

THE HIGH COURT

2007 1644 JR

DUNNES STORES

APPLICANT

AND

THE CENTRAL STATISTICS OFFICE

AND

THE MINISTER OF STATE AT THE DEPARTMENT OF AN TAOISEACH

RESPONDENTS

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of O'Neill J. delivered on the 17th day of December, 2009

1. Relief sought

1.1 On 10th December, 2007, this court (Peart J.) granted leave to the applicant to apply for, *inter alia*, the following reliefs by way of an application for judicial review:-

1. A declaration that the Statistics (Balance of Payments and Financial Accounts) Order 2005 (S.I. No. 124 of 2005) is *ultra vires* the Statistics Act 1993.
2. If necessary, an order of *certiorari* quashing the Statistics (Balance of Payments and Financial Accounts) Order 2005 (S.I. No. 124 of 2005).

Whilst leave was also granted in respect of several other reliefs (as *per* para. D of the statement of grounds), these were not pursued at hearing.

2. The facts

2.1 The applicant is a large private company engaged in retail trading in Ireland and abroad. The first named respondent is a statutory body established under the Statistics Act 1993 ("the Act of 1993") and is the national statistical institute for Ireland. Section 10(1) of the Act of 1993, provides that the functions of the first named respondent shall be, "*the collection, compilation, extraction and dissemination for statistical purposes of information relating to economic, social and general activities and conditions in the State*".

2.2 On 10th October, 2007, six summonses were issued by the first named respondent against the applicant company for alleged breaches of the Statistics (Balance of Payments and Financial Accounts) Order 2001 (S.I. No. 542 of 2001) ("the Order of 2001") and the Statistics (Balance of Payments and Financial Accounts) Order 2005 (S.I. No. 124 of 2005) ("the Order of 2005"), which replaced the Order of 2001. Pursuant to those orders, the first named respondent had requested the applicant to complete two statistical forms on a quarterly basis in respect of its group activities for the years 2006 and 2007, namely, the Balance of Payments Survey of Manufacturing and Non-Financial Services Company ("BOP40Q") and the Balance of Payments Survey of Trade in Services and Royalties ("BOP10Q"). The applicant failed to provide the requested information in those forms in response to directions from the Director General of the first named respondent made, pursuant to s.26 of the Act of 1993.

2.3 The applicant completes its accounts on an annual basis and contends that it is an excessive burden to submit statistical returns on a quarterly basis. In addition, it maintains that as a private company, it is entitled to withhold confidential information which the forms seek to elicit; that the provision of such sensitive information relating to its business has the potential to be highly damaging to its businesses and it believes that the information, as sought in the forms, is unnecessary and *ultra vires* the powers of the first named respondent.

2.4 The statutory basis for both the BOP10Q and BOP40Q forms is stated on those forms to be as follows:-

"Statutory basis: This statutory inquiry is conducted under the Statistics (Balance of Payments and Financial Accounts) Order 2005 (S.I. No. 124 of 2005) made under the Statistics Act 1993; the European Communities (Collection of Statistics) Regulations, 1999; Council Regulation (EC) No. 2533/98 of 23 November, 1998, concerning the collection of statistical information by the European Central Bank; and Regulation (EC) No. 184/2005 of the European Parliament and of the Council of 12 January 2005 on community statistics concerning balance of payments, international trade in services and foreign direct investment."

2.5 Eurostat, the Statistical Office of the European Communities and the European Central Bank require Member States to submit data concerning the balance of payments on a quarterly basis. The first named respondent is responsible for furnishing those European bodies with that data.

2.6 The criminal proceedings against the applicant came before the District Court on 14th November, 2007. The applicant indicated that it intended to challenge the validity of its prosecution before this court. An adjournment was granted by

the District Court until 4th December, 2007. On that date, the matter was given a date for hearing of 21st January, 2008. These proceedings were instituted on 6th December, 2007.

2.7 The applicant submits that the Order of 2005 is *ultra vires* s. 25 of the Act of 1993, as the order does not provide for the frequency with which statistical returns are to be made. Instead, that function of providing for the frequency of the returns is, the applicant contends, impermissibly delegated to the Director General of the first named respondent, even though it is a statutory function reserved for the Taoiseach or the Minister of State at the Department of An Taoiseach.

3. The statutory provisions

3.1 Section 25(1) of the Statistics Act 1993 provides as follows:-

"25.—(1) The Taoiseach may prescribe by order a requirement on persons and undertakings to provide information under this Act, specifying, in particular—

- (a) the general nature of the information required;
- (b) the frequency with which it is to be provided;
- (c) the persons or undertakings, or classes of persons or undertakings, required to provide it."

Section 26 of the Act of 1993 provides:-

"26. —(1) The Director General or an officer of statistics may, pursuant to a requirement made under section 25 of this Act, direct by the delivery of a notice any person –

(a) to complete and return a form, questionnaire or other record in accordance with any instructions contained therein or otherwise communicated to him;

(b) to answer questions asked of him by officers of statistics;

(c) to supply any record, copy of or extract from any record,
by a specified date or within a specified period."

Section 36 of the Act of 1993 states:-

"36. Any person who fails or refuses to provide any requested information in response to a direction from the Director General under section 26 or 27 of this Act pursuant to a requirement made under section 25 of this Act shall be guilty of an offence."

3.2 The Statistics (Delegation of Ministerial Functions) Order 2004 (S.I. No. 664 of 2004) ("the Order of 2004"), made by the Government, on the request of the Taoiseach, in exercise of the powers conferred on them under s. 2(1) of the Ministers and Secretaries (Amendment) (No.2) Act 1977 ("the Act of 1977"), delegated the powers and duties conferred on the Taoiseach by the Act of 1993, to the Minister of State at the Department of the Taoiseach ("the Minister of State"). Section 2(1) of the Act of 1977 states:-

"2.—(1) It shall be lawful for the Government, by order made on the request of a Minister of the Government, to delegate to a Minister of State assigned to the Department of State of which the Minister of the Government has charge all the powers and duties of such Minister of the Government under any particular Act or any particular statutory power or duty of such Minister of the Government."

3.3 The Order of 2005 requires certain persons and undertakings, who carry out certain transactions, as described in Part 1 of the Schedule to the order, including the provision of goods non-residents, to provide statistical information, as specified in Part 2 of the Schedule, to the first named respondent. Article 6 of the Order of 2005 provides as follows:-

"STATISTICS (BALANCE OF PAYMENTS AND FINANCIAL ACCOUNTS) ORDER 2005

I, TOM KITT, Minister of State at the Department of the Taoiseach, in exercise of the powers conferred on me by sections 4 and 25(1) of the Statistics Act, 1993 (No. 21 of 1993) and the Statistics (Delegation of Ministerial Functions) Order, 2004 (S.I. No. 664 of 2004), hereby order as follows:

1. (1) This Order may be cited as the Statistics (Balance of Payments and Financial Accounts) Order, 2005.

(2) This Order comes into operation on 3rd March 2005.

2. (1) In this Order—

'non-resident' means a person who is not a resident;

'particulars' includes information relating to a state, part of a state, a geographical region and a territory;

'resident' means—

(a) any person residing in the State,

(b) any person conducting a business within or outside the State who has a registered office in the State in

respect of that business, or

(c) in respect of a business conducted at a location in the State, the person conducting that business.

(2) In this Order a reference to an Article or Schedule is a reference to an Article of or Schedule to this Order.

3. This Order applies to—

(a) all persons and undertakings engaged in,

(b) all persons and undertakings acting on behalf of other persons and undertakings engaged in and

(c) undertakings, being associations of persons and undertakings referred to in paragraphs (a) and (b), which collect information from those persons and undertakings relating to,

any or all of the transactions specified in Part 1 of the Schedule.

4. A person or undertaking to which this Order applies shall provide the Central Statistics Office with the information specified in Part 2 of the Schedule.

5. Information, the general nature of which is specified in Part 2 of the Schedule, is prescribed as information required to be provided for the purposes of surveys of persons and undertakings to whom this order applies.

6. Information referred to in Article 5 shall be provided, when requested by the Director General, monthly, quarterly, half yearly or annually.

7. (1) Subject to paragraph (2) of this Article, a person or undertaking required by virtue of this Order to provide information to the Central Statistics Office shall provide such information by the completion of forms and questionnaires prepared by the Director General of the Central Statistics Office in accordance with section 23 of the Statistics Act 1993 (No. 21 of 1993).

(2) A person or undertaking required by virtue of this Order to furnish information shall be deemed to comply with that obligation where, with the consent of the Director General of the Central Statistics Office, the information is furnished by electronic means and provided that the Director General approves the format or manner in which the information is provided.

8. The Statistics (Balance of Payments) Order, 2001 (S.I. No. 542 of 2001) is revoked.

SCHEDULE

Part 1

(a) Provision of goods, services or financial instruments to non-residents;

(b) Receipt of goods, services or financial instruments from non-residents;

(c) Acquisition or disposal of a financial claim on non-residents;

(d) Incurrence or redemption of a financial liability to non-residents;

(e) Payment of income to non-residents;

(f) Receipt of income from non-residents.

Part 2

(a) Particulars of shareholdings in or ownership of the undertaking;

(b) Particulars of shareholdings in or ownership of any undertaking;

(c) Particulars relating to the value of goods, services and financial instruments provided by a person or an undertaking to residents or non-residents, or to both, in the period concerned;

(d) Particulars relating to the value of goods, services and financial instruments received by a person or an undertaking from residents or non-residents, or from both, in the period concerned;

(e) Particulars relating to the value of transactions in respect of financial claims on residents or non-residents, or on both, engaged in by a person or an undertaking;

(f) Particulars relating to the value of transactions in respect of financial liabilities to residents or non-residents, or to both, engaged in by a person or an undertaking;

(g) Particulars relating to the value of financial claims on residents or non-residents, or on both, held by a person or an undertaking;

(h) Particulars relating to the value of financial liabilities to residents or non-residents, or to both, held by a person or an undertaking;

(i) Particulars relating to the value of amounts received or receivable by a person or undertaking from residents or non-residents, or from both;

(j) Particulars relating to the value of amounts paid or payable by a person or undertaking to residents or non-residents, or to both;

(k) The address of and trading name or names and any other aliases by which the undertaking is known;

(l) The description of the business in which the person or undertaking is engaged.

GIVEN under my Hand, this 3rd day of March 2005.

TOM KITT,

Minister of State at the Department of the Taoiseach."

3.4 The information referred to in Article 5 of the Order of 2005, is specified in Part 2 of the Schedule. It includes particulars of shareholdings in or ownership of the undertaking or any undertaking; particulars relating to the value of goods, services and financial instruments provided by or received by a person or an undertaking to/from residents or non-residents, or to/from both, in the period concerned; particulars relating to the value of transactions in respect of financial claims on or liabilities to residents or non-residents, or to both, engaged in by a person or an undertaking; particulars relating to the value of financial claims on or liabilities to residents or non-residents, or from both; particulars relating to the value of amounts received or receivable, paid or payable by a person or undertaking to residents or non-residents, or to both; the address of and trading name or names and any other aliases by which the undertaking is known; the description of the business or undertaking is engaged.

4. The issues

4.1 The principal issue which arises for determination is whether or not, on a true construction of Article 6 of the Order of 2005, it involves a delegation of a function of An Taoiseach or the Minister of State to the Director General of the first named respondent to set the frequency of requests in respect of balance of payments information and, if so, whether it is a permissible delegation?

5. Counsel's submissions

5.1 Mr. Mohan S.C., for the applicant, contended that the Order of 2005 is ultra vires the Act of 1993, as it failed to detail the frequency with which the information to which it relates must be provided and instead, impermissibly, delegated that function to the Director General of the first named respondent, such that the information is to be provided at the discretion of the Director General. He characterised the provision of information under the Order of 2005 as an onerous obligation and argued that it was appropriate that the Taoiseach or the Minister of State in his Department, politically accountable persons, should set the frequency of the provision of that information.

5.2 He further submitted that the precise terms of Article 6 of the Order of 2005, amounted to a purported sub-delegation to the Director General by Statutory Instrument of the power to determine the frequency contrary to the principle of *delegatus non potest delegare*, which had been endorsed in *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419, and *Flanagan v. University College Dublin* [1988] I.R. 724. In considering the validity of a delegation, he submitted that this court should consider the statutory framework, the nature of the power and the degree of control retained by the delegating authority. The function of prescribing the frequency, in his submission, was a statutory function reserved for the Taoiseach or the Minister of State in his Department. The nature of the legislation at issue, he submitted, was penal and ought to be construed strictly. In such circumstances, he argued that the Taoiseach and/or the Minister of State could not simply delegate the power vested in him to the Director General. Secondary legislation, he submitted, could only be promulgated by the Taoiseach or a Minister and he observed that there was no statutory equivalent to s. 2(1) of the Act of 1977, in this case which provided for delegation of this function to the Director General of the first named respondent.

5.3 Mr. McDonagh S.C., for the respondents, submitted that the interpretation advanced by the applicant would create the anomalous situation whereby the Director General would have the power under ss.23 and 26 of the Act of 1993, to determine the timing of the completion of statistical forms and the sole responsibility for statistical methodology under s. 13 of the Act of 1993, but would be deprived of the jurisdiction to determine the frequency with which the forms BOP10Q and BOP40Q must be returned. Sections 13, 23 and 26 of the Act of 1993, in his submission, vested the power of deciding the frequency and timing of the collection of statistical information in the Director General. He urged the court to look at the Act of 1993, as a whole and if it did so, he submitted, it would see that the Order of 2005 was *intra vires* the Act of 1993.

5.4 Mr. McDonagh further submitted that the offence with which the applicant was charged was for a failure to comply with the requirement of the Director General under s. 26 of the Act of 1993, and that it was the Minister of State who, in the Order of 2005, set the parameters of what the Director General could do under s. 26 of the Act of 1993 i.e. the type of person that was to provide information, the nature of that information and the frequency with which that information was to be provided by them. The Director General, he contended, was merely exercising an administrative function in choosing one of the four frequencies set down by the Minister of State. In this regard, the words "when requested by the Director General" in Article 6 of the Order of 2005, constituted surplusage in his submission. If there was a delegation, it was permissible, he argued, given the context of the Act, and he relied on the cases of *Cityview Press Limited v. An Chomhairle Oiliúna* [1980] I.R. 381, *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297 and *Dubsky v. Government of Ireland* [2007] 1 I.R. 63.

6. Decision

6.1 The applicant submits that, construed literally, s. 25 of the Act of 1993, requires the Taoiseach and/or Minister of State to specify the precise frequency, not the general frequency, of when information is to be provided to the first named respondent. It accepts that this power to set the frequency has been validly delegated to the Minister of State by virtue of the Act of 1977, and the regulations made thereunder since that delegation is expressly legislated for in primary legislation. The applicant says that when the Minister of State came to make regulations under Article 6 of the Order of 2005, the inclusion of the phrase "*when requested by the Director General*", in effect, transfers to the Director General the power to determine the frequency of that period. I cannot accept this to be the position.

6.2 When one looks at the Act of 1993 in its entirety, it is clear that there is a clear distinction between the role of the Taoiseach and/ or the Minister of State and that of the Director General. The Taoiseach appoints the Director General under s. 12 of the Act of 1993. Section 8 of the Act provides that the Director General, "*shall be responsible for the management and control*" of the first named respondent. Section 13 of the Act of 1993 provides that the Director General shall have, "*the sole responsibility for and be independent in the exercise of the functions of deciding (a) the statistical methodology and professional statistical standards used by the Office; (b) the content of statistical releases and publications issued by the Office; and (c) the timing and methods of dissemination of statistics compiled by the Office.*" Section 14 provides the Director General with a right to consult the Taoiseach concerning any matters affecting the office or relating to official statistics or the administration of the Act. Section 23 gives the Director General the power to prepare forms, questionnaires and other records for the collection of statistical information and may specify the date or period within which those documents should be returned to the first named respondent. Therefore, in essence, the Director General is responsible for the day-to-day running of the first named respondent. The function of the Taoiseach and/ or Minister of State, in contrast, is to exercise a supervisory role and to make relevant regulations as provided for. The Taoiseach's or Minister of State's role is constrained by the parent legislation, as illustrated in this case by s. 25(1) of the Act of 1993.

6.3 In accordance with s. 25(1)(c) of the Act of 1993, Part 1 of the Schedule to the Order of 2005 sets out the classes of persons that are required to submit information pursuant that order. In accordance with s. 25(1)(a) of the Act of 1993, Part 2 of the Schedule to the order outlines the nature of information that must be furnished. There is, however, no third part to the Schedule dealing with the frequency with which that information must be submitted as set out in s. 25(1)(b) of the Act of 1993. The brevity of the prescription in relation to time periods, no doubt, made a separate schedule for that purpose unnecessary.

6.4 As is apparent, s. 25(1)(b) of the Act of 1993, empowers the Minister of State to prescribe by order the frequency with which information is to be provided to the Director General. This, having regard to the respective functions of the Minister of State and the Director General, could not mean that in individual cases the responsibility of deciding the appropriate time period for the provision of information rested with the Minister of State. Such an outcome would be wholly disruptive of the statutory scheme and clearly not contemplated in the primary legislation. Section 25(1)(b) mandates the fixing of a regime or menu of time periods for the provision of the information which can be requested under the legislative scheme. Article 6 of the Order of 2005 does precisely that, and no more. It fixes the permissible time periods as either monthly, quarterly, half -yearly or annually. What that means is that no other time periods are permissible. Thus, the Director General would act *ultra vires* if he were to request information on a weekly basis or any other periodic basis other than those periods set out in Article 6.

6.5 The phrase "*when requested by the Director General*" in Article 6 is merely a reference to a request by the Director General under s. 26(1) of the Act of 1993, which, of course, is the statutory foundation of the power of the Director General or an officer of statistics to make a legally binding request or demand for relevant information as prescribed in the Order of 2005. In no way does that phrase involve a delegation to the Director General of the power given in s.25(1)(b) of the Act of 1993 to the Taoiseach or the Minister of State to prescribe by order the regime of time periods to apply to requests for information, as set out in Article 6 of the Order of 2005.

6.6 The function, which is undoubtedly left to the Director General or an officer of statistics, is to select from the menu of time periods set out in Article 6, a time period to apply to a request made by the Director General or an officer of statistics. This is a purely ministerial function entirely in keeping with the provisions of the Act of 1993, which, as remarked above, leaves to the Director General or officers of statistics the discharge of the function of gathering statistical information under the provisions of the Act. Necessarily, that involves individual requests to individual parties for specific relevant information and necessarily and unavoidably requires the setting of time periods for the provision of that information. This is a function that could only be performed by the Director General or officers of statistics and, manifestly, could not be done by the Taoiseach or the Minister of State under the scheme set out in the Act of 1993. As said above, the Director General or officers of statistics are restricted to selecting from the time periods prescribed by the Minister of State in Article 6 of the Order of 2005. The prescription of time periods in Article 6 of the Order of 2005 by the Minister of State does not impose a legal obligation on any person to do anything. Until the Director General or an officer of statistics exercises his power under s. 26(1) of the Act of 1993, and requires information to be provided, no enforceable obligation exists at law to provide the information. In such circumstances, there is a clear distinction between the functions of the Taoiseach or Minister of State to prescribe time periods as in Article 6 and the function of the Director General to create a legally binding obligation to comply with a time period selected by him from the menu of prescribed time periods. There is no confusion of function or powers here and, in my judgement, no delegation to the Director General of the power of the Taoiseach or Minister of State under s. 25(1)(b) of the Act of 1993 to prescribe the frequency with which information is to be provided.

7. Conclusion

7.1 For the reasons set above, I must refuse the reliefs sought in these proceedings.