Neutral Citation Number: [2008] IEHC 344

THE HIGH COURT

2001 No. 18343P

BETWEEN

BRENDAN RAFFERTY

PLAINTIFF

AND
THE MINISTER FOR AGRICULTURE AND FOOD
AND RURAL DEVELOPMENT,
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

2001 18406P

BETWEEN

JOHN ELMORE

PLAINTIFF

AND
THE MINISTER FOR AGRCULTURE, FOOD AND RURAL DEVELOPMENT
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Brian McGovern delivered on the 31st day of October, 2008

1. The plaintiffs in these cases are sheep farmers on the Cooley Peninsula in County Louth. In February 2001, there was an outbreak of foot and mouth disease in the United Kingdom. Towards the end of that month, the outbreak spread from mainland Britain into Northern Ireland where it occurred in and around Meigh in County Armagh. This was in close proximity to the plaintiffs' sheep farms. The outbreak of foot and mouth disease was taken very seriously by the governments of the United Kingdom and of Ireland respectively, and posed a significant risk to the health of farm animals. The culling of animals took place in affected areas and on adjoining lands. As part of the Government's strategy to prevent the spread of the disease, it was deemed necessary to cull large numbers of animals in the Cooley Peninsula, including sheep flocks belonging to the plaintiffs.

2. It is accepted by the plaintiffs that the cull was necessary in the public interest. It is also accepted by them that there were systems of compensation put in place by the State, under the Diseases of Animals Act 1966. The plaintiffs received compensation following the culling of their sheep flocks, but they maintain that they did not receive proper compensation. They argue that the monies received by them did not adequately compensate them for their losses. Specifically, they claim that as their flocks were not infected, but were required to be culled in the public interest, they are entitled to compensation, which allows for consequential loss and not merely the market value of the animals culled. Furthermore, they assert that if the relevant legislation only permits compensation amounting to market value, that this is an unjust attack on their property rights and that s. 17 of the Diseases of Animals Act 1966 (as amended), is unconstitutional. It is accepted by all parties to the litigation that animals in the affected zone had to be culled quickly and that it was desirable that the owners of animals culled should be compensated without undue delay. This required people to make decisions quickly. On the one hand, the valuers had to arrive at a figure of compensation for the culled animals. On the other hand, the owners of those animals had very little time to weigh up the value of the offers being made. While this was not an ideal situation, it was probably unavoidable in these circumstances. It is clear from the evidence that after initial valuations were made, there was some revision of these values at a later date. This was an attempt to deal with a matter in an equitable fashion.

3. In reaching a valuation of the animals culled, the defendant sought, through its valuer, to arrive at a reasonable market value for each animal. The plaintiffs claim that the defendant did not individually assess each animal for the purpose of determining what market value was. In particular, the plaintiffs claim that no account was taken of the following matters:-

(i) The fact that certain ewes had lambs *in utero* and were in advanced stages of pregnancy;

(ii) The fact that the ewe *primia* were lost as a consequence of the cull, which resulted in significant loss of income to the plaintiffs;

(iii) The fact that significant additional costs were involved in introducing a new flock. In the case of Mr. Elmore it is claimed that this was a particular problem as his flock was "hefted" and grazed commonage on the hillside;

(iv) The fact that there is a significant increase in mortality rate when a new flock is introduced;

(v) That the plaintiffs' businesses and lives were disturbed in the most fundamental way;

(vi) The fact that the plaintiffs suffered trauma and distress as a result of the cull.

The defendants answer each of these points as follows:-

(i) Ewes and lambs were valued separately. Some of the ewes were in lamb but the valuation ascribed to them was in either case generous. In both incidents, the value given was in excess of "market value".

(ii) Ewe *primia* are paid on the basis of the number of sheep held by the farmer. The purpose of the premium is to subsidise the cost of a sheep. All ewe *primia* for 2001 were in fact paid and *primia* were never intended to compensate a farmer for the costs of maintaining non-existent sheep.

(iii) Mr. Elmore has exaggerated the additional costs claimed in respect of having to deal with sheep which were not fully hefted. The compensation paid in respect of the culled sheep was generous and more than took into account any such issue, if such an issue had to be taken into account. The defendants deny that such an issue had to be taken into account under the scheme.

(iv) The defendants do not accept that there was a significant increase in mortality rate when a new flock was introduced. Insofar as some difficulties may have arisen. The plaintiffs were more than adequately compensated for this in

the price which was given for the culled sheep.

(v) The defendants were not tortfeasors and had committed no wrong, which required to be compensated. The question of general damages does not arise under the compensation scheme. Many other people were affected by the restrictions imposed by the foot and mouth outbreak, both in the agricultural sector and the tourism sector and these people were not entitled to compensation. The compensation scheme has been administered in accordance with the Diseases of Animals Acts.

(vi) The cull was necessary to prevent the further spread of foot and mouth disease. The cull and compensation scheme were provided for by both Irish Law and European Law. There is no general principle, either in Irish Law or European Law, that the many individuals and/or businesses that suffered during the foot and mouth outbreak and as a result of the cull and restrictions arising therefrom, should, as a matter of law be compensated by the State. The defendants argue that no wrong has been committed by the State.

4. It is against the above background that the plaintiffs' claims arise. There are other claims, which have been made on behalf of the farmers in the Cooley Peninsula, and it is agreed that these claims should be dealt with first to establish what principles apply.

The Legislation

5. The Foot and Mouth Disease Order 1956 (S.I. No. 324/4/1956) at para. 22 provides as follows:

> "Where an animal is slaughtered or a carcass destroyed by direction of the Minister under The Diseases of Animals Acts, 1894 to 1954, the value of the animal or carcass shall, for the purpose of compensation, be ascertained by a person appointed by the Minister in that behalf."

6. Section 10 of the Diseases of Animals Act 1966, continues in force the 1956 order and s. 4 of the Diseases of Animals (Amendment) Act 2001, confirms the 1956 order (as amended or extended by any subsequent order). The Diseases of Animals Act 1966, ("the 1966 Act") was introduced to consolidate enactments relating to Diseases of Animals. Section 11 describes the application of the Act as follows:-

> "(1) Subject to sub-section (2), this Act shall apply to the animals, poultry and diseases specified in the First Schedule.
>
> (2) The Minister may, for all or any of the purposes of this Act, by order amend the First Schedule so as to extend the application of this Act or any of its provisions to any other kind of animal, poultry or diseases or to exclude any kind of animal, poultry or disease from such application."

7. Foot and mouth disease is specified in Class A of the First Schedule to the 1966 Act. Section 17 of the 1966 Act, as amended by the Diseases of Animals (Amendment) Act, 2001, provides as follows:-

> "(1) The Minister may cause to be slaughtered:-
>
> (a) Any animals or poultry affected with any class A disease or suspected of being so affected, and;
>
> (b) Any animals or poultry which are or have been in the same field, shed or other place, or in the same herd or flock or otherwise in contact with animals or birds, so affected or suspected of being so affected, or which appear to the Minister to have been in any way exposed to the infection concerned.
>
> (c) Any animals or poultry within any area which in the opinion of the Minister sufficiently defines an area where a risk of infection exists.
>
> (2) The Minister, under this section shall, subject to section 58, pay compensation for animals and poultry (other than a dog or cat affected or suspected of being affected with rabies) which have been slaughtered under this section or which have been directed to be slaughtered but died, before they can be slaughtered but also for carcasses and eggs (other than eggs of pigeons, doves, peafowl, swans or birds of the species psittaciformes) which, consequent upon an outbreak or suspected outbreak of disease, have been destroyed on behalf of the Minister under this section.
>
> (c) The Minister may reserve for observation, treatment or testing, any animal or bird liable to be slaughtered under this section but subject to payment of compensation by the Minister as in the case of actual slaughter."

Regulation 22 of the 1956 order provides that:-

> "The value of the animals slaughtered shall, for the purposes of compensation be ascertained by a person appointed by the Minister."

8. Section 17 of the 1966 Act makes provision allowing for a cull and s. 17(2) requires the Minister to pay compensation. In paying compensation, the Minister must act in accordance with the provisions of s. 58 which states:-

> "(1) The provisions of this section shall apply in relation to any compensation under sections 17 or 22.
>
> (2) The Minister with the consent of the Minister for Finance, may, by order:
>
> (a) Make provision for regulating the making and determination of applications for, and the mode of assessment and payment of, compensation;
>
> (b) Include provision for the fixing of compensation by agreement between the applicant and the Minister, or in default of agreement, by a valuer appointed by agreement between the applicant and the Minister or, in default of such agreement, by a valuer appointed by the Minister.
>
> (c) Include provision, in the event of the applicant disputing the determination of the application, for the settlement

of the dispute by arbitration

(3) Where a person has been convicted of an offence under this Act in relation to any animals or poultry slaughtered or taken possession of, or carcasses or eggs destroyed, under this Act, then, as a statutory consequence of such conviction, he shall not be entitled to compensation in respect of such animals, poultry, carcasses or eggs.

(4) Where, under sub-section (3), a person is disentitled to compensation, the Minister may make an ex gratia payment to him of such amount as the Minister thinks fit, in lieu of compensation, taking into account any loss to the Exchequer arising by reason of the offence."

9. Regulation 22 relates to how compensation is to be assessed and s. 17 requires the Minister to pay on foot of that assessment. Regulation 22 does not state who should be appointed to value the animals. In the cases before me, the Minister appointed an independent valuer from a panel which had been set up earlier in 2001, following representations from the Irish Farmers Association. This panel had been established to deal with valuations of cattle under various schemes. Section 58(2) allows the Minister to put in place of framework, such as that envisaged by the subsection. The Minister has not done so in respect of foot and mouth disease. In February 2001, he confirmed the order of 1956. Section 18 of the 1966 Act provides as follows:-

"(1) Where an animal or bird has been slaughtered under this Act at the direction of the Minister, the carcass of the animal or bird shall belong to the Minister and shall be buried or sold or otherwise disposed of at the discretion of the Minister as the condition of the animal or bird or carcass and other circumstances may require or admit.

(2) If, in any case, the sum received by the Minister on sale of a carcass under this section exceeds the amount paid for compensation to the owner of the animal or birds slaughtered, the Minister shall pay that excess to the owner, after deducting reasonable expenses.

(3) If the owner of an animal or bird slaughtered under this Act at the direction of the Minister or local authority has an insurance on the animal or bird, the amount of compensation awarded to him under this Act or any order made thereunder, may be deducted by the insurers from the amount of the money payable under the insurance before they make any payment in respect thereof.

(4) Where an animal or bird has been slaughtered under this Act at the direction of the Minister, the Minister may use for the burial of the carcass, any ground in the possession or occupation of the owner of the animal or the bird suitable for the purpose, or any common or unenclosed land.

(5) Where an inspector, after making such enquiries as he considers necessary, is satisfied that no such ground as mentioned in sub-section (4) is available for the burial of the carcasses of slaughtered animals or poultry, the Minister may use for the reception and slaughter of the animals or poultry and the burial of their carcasses, any convenient ground suitable for the purpose.

(6)(a) Where the owner or occupier of such ground claims to have suffered loss by reason of such user, he may, within two months after such user apply in writing to the Minister for compensation.

(b) Where an application for compensation under this subsection is duly made, the application shall be determined in accordance with such order as may be made by the Minister in that regard.

(c) In the event of the applicant disputing any such determination, the dispute shall be settled by arbitration."

Factual Background
Brendan Rafferty
10. Mr. Brendan Rafferty is a sheep and tillage farmer with approximately 171 acres under grassland for his sheep enterprise. During the time relevant to these proceedings, he owned thirteen acres and rented the remainder. He had built up a large flock and had a number of sheds which were used in connection with his sheep business. All his sheep handling facilities were located in these sheds and they assisted him in achieving low mortality rates. By careful selection, the plaintiff had high weaning percentages approaching 1.8 lambs per ewe by 1999. This was exceptional. The plaintiff left school and obtained a B.A. degree in University and in the late 1980s he became interested in sheep farming through his uncle. He began to build his uncle's flock for him and, by observing the instincts of the sheep; he was able to pick out desirable traits, such as the maternal instincts of ewes and prolificacy. He commenced his own sheep farming business in the late 1980s. He carefully selected rams for different traits and bred them with his ewes. Occasionally, he purchased ewes or hoggetts from outside his flock and he would cull sheep within the flock. Between 1998 and 2001, Mr. Rafferty expanded his ewe numbers from 200 to 695. The majority of his flock were high quality Greyface ewes. He gave evidence that within a further year or so, he expected to have a flock of approximately 900 sheep. He had geared his operation so that the majority of his ewes lambed in January and February to enable him to produce lambs for the Easter market which was more financially rewarding. He had a quota for the ewe premium scheme for the number of sheep which he had. He applied for additional quota from the reserve allocation held by the Department of Agriculture, Food and Rural Development to enable him to expand his flock to approximately 900. He gave evidence that he was successful in that application. He had a quota for 890 sheep. At the end of February 2001, when the foot and mouth outbreak occurred at Meigh, the Cooley Peninsula was designated an exclusion zone and animal movement restrictions and disease prevention measures were put in place. Many of his ewes had lambed at that stage. He had approximately 326 ewes in or around the sheds and all but 60 of them had lambed. He had other ewes that were not due to lamb until late March or early April. The restrictions imposed severe hardship upon the plaintiff and his flock because they were in a restricted area and had eaten the grass down to the roots. He began to lose some lambs in the field and although he requested the authorities to permit him to move the sheep to a field close by, he was not permitted to do so. In that time, he lost 36 lambs. These were lambs which had already survived the critical period for mortality in normal conditions as they were a few weeks old. By 29th March, 2001, the plaintiff's entire flock of sheep had been culled. The defendants calculated that the plaintiff lost 673 ewes, 742 lambs and 11 rams. It was subsequently accepted by the first named defendant that 40 ewes and lambs had been omitted from the valuation. There was some confusion about the numbers of missing sheep and the actual number may have been 44. The defendants' records show that the number of sheep belonging to Mr. Rafferty which were slaughtered comprised 691 ewes, 764 lambs and 11 rams. He was paid a total of IR£145,244 as compensation for the animals culled.

Mr. John Elmore
11. Mr. John Elmore is a sheep farmer and at times relevant to this action farmed 74 acres of lowland and had grazing rights over

3,000 acres of commonage. His share of the commonage was approximately 90 acres. He was the owner of 199 sheep, comprising 65 purebred Scottish Blackface sheep, 89 Scottish Blackface/Cheviot crosses and 45 Scottish black face/Cheviot/Suffolk crosses. Before the sheep cull commenced, 152 of his ewes and hoggetts were in lamb, 40 had lambed and 55 had lambs at foot. 7 hoggetts were not in lamb. On 2nd April, 2001, his entire flock was culled.

12. The plaintiff was an active representative of sheep farmers, both locally and nationally, and was former Chairman of the Sheep Committee of the Irish Farmers Association. He was in regular contact with the defendants when the restrictions on movement came into force and the culling of animals commenced. It is fair to say that he used his good offices to assist in the orderly depopulation of animals required to prevent the spread of foot and mouth and he persuaded many of his colleagues to accept what was inevitable, namely, that in the public interest their flocks would have to be culled.

13. The plaintiff's sheep flock was "hefted". Hefted sheep will remain in a particular area of commonage and the farmer who owns those sheep will know where they are to be found. It is not a genetic trait, but rather, is learned by lambs from their mothers. Apart from the advantage of keeping within a particular area of commonage or their "heft", the plaintiff claims that hefted sheep have certain immunity from flock diseases that might occur to other animals brought into the same area. Obviously, it is of considerable advantage to a hill sheep farmer to have a hefted flock as it makes it a great deal easier for him to manage his flock and to bring them in when they need to be treated or mated or for lambing. The plaintiff asserts that as a result of his flock being culled, it was not possible to buy in another flock that would be hefted. Indeed, he gave evidence of the difficulty he had with sheep scattering when he put them on the hillside after he was allowed to repopulate his flock. Mr. Elmore was prevented from restocking his land until 6th October, 2001. The plaintiff received an initial compensation payment of IR£26,345 and after a revaluation process had taken place he received a further sum of IE£3,125. In total, he received IR£29,495. Mr. Elmore complains that the compensation he received was inadequate. He was also greatly upset by the fact that he had persuaded many reluctant farmers to co-operate with the authorities and he felt he had let them down because the compensation, which was ultimately awarded, was inadequate. I am satisfied, from his evidence, that some disparaging remarks were made to him about Cooley sheep farmers by a representative of the first named defendant, and that these remarks were made in what can only be described as a quite insensitive manner. It was never suggested that Mr. Elmore was one of the sheep farmers against whom the remarks were directed, but it is clear that he was greatly upset by these remarks. He struck me as a gentle and sensitive man who was clearly in great distress while recounting details of the events surrounding the cull. He claims to have suffered severe emotional upset as a result of the cull and its associated consequences.

The compensation paid

14. I am satisfied from the evidence given in this case that the plaintiffs were paid somewhat in excess of the market value of their animals. What I mean by this is that the price given for each animal was more than they had to pay at market to replace those sheep. Mr. Rafferty's sheep were valued having regard to the quality of the animal itself and not taking into consideration whether they had lambed or not. When Mr. Rafferty went out to buy stock to replace his flock, in the autumn of 2001, he paid an average price of €89 per animal. In the case of Mr. Elemore's flock, each animal was valued individually. The valuer did not differentiate between a ewe with a lamb at foot but each animal received an assigned value. Dr. Bielenberg stated that an appropriate figure for ewes with lambs at foot was IR£218.15 and IR£175 for dry hoggetts. For the reasons set out below, I do not accept that this evidence is an accurate reflection of the market value of the animals. Mr. Elmore received an average value per ewe and lamb of IR£165 or €210.62. In October 2001, Mr. Elmore bought twenty hoggetts at a price of €88.88 each and thirty-nine hoggetts at a price of €49.52 each. He bought a ram for €380.92. He agreed that the average spent on animals, including the ram, would have been €67.87, which was the market price at the time. In the course of examination in chief and cross-examination, figures were discussed on the basis that they were in Irish Pounds or in Euro, and there was, from time to time, some confusion about which currency was being used to express the sums in question. This was understandable because the cull took place in the spring of 2001, and it was later in the same year that the plaintiffs purchased stock to replace their flocks. The Euro exchange rate had been fixed on 1st January, 1999, and the currency became legal tender in the State from 1st January, 2002. To some extent, the confusion was corrected by Mr. McDonagh S.C. in his cross-examination of Mr. Rafferty, when he made it clear that figures which had been expressed in Euro should have been in Irish Pounds (*Transcript, Book 2, page 156, line 26-28*). Mr. Rafferty gave evidence that when he went out to replace his stock in the autumn of 2001, he paid an average price of €89.00 per animal. If he had intended to say IR£89, that would represent approximately €113.00. We know that for 327 ewes, he was given compensation at the rate of IR£160 (€203.16), 110 ewes at IR£150 (after revaluation) (€190.46) another 81 ewes were given the same valuation, and 285 lambs were valued at IR£60 (€76.18). 154 lambs were given a valuation of IR£40 (€50.79) and 29 lambs that had been given a valuation of IR£35 were increased to IR£40. His eleven rams were valued at IR£400 each (€507.90). While there may have been some confusion from time to time in the use of Euro instead of Irish Pounds, the evidence quite clearly establishes that the compensation offered to Mr. Rafferty was significantly in excess of the market value when he went to replace the sheep. The same can be said of Mr. Elmore's claim. The market value may not have taken into account intrinsic values such as hefting and other desirable traits, but I am quite satisfied on the evidence that each of the plaintiffs was paid significantly more than the strict market value of their animals by way of compensation.

15. Mr. Mulvihill was appointed by the first named defendant to value the plaintiffs' animals. Mr. Sean Cadden, an agricultural advisor, called to give evidence on behalf of the plaintiffs, said that Mr. Mulvihill was a reputable valuer and he stated that the Department acted reasonably in appointing an independent valuer. He also informed the Court that it was reasonable for the valuer to arrive at one single figure to value each type of sheep, rather than ascribing a different value to each animal.

16. Mr. Rafferty accepted, in evidence, that within six and a half months of buying in a significant number of animals in 2000 (the year before the cull), he was able to get those animals up to the same fertility rate as the sheep which he already had. While I am satisfied that the replacement of his entire flock would have resulted in a delay in achieving the same rates of prolificacy and other desirable traits, the evidence suggests that Mr. Rafferty would, in time, have been able to do this. Mr. J.P. Hanrahan, who is head of the Sheep Production Department of Teagasc, furnished to the Court a report on the claims of each of the plaintiffs, and he also gave evidence. The records of Mr. Rafferty show that he bought 210 hoggetts in 2000, which was before the cull, and he claimed to have achieved more or less the same productivity from those hoggetts as he had from the stock which he already had on hand. Mr. Hanrahan found it difficult to accept that evidence from a scientific point of view and from his considerable experience. He said he would have "very substantial doubt" about that evidence and described it as improbable. He did, however, accept that it would have taken Mr. Rafferty some time to get back to the same weaning rate for his lambs as existed prior to the cull. It could take him up to six years to do so if he was unable to purchase Belclare crossbred sheep. Mr. Hanrahan was of the view that he would have been able to get such animals and that would have accelerated the prolificacy rates of the flock. I accept Mr. Hanrahan's evidence on these matters. Mr. Rafferty's situation is somewhat complicated by the fact that he has now gone into other areas of farming and has expanded his cereal production. I accept his evidence that he suffered losses going beyond mere market value. In the case of Mr. Elmore, he gave evidence that he bought in sheep in October 2001, and had some problems when he put them out on the mountain in spring 2003. But he accepted that by 2005, matters had greatly improved and that he got back to his pre-cull position, more or less, over a five or six year period following the cull. Undoubtedly, he had additional trouble in herding his flock until they became hefted to

the commonage. Mr. Hanrahan accepted that this would have been the case. So Mr. Elmore also suffered losses going beyond the market value of his animals.

Legal issues relating to the assessment of compensation under the scheme
17. There is no dispute between the parties that s. 17(2) of the 1966 Act, requires the Minister to compensate farmers whose animals have been slaughtered pursuant to section 17(1) of the Act. The defendants dispute that the provisions of the Act require the Minister to compensate the plaintiffs for the financial loss and damage and consequential loss which they claim to have suffered. The defendants sought to compensate the plaintiffs and other farmers in the area in the amount of the market value of the flocks culled. The defendants claim that such compensation was legally adequate but do not accept that compensation in the amount of market value is obligatory or that compensation at less than market value would be legally inadequate or impermissible.

18. For the purposes of this case, it is necessary to determine what is meant by "compensation" under the scheme. The term is not defined in the Act. In interpreting a statute, the starting position is to give a literal interpretation to the words sought to be construed. The following passage from Craies on *Statute Law*, 7th Ed., at p.65, has been adopted by our courts as being a correct statement on the rule for the construction of Acts of Parliament:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. 'The Tribunal that has to construe an Act of a legislature, or indeed, any other document, has to determine the intention as expressed by the words used. And in order to understand these words, it is necessary to enquire what is the subject matter with respect to which they are used and the object in view' [per Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* [1877] 2 App. Cas. 394]."

19. The object of interpretation is to discover the intention of Parliament which must be deduced from the language used in the statute. The purposive rule of statutory interpretation cannot be used unless there is some ambiguity as to the meaning of the statutory provision. In *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 at p.151, Blaney J. approved another passage from Craies:

> "If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is 'not to import into statutes words which are not to be found there' [per Patterson J. in *King v. Burrell* [1840] 12 Ad. & El. 460, 468] and there are particular purposes for which express language is absolutely indispensable, 'words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context' [per Evershed Mr. in *Tinkham v. Perry* [1951] 1 T.L.R. 91, 92].

It is clear from this that the first condition that has to be satisfied before recourse can be had to construction by implication is that the meaning of the statute should not be plain."

20. Insofar as it is possible to do so, statutes should be construed according to the intention expressed in the legislation. If the meaning of a statute is not plain, then the courts may apply other rules of construction, for example, the purposive approach. The Interpretation Act 2005, set out in statutory form the position as it existed in common law prior to that enactment. Section 5 states:

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)-
>
> (a) that is obscure or ambiguous or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of-
>
> (i) in the case of an Act to which paragraph (a) of the definition of Act in Section 2(i) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the Parliament concerned

the provision shall be given a construction that reflects the plain intention of the Oireachtas or Parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

21. It is necessary to apply these principles to section 17 of the Diseases of Animals Act 1966.

22. Applying those principles, it seems to me that there is some ambiguity in the Act insofar as "compensation" is not defined in a manner which would indicate the extent of the compensation to be awarded. The 1966 Act provides that the Minister shall, subject to s. 58, pay compensation for animals which are slaughtered and s. 58(2) provides that the Minister may put in place a framework for regulating the making and determination of applications for and the mode of assessment and payment of compensation. But the Minister has not made an order envisaged by section 58 of the Act. However, the Minister has confirmed the order of 1956, which provides that the value of an animal or carcass slaughtered or destroyed shall, for the purpose of compensation, be ascertained by a person appointed by the Minister. It is clear that in this case, the Minister did appoint an expert to carry out the valuations of the sheep which were culled. The defendants argue that there is no conflict between regulation 22 and section 17 of the Act. It seems to me that this is correct. Section 58 of the Act gives the Minister power to make regulations as to how compensation should be assessed and how disagreements between the farmers and the assessor as to valuation should be dealt with. The section gives the Minister power to make orders in that regard, but it is not mandatory on him to do so. I accept the submission made on behalf of the plaintiffs that as there was no appeal under the valuation process which was, in fact, put in place by the Minister, that the court has jurisdiction to look behind the compensation actually awarded, and to determine whether it was fair and reasonable, and also whether it could only be fair and reasonable if it included consequential loss or something more than market value.

23. The plaintiffs argue that it must have been intended that more than mere market value would be given in compensation because under the TB eradication scheme and the Scrapie scheme, more than market value was payable. Dr. Bielenberg, in his evidence, accepted that there was a significant distinction between Scrapie and Foot and Mouth disease. He accepted that a Foot and Mouth virus exists in the soil, perhaps for about one week in the summer, whereas the prion, which brings about Scrapie, can exist in the soil for a number of years. There was also a risk of transmission of Scrapie from animals to humans which was somewhat similar to the situation with BSE in cattle. For this reason, farmers who had Scrapie in their flock would have to have their flock culled and could not use their land for two years. In the case of bovine TB and brucellosis, there were issues of milk yields and loss of milk production to

be considered which would not arise in the case of sheep. In fact, the evidence in this case establishes that within a number of months of the cull, the farmers were able to repopulate their lands with sheep.

24. I can find nothing in the Diseases of Animals Act 1966, which suggests that it was the intention of the legislature that compensation should include consequential loss. Nor does it seem to me to be necessary that it would include such loss to make sense of the legislation.

25. In those circumstances, it seems that it is necessary to examine the provisions relating to compensation in the light of the constitutional provisions to protect property rights.

The constitutional argument

26. The plaintiffs argue that because their flocks were not, in fact, infected, and were required to be culled in the national interest, and in the absence of any wrongdoing on the part of the plaintiffs, that they should not be at any loss as a result of the cull. If they have given up their flocks to be slaughtered to protect the national interest, then, as a *quid pro quo*, they should be entitled to all losses, including consequential loss. This is an attractive argument and the one which, on the face of it, seems hard to resist. This argument assumes that in all such cases the State would be obliged to compensate sheep farmers for all consequential losses arising on the cull of their flocks. But such an argument fails to take into account that there are many other people affected by the foot and mouth outbreak who recover no compensation whatsoever. For example, people in the tourist industry may suffer losses due to movement restrictions and there is no compensation for them. It seems to me that what is necessary is for the State, in providing for compensation, to provide a scheme which is fair and reasonable and proportionate to the situation. In the pleadings, the plaintiffs claim that the provisions of article 40.3 and 43 of the Constitution "require that when property is taken or destroyed in the public interest by the State, full compensation is required if the actions are to be lawful and constitutionally sustainable".

27. Article 40.3.1 of the Constitution provides that the, "*. . . State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen*". Article 3.2 provides that the, " *. . . State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen*". Article 43.1.1 provides that the, " *. . . State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods*". Under Article 43.1.2, the State, "*guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property*". But in the same article the State recognises that these rights have to be regulated by the principles of social justice and that State "*may, as occasion requires, delimit by law, the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good*" (see article 43.2.2). In these cases, it seems clear, from the evidence, that the plaintiffs were compensated by reference to market value of their animals. Allowing for the fact that I hold that they received compensation somewhat in excess of market value, it is, nevertheless, clear that this was the yardstick which was used in arriving at the valuation. The court must therefore look at this approach to see if it is constitutionally permissible.

28. The courts have, in a number of cases, referred to the proportionality principle in addressing such questions. In *Heaney v. Ireland* [1994] 3 I.R. 593, Costello J. stated at p. 607:

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights and of the exigencies of the common good in a democratic society. This is test frequently adopted by the European Court of Human Rights (see, for example, *Times Newspapers Ltd. v. United Kingdom* [1979] 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court of Canada in the following terms: the objective of the impugned provisions must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns, pressing and substantial, in a free and democratic society. The means chosen must pass a proportionality test. They must:
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> (a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) Impair the right as little as possible, and
>
> (c) Be such that their effects on rights are proportional to the objective; see *Chaulk v. R.* [1990] 3 S.C.R. 1303 at pages 1335 and 1336."

In *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321 at p. 361, Keane J. stated:

> "If the State elects to invade the property rights of the individual citizen, it can only do so to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an 'unjust attack' within the meaning of Article 40, s. 3, sub-section 2."

29. The Supreme Court upheld the decision of Keane J., noting that the legislation which provided for a concurrent wrongdoer to make up another wrongdoer's deficiency in the payment of damages "was within [the Oireachtas'] competence in what is truly an area of public policy".

30. The court went on to reiterate what it had stated in *Tuohy v. Courtney* [1994] 3 I.R. 1, in the following passage:

> "[In] a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature, as displayed in their legislation, but rather, to determine, from an objective stance, whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."

31. In cases where the State contends that the legislation under challenge is required by the exigencies of the common good;

> " . . . it is inevitable that there will be an enquiry as to whether, objectively viewed, it could be regarded as so required and as to whether the restrictions or delimitations effected of the property rights of individual citizens (including the plaintiff in cases other than references under Article 26) are reasonably proportionate to the ends sought to be achieved." See In *Re. the Planning and Development Bill 1999* [2000] 2 I.R. 321 at p. 348.

In the Health (Amendment) (No 2.) Bill 2004 [2005] 1 I.R. 105, the Supreme Court held that in deciding whether a Bill, or any provision

thereof, was repugnant to the Constitution, the correct approach was, firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consisted of a regulation of those rights in accordance with principles of social justice, and whether the Bill was required so as to delimit those rights in accordance with the exigencies of the common good; and, thirdly, in the light of its conclusions on those issues, to consider whether the Bill constituted an unjust attack on those property rights.

32. In this case, the court is asked to consider whether or not the compensation paid to the plaintiffs is an interference with their property rights and constitutes an unjust attack on those rights.

33. In *Re. the Planning and Development Bill 1999* [2000] 2 I.R. 321, counsel assigned by the court to argue against the Bill said, " . . . as had been held in *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94, and also in *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364, the absence of compensation and a fortiori the absence of compensation based on market value does not necessarily amount to an unjust attack on private property". However, in that case, counsel argued that the legislation permitted a significant disparity between compensation and market value and there were anomalies and inequities in the way in which the scheme would operate which offended the principle of proportionality. In the judgment of the court, Keane C.J. said at p. 350:

> "[It] is important to bear in mind that, where the property of the citizen is compulsorily acquired by the State, or one of its agencies, for what are deemed by the legislature to be important social objectives, it has, in general, been recognised that he or she is entitled to at least the market value of the property so taken, as constituting fair compensation for the invasion of his property rights. However, that this generally recognised right, although unquestionably of importance, is not absolute, was made clear in two decisions of this court."

34. At page 352 he stated:

> "There can be no doubt that a person who is compulsorily deprived of his or her property in the interest of the common good, should normally be fully compensated at a level equivalent to at least the market value of the acquired property. As Walsh J. in *Dreher v. Irish Land Commission* [1984] I.L.R.M. 94, pointed out, 'even that may not be a sufficient measure of compensation in some cases: hence, the additional elements of compensation payable in compulsory acquisitions of land effected under the Land Clauses Consolidation Act 1845, as determined under the Acquisition of Land (Assessment of Compensation) Act 1919, as subsequently amended, by virtue of which the landowner is to be compensated, not merely for the market value of his land, but also for such additional elements of damage to him as disturbance, injurious affection and severance'."

35. It should be pointed out that the legislation referred to in that passage provided for a clear statutory entitlement to additional elements of compensation which are not provided for under the Diseases of Animals Act 1966, as amended. In *James v. United Kingdom* [1986] 8 EHRR 123, the European Court of Human Rights said at pp. 355-356:

> "Like the Commission, the court observes that under the legal systems of the contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant per present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment, whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.
>
> The court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain."

It is clear, therefore, and was accepted by Keane C.J. In *Re. the Planning and Development Bill 1999*, that the tests adopted by the European Court of Human Rights do not differ in substance from those which have been applied by the Irish courts in this area.

36. In *Platakou v. Greece* [Application No. 38460/97], the court stated that an interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The court held that:

> "The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be considered justifiable under Article 1 of Protocol No. 1."

The Court was referred to other cases from the European Court of Human Rights which reiterated these principles. See *The Holy Monasteries v. Greece* [Application No. 13092/87; 13984/88] and *Lithgow v. the U.K.* [Application No. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81].

37. In *Rooney v. Minister for Agriculture and Food* [1991] 2 I.R. 539, the Supreme Court unanimously rejected the plaintiff's argument that he was entitled to compensation in respect of culled TB reactors, in accordance with the 1966 Act, rather than under the Extra-Statutory Scheme. The Minister argued that, by taking possession of cattle under the scheme rather than under s. 20 of the Act, public funds were safeguarded and that a great deal of expense was saved by the Exchequer. O'Flaherty J., giving the unanimous judgment of the court, stated at p. 546:

> "On behalf of the Minister, it has been submitted that this scheme operates better to safeguard public funds and that if the Minister were to take possession of cattle under s. 20, he would be likely to fare less well financially than a herd owner who would bring his cattle directly to those conducting the factory carrying out the slaughtering operations - human nature being what it is. I need only look at the provisions as regards the various steps that would have to be taken if s. 20 and s. 58 were in operation to realise that it would be vastly more expensive than the scheme which is at present in operation and no one has ever suggested that that, itself, ever represented anything but a huge cost to the Exchequer.
>
> Therefore, this is, at the least, a plausible reason for the operation of such a scheme. The court would only be entitled to review such a decision and, of course, action (embodied in the scheme) if it were satisfied that the decision and course

> of conduct was mala-fides or, at the least, that it involved an abuse of power: see *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23. It may be that the court has no power to enjoin the Minister to make orders under s. 20 (cf.*The State (Sheehan) v. the Government of Ireland* [1987] I.R. 550) in any circumstances, but it certainly has no power to do so in the absence of proof of *mala fides* or abuse of power.
>
> In the course of his submissions, the plaintiff found no fault with the Act of 1966. In fact, he said it was an ideal Act. His complaint is that it has not been operated. I hold that the Minister is not obliged to operate it, since he has in place a reasonable scheme for providing a measure of assistance to herd owners of diseased cattle. That it is not the ideal scheme that the plaintiff would wish to see in place is neither here nor there.
>
> In these circumstances, it seems to me that it is not necessary to enquire into whether there is any constitutional requirement to provide compensation for herd owners who have diseased animals, except to note that the only explicit mention of compensation in the Constitution of Ireland, 1937, is in Article 44, s.2, sub-s. 6, regarding the taking of property of religious denominations or educational institutions. In any event, assuming that there is a constitutional requirement to provide for compensation in such circumstances, the Minister would only be obliged to act to provide compensation as far as practicable, having regard to the common good, and that means that he should act in accordance with the advice that the gets, and having regard to other claims on public funds. Clearly, he has, by the scheme in operation, in effect provided for this."

38. I accept, on the evidence, that in these cases, the plaintiffs have not been fully compensated by the compensation which has been given to them, whether that compensation is market value or, as I have held, something in excess of that. When calamities occur - whether they are natural disasters or outbreaks of disease in the human or animal population - it is inevitable that this will bring suffering and hardship on those who are affected. It is a matter for the State to take such steps as it can to ameliorate the effects of such calamites consistent with available resources. It is often in the nature of such events that the State cannot predict with any degree of certainly, how long the event will last or how many people may be affected by it. In a case such as this, the State was dealing with an outbreak of animal disease, which, fortunately, was kept in check by strict and drastic measures taken. However, at the time, there was no way of knowing that the disease would not break out again in another part of the country, and that further culling of animals would be required. If, as a matter of statutory provision or constitutional law, the State was obliged to compensate farmers by way of full consequential loss, this could have enormous implications for the Exchequer, and impose a serious and disproportionate burden on the taxpayer. The courts in this State, and the European Court of Human Rights, have held that if the measures taken are proportionate and amount to a reasonable delimitation of the plaintiff's property rights, having regard to the exigencies of the common good, then such steps are permissible. The purpose of such a scheme is to minimise the hardship suffered by those sheep farmers who, in this case, had to permit their flocks to be culled. In looking at the proportionality of the measures taken, one is entitled to consider that there are many other people who suffered financial losses as a result of the outbreak of foot and mouth disease for whom there was no scheme of compensation. And, it must at all times be remembered, that there is a presumption of constitutionality in favour of the legislation being challenged. It is the plaintiffs who assume the burden of proving that the measure of compensation provided for in the Diseases of Animals Act, is such as to constitute an unjust attack on their property rights, thereby making those provisions repugnant to the Constitution.

39. It seems to me that the Courts should draw a distinction between compensation based on a finding of fault, and a scheme of compensation to ameliorate hardship, in the absence of fault. While *restitutio in integrum* may be the yardstick for the former, the authorities opened to me clearly establish that this is not the criterion to be used for compensation for loss of property compulsorily taken for the public good. The plaintiffs have not made out any case to the effect that the defendants acted *mala fides* or that the scheme put in place was irrational. What they have sought to prove is that the compensation which they received, if it is market value, is not sufficient, and that they are entitled to full consequential loss. For the reasons set out above, having reviewed the authorities on this matter and considered the submissions on behalf of both parties, I do not accept the plaintiffs' argument on this point.

40. There was some disagreement among the expert witnesses as to the measure of the losses suffered by each of the plaintiffs. I have already stated my view that the plaintiffs have each suffered losses going beyond mere market value of their animals. But in view of my conclusions on the compensation which has been awarded and the legitimacy of the scheme, it is not necessary for me to resolve any conflict between the witnesses on that issue.

41. I find that the plaintiffs have not established that the scheme of compensation was unjust or unlawful and I also find that the impugned provisions of the Diseases of Animals Act 1966, are not repugnant to the Constitution and I also hold that there has been no unjust attack on the property rights of the plaintiffs in this case. The plaintiffs' claims are, therefore, dismissed.