation in the State was levied in accordance with EU law. Moreover, it points to the obligation on Member States to ensure that taxpayers are afforded the opportunity to challenge any system of valuation put in place by national authorities. By concealing the specifics of the valuation system in place, UCII submits, Revenue effectively closed off any meaningful challenge to the valuation system. It states as follows:

*'it is ... impossible to separate the issue of the breadth of UCII's challenge to the VRT system from the Defendants' failure to provide any information which would allow the taxpayer to understand how the system actually operated and tailor its challenge accordingly. It follows that in circumstances in which ... the Defendants chose to conceal*

*how the system worked, the consequences of that misunderstanding cannot now be relied upon by the Defendants as a reason why they should be excused from the obligations otherwise imposed upon the State by EU law.'*

7. Thus, it is contended, the defendants must bear responsibility for any prejudice caused to them by the passage of time. UCII further submits that if Revenue failed to meet the burden of establishing that the OMSPs were not, as a general rule, close to actual values that this '*should result in the invalidation of the VRT charged on cars UCII imported from the EU in the relevant period*'. As such, UCII says, it would be open to it to raise a claim for a return of any VRT paid in respect of cars imported from Northern Ireland. UCII re-iterates Revenue's refusal to provide information in relation to the methodology used by it to determine the OMSP. It suggests in the course of its submissions that the breach of the obligation under EU law to disclose the details of the system of valuation in some sense might give rise to a claim for repayment of VRT '*paid under such a system*'.

8. Before examining the merits of a remittal of this issue, it is important to address separately this latter claim. Irrespective of the outcome of any trial of the issue of whether the State can establish that the OMSP determined by Revenue was close to the actual value of the vehicles in question as that issue is formulated in the CJEU case law, there is and can be no question of UCII recovering taxes paid by it under that system. Such a claim could only be advanced in respect of VRT paid on imports from the EU. UCII wholly based its case in respect of such imports on the forty-four vehicles imported from Northern Ireland. The High Court determined that there was no overvaluation in respect of those vehicles. The contention that an order would be made for repayment of such tax on the separate basis that because the State generally failed to establish that the OMSPs determined by it were close to actual value,

therefore all VRT paid pursuant to that system would have to be repaid irrespective of whether in the case of any particular vehicle the OMSP did in fact reflect the value of the car, lacks any reality. No authority of any kind was cited by UCII in support of this proposition.

9. That being so, the proper approach to the resolution of the remittal issue, it appears to me, is as follows. This Court, in determining whether to remit all or part of the claim in issue, has to strike a balance between two competing considerations. On the one hand, the plaintiff has a claim that the system operated by the defendants for the valuation of used car imports was not in compliance with EU law. It presented that claim before the High Court and the claim has not been determined. *Prima facie*, it is entitled to have that claim decided.

10. As against that, however, there is an obvious and initial question as to whether it is either fair to the defendants or reasonable from the perspective of the Court's time and resources that the High Court would be called upon to interrogate over a period starting almost thirty years ago and ending in 2010, whether a system then operated for the valuation of imported used vehicles and involving the processing of millions of individual transactions, was contrary to EU law. That that issue would fall to be determined solely for the purposes of deciding whether to grant declaratory relief squarely presents the question of whether the claim is of such historic interest that it is in reality futile. All of these questions are inevitably related : as I noted in the principal judgment (at para. 414):

*'in determining whether to grant or refuse declaratory relief (which is of course discretionary), the Court should properly have regard to whether the determination of the issue in question is liable to result in an unfairness to the defendant. In the case of a*

*wide-ranging and ill-defined claim requiring a defendant to justify its actions over a lengthy period of time, there are certainly circumstances in which this could be so.'*

**11.** In resolving these competing issues and determining in this case whether it is appropriate to preclude UCII from pursuing this aspect of the relief claimed by it, a range of considerations are accordingly relevant. The legal system provided in the form of Order 84 RSC a process by which UCII could have expeditiously agitated both its claims that the State was required under EU law to justify the methodology used to determine the OMSP of used vehicles, and its contention that the State was under an obligation as a matter of law to disclose the basis on which it determined the OMSP. Judicial Review proceedings seeking that relief would not have required discovery of any kind and could have been brought and determined with ease and rapidity. UCII chose not to pursue that course of action. Instead, it embarked upon an ambitious and wide-ranging claim, much of which has been determined to be misconceived.

**12.** That, of course, was its right and given that its principal commercial concern was with imports from outside the EU one can see why it might have decided to proceed in that way. What is important is that it had available to it a mechanism for the rapid determination of its EU law rights, which would have enabled it to obtain a ruling when the claim was reasonably limited and current.

**13.** Even then, having decided to proceed as it did, an extraordinary period of time elapsed before the case came for trial. While I note that there is a dispute between the parties as to where responsibility for that lay (UCII contending that it was attributable to Revenue's failure to provide discovery and information as to how the OMSP was determined) the chronology the parties have put before the Court discloses two remarkable periods of what appears to be

complete and unexplained inactivity in the case – between November 1999 to February 2004 and between March 2008 to April 2011. It is not obvious what justification there can be for the failure to take any steps to bring the action forward during these periods. Yet having permitted that time to elapse, UCII – the party with carriage of the case and the primary responsibility to bring its claim to trial – now insists that the High Court engage in an extensive exercise in forensic archaeology for the purposes only of its obtaining declaratory relief as to a state of affairs existing many years ago.

**14.** At the same time, Revenue did nothing to strike the claim out for delay, it was (the Court has held) acting unlawfully in failing to provide UCII with an explanation as to how the OMSPs of used imports was determined and it could have moved to reduce the scope or scale of the plaintiff's claim in advance of the trial. More importantly, and while noting the potential difficulties for Revenue (and the High Court) if the plaintiff is to persist in a claim of the breadth suggested by its claim, it is not impossible that much of the unfairness and logistical difficulty suggested by the plaintiff's claim could be avoided by reducing that claim temporally and limiting it to the period immediately before the case originally came to trial. Such a course of action (if found to be warranted on the facts) might go a considerable distance towards striking a fair balance between the right of the plaintiff to an adjudication on the issue of law it seeks to have determined, and the right of the defendants to have that issue resolved by reference to facts and circumstances within the (relatively) recent past.

**15.** The Court has a wide discretion in remitting proceedings to the High Court. It must exercise that power in a manner that both strives to vindicate the rights of parties to litigate, while at the same time avoiding the imposition on the defendants of such an unreasonable burden as to impair their right to constitutional fair procedures. However, it seems to me that

the question of whether the plaintiff should be permitted to pursue this claim for declaratory relief and, if so to what extent, is a matter that is so dependent on the underlying facts that it would not be appropriate for an appellate tribunal with only a limited account of the evidence relating to these matters, to cut off this aspect of the plaintiff's claim at this point in time.

**16.** Specifically, this Court cannot on the basis of the information before it reliably conclude:

- (i) Where responsibility for the periods of delay in taking this case to trial properly lies;
- (ii) The precise extent to which the passage of time has truly prejudiced the respondents in defending this claim;
- (iii) Whether that prejudice could have been avoided through the maintenance by Revenue of relevant records;
- (iv) Whether any such prejudice affects Revenue for the entire of the period the subject of the claim and, if not, in respect of which periods it would actually suffer no significant prejudice;
- (v) The extent to which a determination as to the compatibility having regard to that aspect of EU law to which I have referred of the methodology used by Revenue to determine the OMSP of used imports would be of direct relevance to the legality of its methodology today;



- (vi) Whether a reasonable and proportionate vindication of UCII's right to litigate its rights under EU law could be obtained while eliminating or reducing any prejudice to the respondents, by limiting the claim to a period immediately before the coming on for trial of the action – or indeed whether there are other mechanisms by which that balance could be achieved.

**17.** While this Court has been presented with assertions that are relevant to these matters, it has not been presented with any evidence touching upon them. Apart from the fact that it could not reliably adjudicate on the issues based upon such assertions, were it to do so it would be determining an aspect of the plaintiff's claim which has never been adjudicated at first instance based upon facts and evidence that neither party will have had a proper opportunity to address, and in a context where the High Court itself was never invited to undertake that exercise. It is the view of the Court – reached not without considerable hesitation – that it should not embark upon these issues as if it were a Court of first instance, and that it must accordingly remit the matter.

**18.** However, it will do so only with the significant proviso that the Court is in no sense precluding the defendants from bringing an application to the High Court to apply to dismiss this claim, or to reduce the time period to which it should relate, or otherwise. Nor should anything in this judgment be read as in any way limiting the jurisdiction or discretion of the High Court in addressing such an application, if brought.

**19.** Accordingly, and with that proviso, it is my view that there should be remitted to the High Court a single issue, as follows:

*‘Did the methodology used by the second named Defendant for the determination of the OMSP of used motor vehicles imported from other Member States of the European Union in the period to which this action relates produce a valuation for those vehicles which were as a general rule close to their actual value as required by Article 110 TFEU and the case law of the CJEU interpreting same?’*

**20.** The second outstanding issue relates to the form of the declaration that should be made arising from the findings of the Court that Revenue failed to comply with its obligations as a matter of domestic and European Law to provide information to UCII regarding the methodology used by it to determine the OMSP of imported used vehicles. It is my view that an Order to the following effect would capture the relief envisaged in the Court’s judgment:

*‘A Declaration that from 1993 to 2010 the second named Defendant acted unlawfully in both domestic law and European Law by failing and/or refusing to provide the Appellant with the methodology applied by it in determining the open market selling price of used vehicles pursuant to s.133 of the Finance Act 1992.’*

**21.** The third and final issue is that of costs – those in the High Court and those in this Court. The starting point in an appeal that is remitted to the High Court is that the High Court should determine the costs of all proceedings in that Court and the issue of costs remitted accordingly (see *McDonald v. Conroy* [2020] IECA 336 at para 34). I see no reason to deviate from that principle in this case.

**22.** In respect of the appeal, the UCII has not been entirely successful as to either the relief it claimed, or the grounds on which it claimed it. Bearing in mind that even if the issues on

which UCII succeeded did not occupy 50% of the time expended in the appeal, it would nonetheless have had to spend a portion of the appeal addressing issues of background touching those questions, it is my provisional view that UCII should obtain 50% of its costs of the appeal. While the case law of the Court makes it clear that the Court may in appropriate cases reduce the costs recovered by a party who is partially successful to reflect the costs incurred by its opponent in advancing those parts of the appeal on which has succeeded, I do not think it appropriate to so order in this case. I am heavily influenced in this view by the fact that Revenue's failure to transparently explain at an early stage how it determined the OMSP was a significant contributing factor to costs at all levels in this action.

**23.** This is only my provisional view as to how the costs should be disposed of. The parties are free to dispute this proposal or any aspect of it. If either party wishes to do so they should notify the Court of Appeal Office within five days of receipt of this judgment in which event the Court will convene a hearing to address the issue of costs.

**24.** Donnelly J. and Faherty J. are in agreement with this Judgment and the orders I propose.