

**THE HIGH COURT**

**No. 2004/19616P**

**BETWEEN /**

**KATHERINE ZAPPONE AND ANN LOUISE GILLIGAN**

**Plaintiffs**

**- and -**

**REVENUE COMMISSIONERS,  
IRELAND AND THE ATTORNEY GENERAL**

**Defendants**

**-and –**

**THE HUMAN RIGHTS COMMISSION**

**Notice Party**

**STATEMENT OF CLAIM**

Delivered the 3<sup>rd</sup> day of December 2004 by Brophy Solicitors, 38-40 Parliament Street, Dublin2, Solicitors for the Plaintiff.

1. The Plaintiffs are both women and Irish citizens. They are both domiciled in the State. The first named Plaintiff is a public policy research consultant and member of the Human Rights Commission. The second named Plaintiff is an academic and works as a lecturer at St. Patricks' College, Drumcondra. They have lived together as a co-habiting couple for 23 years and continue to do so following their marriage on 13<sup>th</sup> September 2003 as more particularly described in paragraph 3 hereof. The First Named Plaintiff is self-employed and the Second Named Plaintiff is a salaried

employee. They are joint owners of two properties, their family home at Glenaraneen, Brittas, County Dublin, and a holiday home at Kimego West, Cahirciveen, County Kerry.

2. The Plaintiffs bring these proceedings pursuant to the leave granted by the High Court (McKechnie J) on 8<sup>th</sup> November 2004.

3. The First Named Defendant constitutes an emanation and/or servant or agent of the State and is responsible for the administration of the State's taxation system. The Second Named Defendant is the State and is obliged to observe and vindicate the Constitutional and legal rights of all citizens of Ireland and is obliged to conform with international standards and norms including those in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Third Named Defendant is the Legal Officer of the State.

4. On 13<sup>th</sup> September 2003 the Plaintiffs got married to each other in Vancouver, British Columbia, Canada. Their marriage is legal and regarded as valid for all purposes throughout Canada. Accordingly the Plaintiffs are a married couple living together in this jurisdiction. The Plaintiffs' marriage in Canada is a marriage validly and lawfully contracted in another jurisdiction. The Plaintiffs fulfilled the requirements for lawful marriage in Canada and in the province of British Columbia at the time when they married.

5. On 28<sup>th</sup> April 2004 the Plaintiffs sought confirmation from the General Register Office that their marriage was legally binding in Ireland, but were told by way of written response that this was not a matter within the remit of the Office. On the 26<sup>th</sup> day of April 2004, the Plaintiffs wrote to the Respondents, their servants or agents informing them of their marriage and enclosing an original copy of the marriage certificate, together with an affidavit from a Canadian lawyer confirming that their marriage is legally recognised under the laws of Canada, and seeking to claim their allowances as a married couple under the Taxes Consolidation Acts.

6. In Irish law, persons both legally married to each other and living together as husband and wife are entitled to certain income tax, capital gains tax, capital acquisitions tax and stamp duty benefits not accruing to unmarried co-habiting

couples. Under the provisions of sections 1015 - 1024 of the Taxes Consolidation Act 1997 (as amended), a married couple living together are entitled to certain income tax and capital gains tax benefits not accruing to unmarried co-habiting couples. Specifically, under sections 1015 – 1024 of the Taxes Consolidation Act 1997 (as amended), a married couple living together can opt for joint, separate or single assessment in relation to their income tax liabilities. Under section 1018 of the Taxes Consolidation Act 1997 (as amended), a married couple living together are deemed to have elected for joint assessment unless they indicate otherwise. Under section 461 of the Taxes Consolidation Act 1997, as replaced by Schedule 1 of the Finance Act 2001, a married couple living together have an entitlement to married tax credit. Under section 1028(3) of the Taxes Consolidation Act 1997 (as amended), a married couple living together can set losses realised by one spouse in a tax year and not absorbed by his/her gains to be set off against the gains of the other spouse arising in that year. Under the provisions of sections 70 and 71 of the Capital Acquisitions Tax Consolidation Act 2003, a married couple living together are entitled to an inter-spousal exemption from Capital Acquisitions Tax in respect of inheritance and gift tax. Under the Stamp Duties Consolidation Act 1999, a married couple living together are entitled to certain reliefs from stamp duty not accruing to unmarried co-habiting couples. Section 96(1) of the Stamp Duties Consolidation Act 1999 entitles a married couple to relief from the normal rates of stamp duty on the transfer of assets between them. The Plaintiffs would thus benefit financially in terms of tax benefits from being recognised as a married couple living together. Further or in the alternative, the Plaintiffs are being disadvantaged financially through the lack of recognition for their marriage for the purpose of Irish tax law.

7. The words ‘married persons’, ‘spouses’, ‘husband’ and ‘wife’ are all used in the Taxes Acts referred to above in paragraph 6. No definitions for any of these terms are contained in the Acts. Moreover the Acts do not confine the definition of ‘married persons’ to exclude persons of the same sex.

8. On the 1<sup>st</sup> day of July 2004, the Defendants replied by way of letter informing the Plaintiffs that they would not allow their claim for allowances as a married couple. This decision was justified by the Defendants on the basis that although the Taxes Acts do not define husband or wife, the Oxford English dictionary defines ‘husband’

as a married man and ‘wife’ as a married woman. The Defendants wrongfully and in breach of the Plaintiffs’ constitutional rights interpreted tax law to mean that the provisions relating to married couples relate only to husband and wife.

9. In their interpretation of tax laws, and their consequent refusal to treat the Plaintiffs as a married couple, the Defendants acted without lawful authority, subjected the Plaintiffs to unjust and invidious discrimination, and acted in breach of the Constitutional rights of the Plaintiffs under Articles 40 and 41 of the Constitution, with particular reference to the provisions of Article 40.1, Article 40.3.1, Article 40.3.2, Article 41.1, Article 41.3.1 and Article 43.

### **PARTICULARS**

A. Article 40.1 of the Constitution guarantees the right to equality before the law. In their reliance upon the Oxford English Dictionary definition of husband and wife, and in their failure to treat married couples of the same sex in the same way as married couples of the opposite sex, the Defendants discriminated against the Plaintiffs in an unjust and invidious manner, on the grounds of their gender and/or sexual orientation. The gender and/or sexual orientation of the Plaintiffs does not provide in law or in accordance with the Constitution any proper or lawful grounds for discriminating as between the Plaintiffs and any other couple lawfully married (whether in Canada, in this State or elsewhere) and living together as husband and wife in this jurisdiction.

B. Article 40.3.1 of the Constitution guarantees that the State shall defend and vindicate the personal rights of the citizen. The right to marry is one such personal right and by failing to recognise the Plaintiffs’ marriage, the Defendants have violated that right.

C. Article 41.1 recognises the family as the natural primary and fundamental unit group of society, and Article 41.3.1 pledges the State to guard with special care the institution of marriage on which the family is founded. The Plaintiffs plead that they

would have had the right to marry each other in this State, and that the said right is guaranteed by Article 41 of the Constitution.

D. Article 43 guarantees the private property rights of citizens, and Article 43.2.1 provides that the exercise of these rights ought to be regulated by the principles of social justice.

E. The Plaintiffs are married persons, income earners and property owners. The Defendants have breached the rights of the Plaintiffs under the aforesaid Articles of the Constitution by denying the Plaintiffs the financial benefits in tax law accorded to married couples in terms of income tax, capital acquisitions and capital gains tax, and stamp duty, and by failing to recognise their marriage or, alternatively, their right to marry each other.

F. The conduct of the Defendants, their servants or agents in denying the Plaintiffs their constitutional rights has caused the Plaintiffs distress, inconvenience, loss and damage.

10. If (which is denied) section 1019 of the Taxes Consolidation Act 1997 (as amended), as properly interpreted, confines certain tax benefits to marriages consisting of husbands and wives, and excludes same-sex marriages (such as that between the Plaintiffs), the said provision of the 1997 Act is invalid having regard to the provisions of the Constitution and void. If (which is denied) sections 1015 - 1024 of the Taxes Consolidation Act 1997 (as amended), as properly interpreted, confine certain tax benefits to marriages consisting of husbands and wives, and exclude same-sex marriages (such as that between the Plaintiffs), the said provisions of the 1997 Act are invalid having regard to the provisions of the Constitution and void. If (which is denied) section 1018 of the Taxes Consolidation Act 1997 (as amended), as properly interpreted, confines certain tax benefits to marriages consisting of husbands and wives, and excludes same-sex marriages (such as that between the Plaintiffs), the said provision of the 1997 Act is invalid having regard to the provisions of the Constitution and void. If (which is denied) section 461 of the Taxes Consolidation Act 1997, as replaced by Schedule 1 of the Finance Act 2001, as properly interpreted, confines certain tax benefits to marriages consisting of husbands and wives, and

excludes same-sex marriages (such as that between the Plaintiffs), the said provision of the 1997 Act is invalid having regard to the provisions of the Constitution and void. If (which is denied) section 1028(3) of the Taxes Consolidation Act 1997 (as amended), as properly interpreted, confines certain tax benefits to marriages consisting of husbands and wives, and excludes same-sex marriages (such as that between the Plaintiffs), the said provision of the 1997 Act is invalid having regard to the provisions of the Constitution and void. If (which is denied) sections 70 and 71 of the Capital Acquisitions Tax Consolidation Act 2003, as properly interpreted, confines certain tax benefits to marriages consisting of husbands and wives, and excludes same-sex marriages (such as that between the Plaintiffs), the said provisions of the 2003 Act are invalid having regard to the provisions of the Constitution and void. If (which is denied) section 96(1) of the Stamp Duties Consolidation Act 1999, as properly interpreted, confines certain tax benefits to marriages consisting of husbands and wives, and excludes same-sex marriages (such as that between the Plaintiffs), the said provision of the 1999 Act is invalid having regard to the provisions of the Constitution and void.

11. Further or in the alternative, section 3 of the European Convention on Human Rights Act, 2003 provides that ‘every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions’. Accordingly the Defendants are under a duty to interpret and apply legislation in a manner compatible with those obligations. Article 8 of the Convention guarantees the right to respect for private and family life. Article 12 guarantees the right to marry. Article 9 of the Charter of Fundamental Rights of the European Union (7<sup>th</sup> December 2000), further provides for the right to marry and to found a family. Article 14 prohibits discrimination in the exercise of Convention rights on a range of grounds including gender and sexual orientation.

12. In failing to recognise the marriage lawfully contracted by the Plaintiffs in British Columbia, Canada, and in failing to apply the provisions in tax law relating to married persons to the Plaintiffs as a married couple, the Defendants have thus discriminated against the Plaintiffs on the grounds of their gender and/or sexual orientation in breach of Article 14 of the Convention, and have violated their right to

respect for their private and family life and their right to marry under Articles 8 and 12 of the Convention, and under Article 9 of the Charter of Fundamental Rights of the European Union.

13. There are no grounds of public policy on which the Irish Courts or Ireland would be justified in refusing to give full faith and credit to a marriage (such as the present one) lawfully and validly entered into in the State of British Columbia.

14. With regard to the nature of the matters in respect of which relief is sought by way of an order of Mandamus, the nature of the Defendants against whom relief may be granted and all the circumstances of the case, it would be just and convenient for this Honourable Court to grant the Injunctive Relief sought. The Plaintiffs will suffer irreparable loss and damage if the relief sought is not granted. Damages would not be a sufficient remedy for these Applicants.

15. The Plaintiffs therefore claim:-

(i) A Declaration that in failing to recognise the marriage lawfully contracted by the Plaintiffs in British Columbia, Canada, and in failing to apply the provisions in tax law relating to married couples to the Plaintiffs as a married couple, the Defendants have acted without lawful authority, have discriminated against the Plaintiffs in an unjust and invidious manner and further or in the alternative have deprived the Plaintiffs of their Constitutional rights under Articles 40 and 41 of the Constitution, with particular reference to the provisions of Article 40.1, Article 40.3.1, Article 40.3.2, Article 41.1, Article 41.3.1 and Article 43.

(ii) A Declaration that insofar as the provisions of the Taxes Consolidation Act 1997 (as amended) fail to define husband or wife or married couple to include same-sex couples, and or in the alternative insofar as those provisions have been interpreted by the Defendants so as to exclude their application to same-sex couples lawfully married in another jurisdiction, those provisions are unjustly and invidiously discriminatory and/or are invalid having regard to the

provisions of the Constitution and in particular Article 40.1, Article 40.3.1, Article 40.3.2, Article 41.1, Article 41.3.1 and Article 43, and are void.

(iii) A Declaration that in failing to recognise the marriage lawfully contracted by the Plaintiffs in British Columbia, Canada, and in failing to apply the provisions in tax law relating to married persons to the Plaintiffs as a married couple, the Defendants acted in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular with Articles 8, 12 and 14 of the Convention.

(iv) If necessary, a Declaration that the provisions of the following statutory provisions are unconstitutional and void:

(a) Sections 461, 1015-1024 and 1028 of the Taxes Consolidation Act 1997 (as amended);

(b) Sections 70-71 of the Capital Acquisitions Tax Consolidation Act 2003;

(c) Section 96(1) of the Stamp Duties Consolidation Act 1999.

(v) A Declaration, pursuant to section 5(1) of the European Convention on Human Rights Act, 2003 that the provisions of the Taxes Acts in failing to define the terms 'husband' or 'wife' or 'spouse' or 'married persons' so as to encompass same-sex couples, and or in the alternative the interpretation of those provisions by the Defendants so as to exclude their application to a same-sex couple lawfully married in another jurisdiction, are incompatible with the State's obligations under the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular with Articles 8, 12 and 14 of the Convention.

(vi) If necessary, a Declaration that if the Plaintiffs' marriage in British Columbia is not entitled to recognition in this State, that the Plaintiffs have a right to marry each other in this State.

(vii) An Order of Certiorari quashing the decision of the Defendants disallowing the Plaintiffs' claim for allowances as a married couple.

(viii) Mandamus or an Injunction directing the Defendants to recognise the marriage lawfully contracted in Canada by the Plaintiffs, and to treat the Plaintiffs as a married couple for the purposes of tax laws.

(ix) An Injunction directing the Defendants to recognise the marriage lawfully contracted in Canada by the Plaintiffs and to treat the Plaintiffs as a married couple for the purposes of tax laws.

(x) Damages for breach of constitutional rights.

(x) Damages pursuant to section 3(2) of the European Convention on Human Rights Act, 2003.

(xi) Further and Other Relief.

(xii) An Order providing for the payment of the Plaintiffs' Costs.

Ivana Bacik BL

Gerard Hogan SC

Signed:

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Philomena O'Hehir,  
Solicitor for the Plaintiffs,  
Brophy Solicitors,  
38-40 Parliament Street,  
Dublin 2

Dated this        day of December 2004

**THE HIGH COURT**

**No. 934/04 JR**

**BETWEEN /**

**KATHERINE ZAPPONE AND**

**ANN LOUISE GILLIGAN**

**Plaintiffs**

**- and -**

**REVENUE COMMISSIONERS,  
IRELAND AND THE ATTORNEY  
GENERAL**

**Defendants**

**-and –**

**THE HUMAN RIGHTS COMMISSION**

**Notice Party**

**STATEMENT OF CLAIM**

**BROPHY SOLICITORS**

**38/40 Parliament Street,**

**Dublin 2.**

**Our Ref: POH/ZAK001/001**