

In Case 182/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Supreme Court of Ireland for a preliminary ruling in the proceedings pending before that court between

ROBERT FEARON AND COMPANY LIMITED,

objector/appellant,

and

THE IRISH LAND COMMISSION,

respondent,

on the interpretation of Article 58 of the EEC Treaty,

THE COURT,

composed of: Lord Mackenzie Stuart, President, O. Due and C. Kakouris (Presidents of Chambers), U. Everling, K. Bahlmann, Y. Galmot, and R. Joliet, Judges,

Advocate General: M. Darmon

Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The main proceedings relate to an objection to a decision of the Irish Land Commission to acquire land compulsorily from the objector/appellant, a

private limited company registered in Ireland. The land compulsorily acquired, covering 58 acres (approximately 21 hectares), is situated in County Cavan.

The Irish Land Commission's powers of compulsory acquisition have been conferred upon it by a series of statutes. The relevant provision in the present case is Section 32 (3) of the Land Act 1933 as amended by Section 35 of the Land Act 1965.

That provision contains an exception to the powers of compulsory acquisition in favour of tenants or proprietors who reside either on the land itself or in the immediate neighbourhood thereof (meaning any place which is not more than three miles from the nearest point of the relevant land).

As regards land of which a body corporate is the tenant or proprietor, each of the persons entitled to a beneficial interest in the body corporate must have, throughout the whole of the qualifying period, resided either on the land or in the immediate neighbourhood thereof. In the case of a limited company, this provision means that each of the members must meet the residence requirement.

The objector/appellant was not allowed to avail itself of the exception because its members resided neither on the land to be acquired nor in the immediate neighbourhood thereof. In fact, four of the members live in England. The fifth, who is both secretary of the company and manager of the farm, lives in Northern Ireland, but more than three miles from the land in question. One of

the members is both an Irish and a British national, while the others are all British nationals.

Following a submission by the objector/appellant that the residence requirement was incompatible with the principle of freedom of establishment laid down by Article 58 of the EEC Treaty, the Supreme Court stayed the proceedings and submitted the following question to the Court of Justice for a preliminary ruling:

“Where a statute of a Member State contains a condition requiring that a person (other than a body corporate) who own land should have resided on it for a certain period, if the owner of the land is a body corporate, is Article 58 to be interpreted as prohibiting a condition requiring that each of the persons entitled to a beneficial interest in the body corporate should have resided on the land during a similar period?”

The order making the reference was lodged at the Court Registry on 25 August 1983.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by Robert Fearon and Company Limited, represented by Kathleen J. H. O'Brien of the Northern Ireland Bar, instructed by Messrs Finbar Cahill and Company, Solicitors, Dublin, by the Irish Land Commission, represented by Michael G. O'Beirn, Solicitor, acting as Agent, by the Commission of the European Communities, represented by D. R. Gilmour, a member of its Legal Department, acting as Agent, and by

Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent.

Ireland requested the Court to hear and determine the reference in plenary session. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community

According to the objector/appellant in the main proceedings, *Robert Fearon and Company Limited*, Article 58 requires the Member States to accord companies, within the meaning of that article, the right of establishment granted to natural persons by virtue of Article 52.

In its view, Article 52 guarantees equality of treatment to the nationals of each Member State in the other Member States. That prohibition of discrimination includes but is not restricted to discrimination on grounds of nationality. The objector/appellant refers to the case-law of the Court, according to which all instances of different treatment of like situations may constitute discrimination.

In the view of the objector/appellant, the Irish legislature clearly intended to discriminate on grounds of nationality. Even though the law does not expressly so provide, an intention to keep Irish land for the Irish is revealed in the parliamentary debates preceding the passing of the Act. In particular, the amendment passed in 1965 was designed to deal with

Irish companies having foreign shareholders. The Minister has the power to determine the lands to be inspected for possible acquisition. This power could be used in a nationalist way. The Minister gave an assurance that the compulsory acquisition procedure would not be used against Irish nationals.

Even if the Court finds that there is no discrimination on grounds of nationality, there is discrimination in the wider sense, because a company cannot, in practice, avail itself of the exception. In the case of private companies, even if all the members lived on the land in question, the existence of a mortgage would make the land vulnerable to compulsory acquisition.

The compulsory acquisition powers also contravene the principle of proportionality, given that the Land Commission's other compulsory acquisition powers are entirely adequate.

Finally, the provision at issue creates a situation of legal uncertainty. A company can acquire agricultural land and farm it without its shareholders being subjected to a residence test, but that test comes into operation in the event of compulsory acquisition. This legal uncertainty constitutes an obstacle to capital investment in agricultural land and to the exercise of the freedom of establishment. Furthermore, any attempt to end the uncertainty by putting the land up for sale increases the prospect of compulsory acquisition.

In its observations submitted to the Court, the *Irish Land Commission* begins by stating that the land belonging to Robert Fearon and Company Limited was compulsorily acquired because the objector had not discharged the onus of establishing, in accordance with Section 35 of the Land Act 1965, that each of

the persons entitled to a beneficial interest had throughout the whole of the qualifying period resided either on the land or in the immediate neighbourhood thereof.

Analysing the provisions of Article 58 of the EEC Treaty, the Irish Land Commission considers that the essence of the article is that companies to which it applies shall, for the purposes of Chapter 2 of Title III, be treated in the same way as natural persons who are nationals of Member States. Those purposes are to be found in Article 52. In the view of the Irish Land Commission, that article requires that all restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State be abolished. Freedom of establishment includes the right to set up and manage companies or firms to which Article 58 applies under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

The Irish Land Commission submits that the provisions of Section 35 of the Land Act 1965 requiring residence by the persons entitled to a beneficial interest in a body corporate are not contrary to Article 58 for the following reasons:

In the first place, the residence requirement does not affect the right of establishment of a company, because a company, whether Irish or from another Member State, would first have to be established in Ireland and to own land there before it could be affected by Section 35 of the Land Act, which governs the exercise of this property right.

Secondly, the right of establishment under Chapter 2 of Title III of the EEC Treaty is not an unrestricted right. In the opinion of the Irish Land Commission, Section 35 merely constitutes one of the conditions which are laid down by Irish

law for the exercise of the right of establishment and which are applicable to Irish nationals as well. Consequently, it is applicable if nationals of other Member States exercise their right of establishment.

Thirdly, the objector/appellant in the main proceedings is a company formed in accordance with the laws of Ireland and carrying on business in Ireland. Thus it cannot rely, in Ireland, upon any right of establishment under Articles 52 and 58 of the EEC Treaty.

Finally, in the fourth place, the Irish Land Commission contends that the residence requirement in Section 35 is not only in conformity with Article 58 of the EEC Treaty but is required by that article. The absence of any such provision in the Land Act would have been a discrimination against companies as it would have prevented them from complying with the residence requirement. The provision made for companies in Section 35 comes as close as possible to treating companies in the same way as natural persons.

In conclusion, the Irish Land Commission submits that the question referred to the Court should be answered as follows:

Article 58 of the EEC Treaty is not to be interpreted as prohibiting the condition in Section 35 of the Land Act 1965 whereby, in the case of a corporate body owning land, each of the persons entitled to a beneficial interest in the body corporate is required to have resided either on the land or in the immediate neighbourhood thereof throughout the whole of the qualifying period.

For its part, the *Commission of the European Communities* recognizes from the outset that the constant purpose of the Irish Government under the various Land Acts concerning the operation of the Irish Land Commission has been at

one and the same time to prevent speculation in land, to ensure as far as possible that the land belonged to those who worked it and, lastly, to increase the size of uneconomic holdings in order to overcome the problems of agrarian poverty to which this gave rise.

According to the Commission, the essence of the question put to the Court is how far it is lawful for Ireland to exclude the members of a land-owning company from the benefit of an absolute defence against a compulsory purchase order. The Commission expresses its doubts as to the relevance of formulating that question in terms of the interpretation of Article 58, since the company in question is Irish. The true position is that the shares in this Irish company are owned by British nationals who have thus exercised their right of establishment, primarily or secondarily, under Article 52 of the EEC Treaty. In the view of the Commission the question for consideration is therefore whether a residence requirement of the land can be applied to foreign shareholders of an Irish company, in conformity with the provisions of the EEC Treaty relating to establishment.

The Commission states that Article 52 of the EEC Treaty requires the standard of national treatment for all Community nationals seeking to exercise the right of establishment. It is the law of Ireland that any natural person who owns land may be subject to a compulsory purchase by the Land Commission unless certain conditions are fulfilled, one of which being that he lives on the land or within three miles of it. This limitation on ownership cannot be circumvented by forming a limited company and establishing a fictive residence on the land. Since those rules apply to all Irish citizens, their application to non-

nationals who are the beneficial owners of the interests in question, via the device of a limited company, cannot give rise to discrimination contrary to Article 52.

Although a legal person and all those entitled under it may not be able readily to fulfil certain stringent conditions imposed on natural persons, that does not mean that those conditions must not be applied to the legal person. Any other interpretation would simply turn Article 58 into a discrimination against natural persons, whereas its purpose is to ensure that there is no discrimination against legal persons.

Finally, the Commission mentions that the system of compulsory purchase by the Land Commission and the various conditions surrounding it are part of the system of property ownership in Ireland, which, by virtue of Article 222 of the EEC Treaty, is in no way prejudiced by that Treaty. In the view of the Commission, that provision on its own would be sufficient to justify a negative answer to the question posed the court making the reference.

The Commission concludes by suggesting that the Court answer the question as follows:

Nothing in the provisions of the EEC Treaty concerning the right of establishment prohibits a condition requiring that each of the persons entitled to a beneficial interest in the body corporate should have resided on the land during the qualifying period.

Ireland contends, in its observations submitted to the Court, that the question asked by the Supreme Court, although it expressly refers only to Article 58 of the

Treaty, requires that Article 52 should also be taken into account. It submits that the essential requirement of Article 58 of the EEC Treaty is that the rule of national treatment contained in Article 52 must be complied with. All companies and firms within the scope of Article 58, irrespective of their places of incorporation, the locations of their registered offices, or the locations of their principal place of business within the Community, are subject to the same requirements under Section 35 of the Land Act.

As regards the requirement of national law that natural persons owning agricultural land should reside on or in the neighbourhood, that is to say within three miles, of that land, Ireland submits that a rule that those beneficially owning a company should satisfy the same requirement is justified in regard to Article 58 of the EEC Treaty. Any lesser requirement would involve discrimination against natural persons.

Ireland questions in any event whether the plaintiff company in the main proceedings, which is incorporated in Ireland, is a beneficiary of either Article 52 or Article 58.

In conclusion, Ireland asks the Court of Justice to answer the question referred to it by the Supreme Court of Ireland as follows:

Where a statute of a Member State contains a condition requiring that a person (other than a body corporate) who owns land should have resided on it for a certain period, the provisions of the Treaty concerning freedom of establishment are *not* to be interpreted as prohibiting, in the case of an owner of land which is a body corporate, a condition requiring that each of the persons entitled to a beneficial interest in the body corporate should have resided on the land during a similar period.

III — Oral procedure

The objector/appellant, represented by Miss K. J. H. O'Brien, Barrister-at-Law, the defendant and Ireland, represented by J. Blayney, Senior Counsel, and the Commission of the European Communities, represented by D. R. Gilmour, acting as Agent, presented oral argument at the sitting on 16 July 1984.

The Advocate General delivered his opinion at the sitting on 4 October 1984.

Decision

- 1 By order of 15 June 1983, received at the Court Registry on 25 August 1983, the Supreme Court of Ireland referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question relating to the interpretation of Article 58 of the EEC Treaty in order to determine the compatibility with the Treaty of Section 32 (3) of the Land Act 1933 as amended by Section 35 of the Land Act 1965.

- 2 That question was raised in the context of proceedings concerning the decision of the Irish Land Commission to acquire compulsorily land owned by Robert Fearon & Company Limited, a company registered under Irish law.
- 3 The purpose of both the Land Act 1933 and the Land Act 1965 is to increase the size of holdings of land which, if that were not done, could not be exploited on an economic basis, to prevent land speculation, and, finally, to ensure as far as possible that the land belongs to those who work it. To achieve the latter objective, Section 32 (3) of the Land Act 1933, as amended by Section 35 of the Land Act 1965, provides that the Irish Land Commission cannot exercise its powers of compulsory acquisition against persons who have resided for more than one year within three miles of the land or against bodies corporate all of whose shareholders meet the same residence requirement. In this case, the five shareholders of Robert Fearon & Company Limited are British nationals none of whom meets the residence requirement set out above.
- 4 The Supreme Court of Ireland, before which the matter had been brought by way of a final appeal, submitted the following question to the Court of Justice for a preliminary ruling:
- “Where a statute of a Member State contains a condition requiring that a person (other than a body corporate) who owns land should have resided on it for a certain period, if the owner of the land is a body corporate, is Article 58 to be interpreted as prohibiting a condition requiring that each of the persons entitled to a beneficial interest in the body corporate should have resided on the land during a similar period?”
- 5 In its written observations, the Commission contends first of all that the system of compulsory acquisition by public bodies is part of the system of property ownership in Ireland and that Article 222 of the Treaty, according to which “this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”, would thus on its own justify a negative answer to the question put by the national court.
- 6 That conclusion cannot be accepted. By virtue of Article 54 (3) (e) of the Treaty, the restrictions on the acquisition and use by a national of one

Member State of land and buildings situated in another Member State are among those which are to be abolished with a view to the realization of freedom of establishment. Similarly, the Council's "Programme Général pour la Suppression des Restrictions à la Liberté d'Établissement" [General Programme for the Abolition of Restrictions on the Freedom of Establishment] of 18 December 1961 (Journal Officiel 1962, p. 36) lists, among the restrictions on freedom of establishment to be abolished, provisions or practices which provide for less favourable rules for nationals of another Member State in regard to compulsory acquisition.

- 7 Consequently, although Article 222 of the Treaty does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment.
- 8 As the Commission rightly points out, Article 58 of the Treaty, to which the national court's question refers, does not govern the solution of the matter in litigation in the main proceedings. The effect of that article is to assimilate, for the purposes of giving effect to the chapter relating to the right of establishment, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to natural persons who are nationals of one of the Member States. In this case, since Fearon & Company Limited is an Irish company for the purposes of Article 58 of the EEC Treaty, it cannot claim in Ireland the benefit of the right of establishment granted to companies formed under the laws of the other Member States.
- 9 The question raised by the Supreme Court of Ireland seeks to ascertain, however, whether, having regard to the rules laid down in the Treaty, nationals of other Member States who have exercised their right of establishment in Ireland under Article 52 of the Treaty by participating in the formation of a company within the meaning of Article 58 of the Treaty can be required to meet a residence requirement.
- 10 That question must be answered in the affirmative if the obligation to reside on or near land is imposed by a Member State, within the framework of legislation concerning the ownership of rural land which is intended to

achieve the objectives set out above, both on its own nationals and on those of the other Member States and is applied to them equally. A residence requirement so delimited does not in fact amount to discrimination which might be found to offend against Article 52 of the Treaty.

- 11 The reply to the question put to the Court by the Supreme Court of Ireland must therefore be that Article 52 of the Treaty does not prohibit a Member State from making exemption from compulsory acquisition measures adopted under legislation governing the ownership of rural land subject to a requirement that nationals of other Member States who have taken part in the formation of a land-owning company reside on or near the land, if that residence requirement also applies to nationals of that Member State and if the powers of compulsory acquisition are not exercised in a discriminatory manner.

Costs

- 12 The costs incurred by Ireland and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Supreme Court of Ireland by order of 15 June 1983, hereby rules:

Article 52 of the Treaty does not prevent a Member State from making exemption from compulsory acquisition measures adopted under legislation governing the ownership of rural land subject to a requirement that nationals of other Member States who have taken part in the formation of a land-owning company reside on or near the land, if

that residence requirement also applies to nationals of that Member State and if the powers of compulsory acquisition are not exercised in a discriminatory manner.

Mackenzie Stuart	Due	Kakouris	
Everling	Bahlmann	Galmot	Joliet

Delivered in open court in Luxembourg on 6 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

A. J. Mackenzie Stuart

President

OPINION OF MR ADVOCATE GENERAL DARMON
DELIVERED ON 4 OCTOBER 1984¹

*Mr President,
Members of the Court,*

1. The relevant facts which underlie this reference for a preliminary ruling made by the Supreme Court, Dublin, are as follows.

Robert Fearon and Company Limited (hereinafter referred to as "Fearon"), a company registered under Irish law, is the owner of a farm in County Cavan, Ireland. The company consists of five shareholders who are British nationals. Four of them reside in England. The

fifth, who is also an Irish national, resides in Ireland but at a distance of more than three miles from the farm.

The place of residence of the shareholders is, in this case, of crucial importance. According to Section 32 (3) of the Land Act 1933 as amended by Section 35 of the Land Act 1965 it is provided that the Irish Land Commission, a public body with powers of compulsory acquisition, cannot exercise those powers as against proprietors who have resided for a year either on the land or within three miles of it. Where the proprietor is a body corporate, each of the share-

¹ — Translated from the French.