

**Robert Fearon and Company Limited v. Irish Land
Commission**

(Case 182/83)

**Before the Court of Justice of the European
Communities**

ECJ

**(Presiding, Lord Mackenzie Stuart C.J.; Due and
Kakouris PP.C.; Everling,
Bahlmann, Galmot and Joliet JJ.) M. Marco Darmon
Advocate General.**

6 November 1984

Reference from Ireland by the Supreme Court under Article 177 EEC.

Property. Expropriation. Establishment. Discrimination.

Although Article 222 EEC does not call in question the right of member-States to establish a system of compulsory acquisition by public bodies, the latter remains subject to the fundamental rule of non-discrimination which underlies the Treaty rules on freedom of establishment. [7]

Companies. Corporate veil. Establishment.

An Irish company, the shareholders of which are all UK nationals, cannot claim under Article 58 EEC the right of establishment granted to companies formed under the laws of other member-States. [8]

**Companies. Shareholders. Residence. Establishment. Agriculture.
Absentee landlords.**

Nationals of other member-States who have exercised their right of establishment under Article 52 EEC by participating in the formation of a company under **Article 58** can be required to meet a residence requirement, namely to reside on or near farming land under national laws on the ownership of rural land intended to prevent land speculation and to ensure that the land belongs to those who work it. It is therefore permissible under **Article 52** for a

member-State to make exemption from compulsory acquisition of rural land conditional on the shareholders of such a company residing on or near the farm land owned by their company. This will, however, only be so if the same residence requirement applies to local nationals and if the powers of expropriation are not exercised in a discriminatory manner.

The Court *interpreted* Article 52 and 58 EEC *in the context of* the compulsory acquisition of the plaintiff company's farm land in*229 Ireland, the company being Irish but its shareholders being British and resident away from the land, *to the effect that* the Irish statutory rule that shareholders of a company owning agricultural land should reside within three miles of it or risk expropriation of the property could apply without infringing the right of establishment of the UK shareholders.

Representation

Kathleen J. H. O'Brien, of the Northern Ireland Bar, instructed by Finbar Cahill & Co., for the plaintiff company.

J. Blayney S.C., instructed by James Winston S.C., for the defendant Land Commission.

D. R. Gilmour, of the Legal Service of the E.C. Commission, for the Commission as *amicus curiae*.

J. Blayney S.C., instructed by Louis J. Dockery, Chief State Solicitor, for the Irish Government as *amicus curiae*.

The following case was referred to by the Advocate General:

[Hauer v. Land Rheinland-Pfalz \(44/79\), 13 December 1979: \[1979\] E.C.R. 3727, \[1980\] 3 C.M.L.R. 42. Gaz:44/79](#)

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Facts

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.

*230 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 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?

Opinion of the Advocate General (M. Marco Darmon)

1

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

Robert Fearon & Company Ltd. (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 provides 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 shareholders must meet that residence requirement during the same period.

Since none of Fearon's shareholders met the residence requirement, the Irish Land Commission decided to make a compulsory acquisition order against the company and it was in the course of an appeal against that decision that the Supreme Court, Dublin, referred the following question to the Court of Justice for

a preliminary ruling:

*231 [*The Advocate General repeated the question, and continued:*]

2

Observations were submitted to the Court not only by the appellant and the respondent in the main proceedings, that is, Fearon and the Irish Land Commission, but also by Ireland and the Commission.

The latter, at the end of its written observations, argues briefly that Article 222 of the Treaty would 'on its own ... be sufficient to justify a negative answer to the question posed by the court of renvoi'.

That **Article** provides that 'this Treaty shall in no way prejudice the rules in member-States governing the system of property ownership'. In the Commission's view therefore, the question should be answered in the negative because 'the system of compulsory purchase by the Land Commission and the various conditions which surround that are part of the system of property ownership in Ireland'.

I cannot agree with the Commission's view on that point. Its interpretation of **Article 222** is incompatible with the terms of Article 54(3)(e), which provides, with regard to the right of establishment, that the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

...

(e) By enabling a national of one member-State to acquire and use land and buildings situated in the territory of another member-State

...

The Commission's interpretation is also contradicted by various acts of the Council and in particular by the 'Programme General pour la Suppression des Restrictions a la Liberte d'Etablissement' (General Programme for the Abolition of Restrictions on the Freedom of Establishment) of 18 December 1961 which expressly mentions the possibility of 'acquiring, enjoying or alienating rights and property, both movable and immovable' and Annex V of which deals with agriculture. Title III, A, j, of that text states that restrictions which 'solely as regards aliens ... provide for less favourable rules in the case of nationalisation, compulsory purchase or requisition' must be removed.

As Capotorti A.G., appropriately quoted at the hearing by the appellant in the main proceedings, has said:

As for the Community Treaties, I am of the opinion that the rule expressed in **Article 222** of the EEC Treaty, which provides that the Treaty 'shall in no way prejudice the rules in member-States governing the system of property ownership' makes it impossible to hold that in Community law private property is more clearly protected or on the contrary subject to a restrictive conception; the truth is that--apart*232 from the limits expressly imposed by some provisions of the Treaties and particularly by the Treaty establishing the EAEC--the **Article** cited confirms that it was not the intention of the Treaties to impose upon member-States or to introduce into the Community legal order any new conception of property or system of rules appertaining thereto. [FN1]

FN1 Opinion in [Case 44/79 Hauer v. Land Rheinland-Pfalz: \[1979\] E.C.R. 3727 At 3759-3760, \[1980\] 3 C.M.L.R. 42 At 54-55.](#)

Since **Article 222** cannot therefore be interpreted as excluding the rules in member-States governing the system of property ownership from the field of application of the general principles of Community law, it is necessary to consider whether, as Fearon contends, those principles are not respected by the aforementioned Irish legislation.

3

According to Fearon, that legislation is discriminatory, contrary to the principle of proportionality and a source of legal uncertainty. In addition, according to Fearon, the discussion before this Court should not be limited to the interpretation of **Article 58** of the Treaty and the Supreme Court, instead of holding that section 35 of the Land Act 1965 was not incompatible with Article 40 and **52** of the Treaty, should have referred to this Court the questions raised before it by Fearon concerning those two **Articles**.

4

With regard to the complaint of discrimination, Fearon contends that **Article 58** requires the member-States to grant the right of establishment, conferred on natural persons by **Article 52**, to companies, as defined by the second paragraph of **Article 58**.

According to Fearon, although section 35 of the Land Act 1965 does not embody any express discrimination, it is in fact discriminatory in two respects: on the ground of nationality, because the parliamentary debates which preceded its enactment demonstrated the wish of the Irish Parliament to place Irish nationals in a privileged position; and more generally, and to the detriment of companies, because it is more difficult than it is in the case of natural persons, and sometimes even impossible, for each of their shareholders to meet the residence requirement which would enable a successful objection to be made against a compulsory acquisition.

The first paragraph of **Article 58** provides that

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 shall, for the*233 purposes of this Chapter, be treated in the same way as natural persons who are nationals of member-States.

Two observations should therefore be made:

1. It may be asked, and the Commission of the European Communities, Ireland and the Irish Land Commission do in fact ask, whether **Article 58** can be usefully relied upon in this case. Fearon is not a company constituted in another member-State which wishes to establish itself in Ireland. It is an Irish company already established in Ireland.

2. **Article 58**, which is the last **Article** of Chapter II dealing with the right of

establishment, by implication but necessarily refers back to the preceding articles and in particular to **Article 52** and this is confirmed moreover by the second paragraph of the latter **Article**.

That paragraph is worded as follows:

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of **Article 58**, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

As the Commission rightly maintains, the problem is therefore as follows: In the light of the provisions of the Treaty relating to establishment, may a residence requirement be applied to British nationals who have exercised their right of establishment in Ireland under **Article 52** as shareholders in an Irish company?

That question should be answered in the affirmative.

Article 52 requires that all nationals of a member-State seeking to exercise their right of establishment in another member-State be treated in the same way as nationals of the latter State. However, the residence requirement, which enables the risk of compulsory acquisition to be avoided, is required both in the case of natural persons and in the case of the holders of shares in a body corporate, without any distinction as to nationality. There is thus no discrimination in that respect in the text of the Land Act. Nor has any discriminatory practice been proved. Consequently, foreign shareholders cannot rely on reverse discrimination as a means of avoiding that requirement.

Nor is there any discrimination *lato sensu* against bodies corporate.

There is no doubt that it is more difficult for a body corporate than it is for a natural person to meet the residence requirement because that requirement must be met by all the members of the body corporate. However, that difficulty, which undoubtedly grows with the number of shareholders, is attributable to the nature of a body corporate and not to any discrimination against companies.

*234 The contrary solution, which would absolve bodies corporate from the residence requirement demanded of their shareholders would have two disadvantages:

It would enable natural persons, by constituting a company, fraudulently to avoid the risks inherent in non-residence, and it would constitute discrimination, contrary to the provisions of **Article 58** of the Treaty, against natural persons and in favour of companies.

5

The complaints based on a breach of the principles of proportionality and legal certainty also appear to have little merit. Those principles cannot be interpreted as prohibiting the national legislature from laying down, on a basis which does not involve discrimination on grounds of nationality, rules for compulsory acquisition such as those introduced by section 35 of the Land Act 1965.

6

There remains the reference to Article 40.

That **Article** is concerned with the Common Agricultural Policy. It contains no rule and has given rise to no measure which may be validly relied upon by the appellant in the main proceedings who in fact admits 'the absence of an express provision of Community law' dealing with the subject.

7

In conclusion therefore I suggest that the Court should rule that:

Where a statute of a member-State contains a condition that a natural person who owns land must have resided on it, or at least within a certain distance from it, for a certain period in order to be able to avoid the compulsory acquisition thereof, neither **Article 58** nor any other provision of the Treaty prohibits, if the proprietor of the land is a body corporate, a requirement that each of the members of that company should fulfil that condition.

JUDGMENT

[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)*235 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 Ltd., 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 Ltd. 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 realisation of freedom of establishment. Similarly, the Council's Programme General pour la Suppression des Restrictions a la Liberte d'Etablissement (General Programme for the Abolition of Restrictions on the Freedom of Establishment) of 18 December 1961 [FN2] lists, among the restrictions on freedom of establishment to be abolished, provisions or practices which provide*236 for less favourable rules for nationals of another member-State in regard to compulsory acquisition.

FN2 J.O. 36/62.

[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 Robert Fearon & Company Ltd. 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.

***237 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.

Order

On those grounds, THE COURT, in answer to the question referred to it by the Supreme Court of Ireland by order of 25 August 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.

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[1985] 2 C.M.L.R. 228

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