Neutral Citation: [2016] IEHC 216

THE HIGH COURT

[2011] 492 P

BETWEEN

THOMAS DEEGAN

PLAINTIFF

AND

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT, IRELAND, AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 15th day of March, 2016.

1. This is an application brought on behalf of the plaintiff, Thomas Deegan, to discontinue the within proceedings as against the defendants pursuant to Order 26 Rule 1 of the Rules of the Superior Courts. Further, the plaintiff seeks the costs of the proceedings to date as against the defendants. The defendants are not resisting the plaintiff's application to discontinue the proceedings as against them, but, in turn, seek their costs from the plaintiff.

2. The background to this application is that the plaintiff is a farmer and the owner of circa 380 acres of bog near the town of Roscrea, Co. Tipperary. In 2003, the first named defendant, by statutory instrument, National Heritage Area, Nore Valley Bogs, 001853, Order 2003, designated certain bog lands as a special area of conservation (including the bog the subject of these proceedings) and on the 11th of July, 2007, the first named defendant advised the plaintiff to discontinue his use of his bog lands. As a consequence, the plaintiff alleges that he has been deprived of the profit he was earning therefrom and has suffered and continues to suffer considerable loss and damage arising from the nature and extent of the restriction placed on his bog lands.

3. The plaintiff's declaratory proceedings seek various orders:

(a) A declaration that the Natural Heritage Area (Nore Valley Bogs NHA 001853) Order 2003 (SI No. 606 of 2003) is ultra vires, void and of no effect.

(b) A declaration that the defendants failed to comply with the principles of basic fairness of procedures and natural and constitutional justice.

(c) A declaration that the Natural Heritage Area (Nore Valley Bogs NHA 001853) Order 2003 (SI No. 606 of 2003) is invalid having regard to the provisions of the Constitution of Ireland.

(d) A declaration that the provisions of Chapter II, Part III of the Wildlife (Amendment) Act 2000 regarding Natural Heritage Areas and the making and effect of a Natural Heritage Order are invalid having regard to the provisions of the Constitution of Ireland.

(e) If necessary, a declaration of incompatibility under section 5 of the European Convention on Human Rights Act 2003 regarding Chapter II, Part III of the Wildlife (Amendment) Act 2000 regarding Natural Heritage Areas and the making and effect of a natural Heritage Order for breach of the plaintiff's Convention rights.

(f) Such further and other declaratory order or relief as to this Honourable Court shall deem just.

(g) Damages for breach of constitutional rights.

(h) If necessary, damages under section 3 of the European Convention on Human Rights Act 2003 for breach of the plaintiff's Convention rights.

4. The plaintiff also purported to seek further substantive reliefs regarding additional pleas of an alleged breach of statutory duty by the defendants under the Wildlife Acts 1976 and 2000.

5. Prior to the institution of these proceedings in 2011, both parties were engaged in an arbitration as regards a claim for compensation pursuant to the Wildlife (Amendment) Act 2000 and the Land Clauses Acts. By February, 2011, the parties awaited a decision of the property arbitrator on a preliminary issue (as to jurisdiction) which, if decided in favour of the Minister, would have ended the arbitration on a basis involving no payment of compensation to the plaintiff. The arbitration was stayed by the plaintiff at this juncture and the present proceedings were instituted on the 19th of January, 2011.

6. On the 15th of January, 2014, the defendants published its *Long Term Strategic Plan for Ireland's Peatlands.* In this review, the defendants carried out a root and branch review of the Natural Heritage Area Orders made by the Minister for the Environment, including the Nore Valley Bogs Natural Heritage Area Order 2003. In that context, the defendants have decided to de-designate 48 Natural Heritage Area Orders including the order challenged in these proceedings. De-designation is consistent with legislative intervention on the part of the government, whether by primary and/or secondary legislation, which will result in the ending of the Nore Valley Bogs Natural Heritage Area Order and restrictions on turf cutting that previously applied.

7. The Review of NHAs sets out a significant reconfiguration of Ireland's NHA raised bog network to meet conservation targets whilst reducing the impact on the taxpayer by ensuring that the smallest number of turf cutters are impacted. The Review sets out that:

- "This reconfiguration will improve conservation outcomes by increasing the area of endangered habitats within the network of sites.

• It will also exclude the most heavily cut sites from the network, avoiding any impact on over 80% of active turf-cutters currently in the NHA network from over 3,000 to around 500.

• Turf cutting on 46 NHAs will be able to continue and the Minister will proceed towards de-designation of these sites.

• Turf cutting will be phased out on 36 NHAs over three years with the introduction of an individual permit system immediately.

• Conservation management plans will be in place for all raised bog NHAs by 2017.

• 25 new sites will be proposed for designation as raised bog NHAs to replace the habitats lost through de-designation of the more heavily cut sites. Many of these are in public ownership or have relatively few or no turf cutters.

• Any turf-cutter required to cease turf-cutting on an NHA will be offered compensatory measures similarly to those available to turf-cutters from raised bog SACs. Compensation will be made available immediately to active turf-cutters on these sites.

• The new NHA network will contain more active and degraded raised bog habitat (which is capable of being restored) than the existing network. It will therefore have significantly better restoration prospects while also avoiding, to a significant extent, areas that are subject to intensive turf-extraction. Extensive areas of Bord na Mona land of conservation value will also be included within the NHA network."

8. The Minister's Department wrote to the plaintiff on the 24th of February, 2014, notifying him that the Nore Valley Bogs NHA Order 2003 would be de-designated. The letter stated the following:

> "The site referred to in this letter is one of those bogs where restrictions on turf cutting would not come into effect as it is no longer required to meet national conservation objectives for raised bog habitat. The Department will, in due course, initiate a process which will lead to the de-designation of this site."

9. As a result of the foregoing, the plaintiff argues that the proceedings are now moot and thus wishes to discontinue them with an order for costs as against the defendant.

Submissions on the plaintiff's behalf.
10. It is argued on the plaintiff's behalf that the validity issue between the plaintiff and the defendants is now moot as the Natural Heritage Order 2003 is to be de-designated.

11. It is submitted by Mr. O'Reilly on the plaintiff's behalf that primary and/or secondary legislation bringing to an end the natural life of the statutory instrument will now be needed. All of the interlocutory applications brought by the plaintiff in these proceedings issued at a time prior to the Government's change of policy regarding the Nore Valley Bogs NHA Order. As a result, litigating the lawfulness of the Nore Valley Bogs NHA Order 2003 in the above context would appear to be a waste of valuable High Court time.

12. The extent of the change brought about by the Government's *Long Term Strategic Plan for Ireland's Peatlands* published on the 16th of January, 2014, is explained in the affidavit of Donal Keigher, solicitor for the plaintiff, sworn on the 3rd of June, 2015. The government effectively reviewed its policy regarding peatlands including in that context raised bogs. The Natural Heritage Area Order the subject matter of these proceedings currently affects a raised bog in Co. Tipperary of which Timonehy Bog is in large part owned by the plaintiff, Thomas Deegan.

13. These proceedings seek to challenge the validity of the Nore Valley Bogs Natural Heritage Order on a number of public law grounds. In circumstances where the first named defendant and the Government has stated that the Nore Valley Bogs NHA otherwise the subject matter of these proceedings is to be de-designated, counsel on behalf of the plaintiff submits that that in substance addresses the challenge raised in these proceedings. It is further submitted that it would be wasteful of the scarce resources of the High Court to litigate an issue regarding the validity of the Order in circumstances where the defendants have set in train a statutory procedure which will lead to its de-designation.

14. Counsel for the plaintiff submits that rather than litigate a challenge to the lawfulness of the order, a common sense and practical approach is to resume the arbitration before the Property Arbitrator pursuant to the (Amendment) Act 2000. The plaintiff's solicitors, Donal Keigher & Co., wrote to the Chief State Solicitor on the 3rd of June, 2015, making such a suggestion. In the same letter, the plaintiff's solicitors stated that these plenary proceedings would not have been instituted if the plaintiff had known of the first named defendant's intention to de-designate the NHA Order the subject matter of these proceedings.

15. Counsel relies on the recent Supreme Court judgment in *Cunningham v The President of the Circuit Court and the Director of Public Prosecutions* [2012] 3 IR 222 which he describes as the leading authority on the approach the Superior Courts should take to proceedings which become moot during their currency. Counsel submits that the Court should lean in favour of making no order as to costs where proceedings have become moot outside the control of the parties, whereas the Court should lean in favour of making an order for costs where the proceedings become moot as a consequence of the action of one of the parties.

16. In paragraph 24 of that judgment, Clarke J. (with Denham C.J., Hardiman J. concurring) describes the principle on which reliance is placed by the plaintiff as entitling the Court to make an order allowing the plaintiff to discontinue the proceedings with an order for costs in his favour:

> "24. … without being overly prescriptive as to the application of the rule, [a Court] should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot."

17. Counsel for the plaintiff argues that the judgment in Cunningham refers to its application where there has been a change of policy on the part of the Government, and that that in substance describes what has happened here. There has been a change of policy on the part of the Government which will lead to the de-designation of the NHA Order and which will render these proceedings moot.

18. The only outstanding issue, counsel submits, is the issue of when the Nore valley Bogs NHA Order 2003 will be de-designated. The Environmental Protection Agency (EPA) has informed the plaintiff's solicitors that no licence can be obtained from that Agency while

the Nore Valley Bogs NHA Order 2003 remains in place. As such, the plaintiff seeks to know when the de-designation will take effect.

Submissions on the defendants' behalf.
19. It is submitted by Mr. Holland on the defendants' behalf that the extensive reliefs sought by the plaintiff have not, on any view, been rendered moot. The intended de-designation of the plaintiff's bog is not material to any of the declaratory reliefs sought by the plaintiff, or to his extensive claims for damages.

20. Counsel submits that the Minister's decision to de-designate the NHA was merely part of a greater national process which resulted in the publication of the 2014 review of Raised Bog Natural Area Network authored by the Department of Arts, Heritage, and the Gaeltacht, and the reconfiguration nationally of the Natural Heritage Area Network, in which the Minister decided to de-designate 46 Raised Bog Natural Heritage Areas as part of a major reconfiguration of Ireland's NHA raised bog network. As such, the de-designation of the plaintiff's bog was not the result of any intervention directed specifically to the plaintiff's bog or linked in any way to these proceedings.

21. It is submitted on the defendants' behalf that the proceedings are not moot and that the motion to discontinue is merely a tactical decision taken by the plaintiff as further prosecution of the proceedings is no longer in his interest.

22. As such, it is submitted on the defendants' behalf that the ordinary rule applies, as per the rationale underlying Order 26 Rule 1 of the Rules of the Superior Courts, that a plaintiff who seeks to discontinue his proceedings must pay the defendants' costs unless it would be unjust to do so. The principles to be applied are outlined in *Callagy v Minister for Education and Science, Ireland, and the Attorney General* [2003] 5 JIC 2302. In *Callagy*, the plaintiff had sought an injunction preventing the minister from introducing a certain educational programme into schools. It transpired that his son's school did not intend to introduce the programme. The plaintiff sought to discontinue the action and there was disagreement as to costs. It was held that the general rule is that, where a plaintiff begins, but then abandons proceedings, that plaintiff must pay the defendants' costs and:

> "if he wants the defendant to pay the costs he must be prepared to go on the full length of the proceedings, obtain the relief that he sought and then invite the court to award costs in the ordinary way as following the event."

23. This principle was confirmed in *Shell E & P Ltd v McGrath & Ors* [2007] IEHC 144, wherein Laffoy J. found that there should be no deviation from the general rule:

> "…the rationale which obviously underlies the provision contained in O. 26, r. 1 in relation to the costs of early discontinuance, which is that, by initiating and prosecuting the proceedings to the date of discontinuance, the plaintiff has created the situation in which the defendant has had to incur the costs of defending the proceedings. However, the court has to go further and has to consider whether the factors canvassed on this application would render such provision unjust."

It is submitted on the defendants' behalf that in the present case the normal rule as to costs applies as no factors have been canvassed which would render such provision unjust. On the contrary, it would be unjust either to order the defendants to pay the plaintiff's costs, or to decline to award the defendants their costs.

24. Even if the proceedings are now moot, the defendant submits that the plaintiff has not proved that he is entitled, as a matter of law, to his costs. The plaintiff has failed to discharge the burden of proving that they became moot due to the unilateral act of the defendants.

25. *Telefonica O2 v Commission for Communications Regulation* [2011] IEHC 380 concerned the costs of notice parties to a motion for discovery and inspection of documents. Telefonica sought discovery of the Commission. Relevant documents held by the Commission contained information which the notice parties (being the Minister for Communications, Energy and Natural Resources, and BT) claimed to be confidential. Ultimately, the proceedings settled confidentially as between Telefonica and the Commission, rendering the discovery motion moot, and there was no final determination on the motion. As such, there was no 'event' for costs to follow. This Court (Clarke J.) held that:

> "6.3 … a Court should favour making no order as to costs in proceedings which became moot in the absence of other significant countervailing factors. However, that analysis is based on a situation where the case becomes moot by reason of factors entirely outside the control of the parties. It seems to me that somewhat different considerations apply where the reason (or at least a significant contributory reason) to the proceedings becoming moot derives from the actions of some but not all of the parties to the case.
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> 6.4. While there is no reported decision on the matter, such an approach was taken by the Supreme Court in dealing with the costs of *Murray v Commission to Inquire* into Child Abuse [2004] 2 I.R. 222. Those proceedings involved a challenge to the stated intention of the Commission to make individual findings in respect of specific allegations of abuse involving individuals who may have been deceased or where there were other reasons which might have impaired the individual concerned from being in a position to defend the accusation. The proceedings were successful in this Court… An appeal was brought to the Supreme Court by the Commission. Before the appeal came on for hearing a new policy was determined on by the Commission as a result of which it was no longer the stated intention of the Commission to make specific findings in most of the individual cases which were the subject of the litigation. In those circumstances it was accepted by all concerned that the issues raised in the challenge and which were the subject of the appeal to the Supreme Court were moot. However, it also had to be accepted that the reason why the issues had become moot was because a change of policy on the part of the Commission and in those circumstances the Supreme Court felt that the appropriate order as to costs was that the plaintiffs should obtain the full costs of the proceedings.
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> 6.5. It seems to me, therefore, that a significant factor to be taken into account in the exercise of the Court's discretion as to costs in proceedings which have become moot is to analyse whether it can reasonably be said that the actions of any relevant party have rendered the proceedings moot. If that be so, then that is a significant factor to be taken into account in the award of costs."

26. On the facts in *Telefonica*, it was the actions of the applicant and respondent in settling the proceedings that rendered them moot. The Court thus concluded in those circumstances, and particularly where the involvement of the notice parties was necessary, reasonable, and proportionate, that the notice parties were entitled to their reasonable costs. Counsel on behalf of the defendants submits that Telefonica can be distinguished from the present proceedings in that the actions of the parties in settling those proceedings, which actions rendered the motion for discovery moot, were actions intimately and fundamentally related to the

proceedings and their conduct and were primarily, if not entirely, informed by the litigious interests of the parties.

27. In *Cunningham v the President of the Circuit Court and the DPP* [2012] IESC 39, the applicant was charged in 2003 with offences that occurred in 1977 and 1991. The applicant was unsuccessful in the High Court in judicial review proceedings seeking to prohibit the prosecution on the grounds of delay. She appealed and before the appeal came on the DPP entered a *nolle prosequi* in the criminal proceedings. The reason for the entrance of the *nolle prosequi* related to evidential issues on which the DPP did not fully elaborate. The issue which arose was whether the applicant was entitled to her costs. Clarke J. reiterated the principles he had set out in *Telefonica* and noted the following:

> "It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. To take a simple example, one might envisage a criminal prosecution which was, on any view, wholly dependent on the evidence of an individual who unfortunately had died before the case could commence. If there had been a challenge, on judicial review grounds, to that prosecution which was not finalised, and if, as here, the second respondent were to enter a nolle prosequi because of the death of the only real witness, then it might superficially be said that the judicial review challenge had become moot by reason of the unilateral action of the second respondent but in truth the real reason why the judicial review challenge had become moot would have been because of the death of the witness which made it necessary for the second respondent to bring the criminal process to an end.
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> In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party."

28. It is submitted on the defendants' behalf that if, contrary to the submissions on the plaintiff's behalf, the proceedings are moot, the circumstances which rendered them moot came about through the proper exercise of the Minister's powers through a necessary response to changing external circumstances. Specifically the 2014 review records that:

> "The aims of the scientific assessment of the NHA Raised Bog network and the non-designated raised bog sites of potential conservation value were to:
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> • Fundamentally review the current raised bog NHA network in terms of its contribution to the national conservation objective for raised bog inhabitants;
>
> • Scientifically determine the most suitable sites to replace the losses of active raised bog habitat and high bog areas within the SAC network (which was required for the National Raised Bog SAC Management Plan) and to enhance the national network of NHAs; and
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> • To meet nature conservation obligations while having regard to national and local, economic, social and cultural needs.
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> The main task has been to assess how the NHA network could contribute to the national conservation objective of restoring the Active Raised Bog habitat to favourable conservation status, while avoiding unnecessary impacts on the traditional rights of land-owners/turf-cutters and minimising the cost to the tax-payer arising from compensation and restoration."

Conclusion.

26. The plaintiff, in effect, submits that the defendants' unilateral action of de-designating the Nore Valley NHA Order 2003 has rendered the present proceedings moot and that this constitutes an 'event' to which an order for costs in his favour should follow. The defendant, in response, submits that although it is accepted that the de-designation is technically a unilateral action taken by the defendant, it does not render the proceedings moot as there still exist legal issues between the parties, notably the claim for damages being pursued by the plaintiff as a result of the initial Order. The defendant submits that even on this application to discontinue these proceedings, the plaintiff has expressed that he has suffered loss and damage by virtue of the Order which is continuing and causing great financial hardship. Further, the defendant contends that even though the action taken may have been unilateral, it was taken in complete isolation to these proceedings and is entirely unconnected. As such, the factual matrix that pertains in the instant case distinguishes it from previous judgments on this issue.

27. Clearly the first issue for the Court to determine is whether the cause of action in these proceedings has become moot. The law in this jurisdiction is clear that, in general, a Court will not proceed to determine a matter where there is no real dispute between the parties and will not, as a matter of course, issue advisory opinions. Hardiman J. explained the doctrine of mootness eloquently in *Goold v Collins* [2004] IESC 38, wherein he stated:

> "A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of *locus standi* but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."

28. In some cases, an exception may arise if there persist exceptional circumstances or if the issue being determined affects many other cases, for example if it is a 'test case.'

29. The justification for the doctrine of mootness (and for its exceptions) is set out very clearly by White in *Social Inclusion and the Legal System; Public Interest Law in Ireland* (Institute of Public Administration, 2002):

> "In the context of the traditional model of litigation, where the impact of the judgment is confined to the parties the rule whereby the courts will not adjudicate on moot points is easily defended as a prudent use of scarce judicial resources. However, where the litigation is capable of clarifying the legal rights of many individuals who are not party to the litigation, a prudent use of scarce judicial resources might actually be better served by allowing the court to clarify those rights, even though the point might now be moot in relation to the particular litigants by virtue of an agreed settlement."

30. In the view of the Court, the de-designation of the Nore Valley NHA Order 2003 by the defendants overcomes the cause of action as pleaded, and constitutes an event which has rendered the legal issues between the parties to these proceedings moot. It is not the case that these proceedings fall into any exception to the doctrine because it is not the case that the dispute has merely been settled between the parties to the exclusion of any other parties who may still be affected by the NHA Order. The Order is being de-designated and as such there are no non-party individuals whose legal rights need clarification.

31. The submission by counsel for the defendants that there are extant issues as between the parties by virtue of the plaintiff's claim for damages does not find favour with the Court because clearly the cause of action in these proceedings was the plaintiff's challenge to the validity of the NHA Order. The claim for damages is not a separate issue but merely flows from the substantive claim, without which the claim for damages falls away.

32. While it is noted that the plaintiff may continue with the original arbitration once these proceedings are discontinued, those arbitration proceedings relate to compensation as provided for by statute pursuant to the Wildlife (Amendment) Act 2000 which Act provides a medium for compensation for those affected by the NHA Order and which is entirely separate to a claim for damages in the High Court proceedings.

33. However, having so found, the Court is also of the view that the decision to de-designate the Nore Valley NHA is not particular to the plaintiff's lands and derives not from the proceedings but from a national review and major reconfiguration of Peatland NHAs. In my view, neither side was directly responsible for the 'event' which has rendered these proceedings moot.

34. It is not the case here that the present proceedings were a significant or critical factor in the decision of the defendants to de-designate the plaintiff's bog. The change of policy which the plaintiff relies upon as the 'event' to which costs should follow is not related to the instant proceedings and as such is not a concession on the defendants' behalf. The plaintiff accepts that the review which precipitated the change in policy was a "root and branch review" the purpose of which was to contribute to the national conservation objective of restoring the active raised bog habitat to a favourable conservation status. The decision to initiate the intended de-designation arises as a result of a fresh appraisal of the changed environmental circumstances that have evolved since the previous designation of the lands. This is apparent from reading the 2014 Review. This distinguishes the present case from the decision in Cunningham where the unilateral action of the DPP in entering a nolle prosequi without much elaboration or explanation persuaded the Court to award the plaintiff her costs. It also distinguishes the present case from the recent High Court decision in *Benloulou v Minister for Justice & Equality* [2015] IEHC wherein the bringing of a judicial review application by the plaintiff was held to be a critical factor in achieving a concession on behalf of the defendant which rendered the legal issue between the parties moot and which awarded the costs of the proceedings to the plaintiff.

35. In view of the foregoing, I grant leave to the plaintiff to discontinue the proceedings and I propose to make no order as to costs. I take the view that to hold the defendants responsible for the costs of the proceedings to date would be effectively to penalise the defendants for lawfully executing executive and policy functions as to environmental protection and in response to the current scientific, legal, and political reality as well as the demands of best practice.