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THE HIGH COURT

JUDICIAL REVIEW

2009 770 JR

IN THE MATTER OF THE BOURN VINCENT MEMORIAL PARK ACT 1932, AND IN THE MATTER OF THE STATE PROPERTY ACT 1954, AND

IN THE MATTER OF THE BYE LAWS MADE BY THE COMMISSIONER OF PUBLIC WORKS IN IRELAND (WITH THE APPROVAL OF THE MINISTER FOR FINANCE) BY VIRTUE OF THE POWERS CONFERRED ON THE SAID COMMISSIONERS UNDER THE BOURN VINCENT MEMORIAL PARK ACT 1932

BETWEEN

PAT O'SULLIVAN, PAUL TANGNEY, BILLY TANGNEY, MARK TANGNEY, MICHAEL MCCARTHY, MICHAEL JOY, PAT JOY, JOHN CRONIN, DENNIS DOONA, JEREMIAH O'SHEA, MICHAEL GRIFFIN, RICHARD O'GREENE, MICHAEL O'GRADY, GERARD CRONIN, JOHN O'GRADY, MICHAEL SWEETMAN, MICHAEL MORIARTY, JOHN COFFEY, HUGH MUNDELL, DAN MURPHY, TOM HICKEY, ULTAN BREENE, DENNIS O'SHEA, DAN FERRIS, ROSE HICKEY, BRENDAN JOY AND MICHAEL J. O'DONOGHUE

APPLICANTS

AND

THE NATIONAL PARKS AND WILDLIFE SERVICE OF THE DEPARTMENT OF THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

RESPONDENTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 13th day of May, 2010

Introduction:

1. Killarney National Park is unique: Killarney jarveys are unique: both are in conflict in unique circumstances.

2. Killarney National Park, which is the first national park established in Ireland, was created when Muckross Estate was donated to the State in 1932. The presentation was that of Senator Arthur Rose Vincent and his parents-in-law, Mr. and Mrs. William Bowers Bourn, in memory of the Senator's late wife Maud. The nucleus of the Park remains the 10,700 acres which since the gift, has been known as the Bourn Vincent Memorial Park. Since then, however, lands of the Grosvenor Kenmare Estate, McShain (Innisfallon), Islands in Lough Leana, McShain (Glena), Villears-Stewart (Incheens) Kenmare Estate, McShain Estate, Edward Dawney and Mary McCabe (Incheens), have all been incorporated. As a result, the National Park in all comprises over 25,000 acres of diverse ecology including the Lakes of Killarney, much woodland of international importance and many mountain peaks. This Park is protected under regulations implementing the EU Habitats Directive (S.I. No. 94 of 1997) and the EU Birds Directive (S.I. No. 31 of 1995) as well as having UNESCO Biosphere Reserve designation (1981). It is managed on behalf of the State by the Department of the Environment, Heritage and Local Government, through its National Parks and Wildlife Service.

3. For many years an assembly of persons have transported members of the public for reward in horse-drawn carriages or buggies in or about the national park. A majority of this group offer their services from the Killarney Town/Muckross Road direction with a smaller number operating from the Gap of Dunloe. The applicants, being twenty seven in number, operate from the town and ply their trade essentially on what are known as the Ross Castle and the Muckross Park House routes. This case and the issues raised concern these operators and no others: in this judgment they will be referred to as "the jarveys".

4. The respondents so named in these proceedings, the National Park and Wildlife Service ("NPWS"), are sectioned within the Department of the Environment, Heritage and Local Government. No point arises that the department itself is not named as a respondent: it can be assumed that, when occasion requires, the Department is deemed to be included: both are therefore referred to as "the respondents". This case relates only to that part of the national park for which they have responsibility: this I will term the "Park": the rest of the area is within the jurisdiction of Killarney Town Council.

5. The proximate cause giving rise to these proceedings arose out of a letter dated the 8th May, 2009, in which the affected jarveys were informed that, as and from the 8th June, 2009, it would be a mandatory requirement of their permits to have an approved dung-catching device fitted to their jaunting car. Previously on the 4th March, 2009, they had been forewarned of this date. (para. 13 *infra*). For the reasons next explained, the jarveys took issue with this condition and refused to implement it: they continued, however, to use the Park for business purposes. Despite some contact between the parties from the due date to the 14th July, 2009, no resolution was achieved. As a result, on the 14th July the respondents erected a series of demountable bollards at strategic points which prevented jarveys from entering the Park. This led to the instant proceedings. On the 16th July, 2009, leave was given by this Court to seek orders by way of judicial review and, on the 17th July the applicants secured a interim injunction restraining the respondents from barring access to the Park. On the resulting motion seeking to have that order made interlocutory, the same was discharged by Charleton J. on the 29th July, 2009. Thus, this position remains to the present day: the jarveys (apart from one) have refused to sign up and they remain outside the Park. This Court, having heard the substantive judicial review proceedings, now gives judgment in respect thereof.

Background

6. Before looking in detail at the statutory scheme by which the Bourn Vincent Memorial Park came to be State owned and by which that Park is governed, it should be noted that under bye laws made in October, 1971, a licensing or permit system was introduced in respect of jaunting cars and other horse-drawn vehicles, engaged in the carriage of persons for reward within the Park. From May,

1975 (approx) onwards, such system has been in existence. It is the insertion into all new licenses of the requirement referred to at para. 5 (*supra*), which gives rise to this litigation.

7. At the outset it should be noted that the relationship between the jarveys and the NPWS has been excellent up to the present issue, with a high level of consultation and co-operation existing between them. This has resulted in the jarveys putting in place an appropriate level of insurance and in implementing the provisions of a safe operating procedure for their horses and buggies. Their safety record is acknowledged by all. On the other side, the respondents, being responsible for the management of the Park, have carried out without interruption, all required acts of upkeep and ongoing maintenance. This included a system whereby organic waste produced by horses, drawing jaunting cars, was removed from hard surfaces by a manual operator. Moreover, whilst access to the Park is subject to obtaining a permit, the same is charged at most modest rates: up until recently €2.00: now €25.00 per annum. There are no other cost implications for the use of this facility.

8. Commencing in 1998 the issue of dung and its treatment was occasionally mentioned in meetings between the jarveys and the NPWS: it was, however, only in 2002 that some serious consideration was given to it. In October of that year, a discussion document, entitled "Killarney National Park - Draft Management Plan" was issued in which, under the heading of "Jaunting Cars" it was stated that "in order to prevent fouling of roads… jaunting cars will be required to be fitted with dung-catchers by 2004." On the 14th May, 2004, a five-year plan for the National Park was signed off on: the respondents and Killarney National Park Liaison Committee, a committee comprised of representatives from conservation, recreation, commercial, community and educational sectors were the signatories: the latter party included two jarvey representatives. At para. 4.6.3 of the plan the respondents undertook to "investigate best practices for containment and disposal of horse dung, and will implement same in consultation with the jarveys". The intended consultative process began in earnest in October, 2007 and was driven solely by the respondents, as its request to Killarney Town Council for a joint approach was rejected.

9. Having requested proposals from all jarveys as to how best horse dung could be contained and disposed of, the NPWS organised a series of seven meetings as part of the process outlined in the five year plan. These were held between November, 2007 and 14th August, 2008. At the last meeting the director of NPWS indicated that, after ten months of consultation all the issues raised would be considered and that a report would be submitted to the Minister for his decision. That report however, would be deferred for at least one month during which further submissions would be received if made by the jarveys. A reminder letter issued on the 26th August, 2008. Only one such submission was made. Apparently, two broad approaches emerged from these discussions: one being the use of dung-catchers which was promoted by the NPWS and the other, being road sweeping, either mechanical or manual, which was favoured by the jarveys. No other viable option was identified.

10. On the 5th April, 2008, as part of the above process, the road sweeping option was trialled within the Park in the presence of jarvey representatives. Whilst acknowledging some merit with this proposal, problems persisted: these included repeat and constant fouling, noise associated with any mechanical means which impacted severely on the environmental beauty of the Park and financial issues.

11. Continuing with the process: objections to the dung-catchers were made and investigated. Firstly, it was said that whilst such devices may work with four wheel carriages, they would be quite unsuitable for two wheeled vehicles which constituted about fifty percent of the available stock. To evaluate this, the NPWS acquired a traditional trap and with it, carried out trials using a number of different horses. The results seemed satisfactory and a D.V.D. of the tests was made and offered to jarvey representatives. Secondly, it was suggested that the hilly and undulating nature of the terrain was so severe that the devices could not be utilised. Trials in October, 2007 (using one horse) and November, 2008 (using four horses), both of which were attended by veterinary experts, did not disclose any such cause for concern. Thirdly, animal health, welfare and safety issues were also aired. These involved matters such as obstructing movement of a horse's tail and thus rendering the horse defenceless against fly attack. Further, it was said that horses become irritable, touchy and cranky and become disobedient; even at times dangerous. It therefore followed that such matters affecting horses, would likewise affect the safety of passengers and the public. These issues were also looked at during the course of trials. The outcome from the respondents' point of view was that dung-catchers:

- work effectively with traditional traps
- work in various terrain
- are easy to attach
- do not compromise animal health, welfare or safety

12. By the end of 2008 the NPWS, having concluded its examination of the various issues, which included the success of the practical trials and the receipt of favourable expert opinion, was in a position, by reference to a written submission dated the 23rd December, 2008, to seek ministerial approval for its preferred option: as a gesture it suggested that the Department would cover the cost of the initial supply of dung-catchers. On the 10th February, 2009, approval was so obtained.

13. On the 4th March, 2009, the jarveys were briefed by the respondents of their intention to introduce these devices after a lead-in period of three months; ongoing advice and assistance would be available and the initial cost of providing such devices would be defrayed. A DVD of the practical trials was shown. During the weeks following, repeat requests were made for the jarveys to at least operate the devices on a 'trial and see' basis. An open day was held whereat the workings of the device were demonstrated on a moving jaunting car. Information packs were offered. Unfortunately with these overtures the jarvey operators were less than impressed: they rejected such attempts and disengaged from the process.

14. This is the background to the letter of the 8th May, 2009, (para. 5 *supra*) notifying, as the commencement date, the 8th June, 2009. Availability for ongoing consultation was once again indicated. A further training day was set for the 2nd June. Between the 8th and 18th June, 2009, correspondence issued in which the Department recorded its disappointment at the jarveys refusal to adopt the new regime: the impasse from their viewpoint could not continue, whilst the jarveys were content operating as normal. At a meeting held on the 3rd July, 2009, the respondents took the decision that, without some movement from the applicants the specified requirement would have to be enforced: if necessary by preventing access to the Park, save for those who indicated compliance. This led to the actions of the 14th July, 2009, (para. 5 *supra*) and, in consequence, to these proceedings.

The Legislative Context

15. The gift by Senator Arthur Rose Vincent and by Mr. and Mrs. Bourn of the Muckross Estate to Ireland was effected in

documentary form by way of The Preliminary Agreement, The Deed of Grant and The Supplementary Agreement all under cover of statutory authority and approval as outlined in the Bourn Vincent Memorial Park Act 1932 ("the 1932 Act" or "the Act"). These documents are respectively Scheduled in Part I, Part II and Part III of the Act. Whilst nothing turns on the details of such documents the provisions of the Act, however, are central to this case.

16. The following sections are material to the issues:-

> "10. The Minister shall enter into possession and occupation of the Park on the 31st day of December, 1932, and as on and from that date shall be responsible for the management and control of the Park…
>
> 11. The management and control of the Park shall be vested in the Commissioners, but such management and control and all other duties and powers imposed on or vested in the Commissioners in relation to the Park by this Part of this Act or otherwise shall be performed and exercised by the Commissioners, subject to and in accordance with the general directions of the Minister.
>
> 12.
>
> (1) The Commissioners shall maintain and manage the Park as a national park for the general purposes of the recreation and enjoyment of the public and shall for that purpose have full power, subject to the sanction (either general or particular), of the Minister to execute all such works and do all such things as shall in their opinion be necessary for the proper maintenance and management of the Park or be necessary for or contribute towards affording to the public the facilities and benefits to be derived from the Park.
>
> (2) In addition and without prejudice to the general powers conferred on the Commissioners by the preceding subsection of this section, it shall be lawful for the Commissioners, with the sanction (either general or particular) of the Minister to reserve any portion of the Park or any building in the Park for any particular purpose…, to let any part of the Park…and to charge tolls for the admission of persons, vehicles, vessels and animals to the Park…
>
> 14.
>
> (1) The Commissioners may subject to the approval of the Minister, make bye-laws for regulating and controlling the use and enjoyment of the Park by the public, and generally for the maintenance, management and preservation of the Park as a national park.
>
> (2) Every person who shall do any act…which is a breach or in contravention of a bye-law made under this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding five pounds.
>
> (3) …
>
> (4) Every bye-law made under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if either such House shall, within twenty one days on which that House has sat next after such bye-law was laid before it, pass a resolution annulling such bye-law, such bye-law shall be annulled accordingly,…
>
> 15.
>
> (1) If any person in the Park and within the view of a park constable does any act which is an offence under any bye-law made under this Act, or is in contravention of any such bye-law, such park constable, if in uniform, may do both or either of the following things, that is to say:-
>
> *(a) demand from such person his name and address, or*
>
> *(b) order such person to leave the Park.*
>
> (2) …
>
> (3) If any such person as aforesaid, on being so required as aforesaid refuses or fails to leave the Park, any park constable may either remove such person from the Park by force or may without warrant arrest and take into custody such person.
>
> (4) …
>
> (5) Every such person…who on being ordered by a park constable acting under this section to leave the Park, refuses or fails to leave the Park, or having left or been removed from the Park returns thereto on the same day, shall be guilty of an offence…and shall be liable on summary conviction thereof to a fine not exceeding five pounds.
>
> (6) …"

17. Pursuant to the powers conferred by s. 14 of the Act, bye laws were made by the Commissioners of Public Works in Ireland, with the approval of the Minister for Finance, on the 16th August, 1971 (S.I. No. 234 of 1971) (the "bye laws"). These bye laws deal with several matters including temporal and directional access to the Park and movement within it, horse riding and being in charge of horses, camping and caravanning, musical performances and dances *etc*. None of these matters are of direct relevance to this case save for that contained at para. 3(9) of the bye laws which reads:-

> "(9) No jaunting car or other horse-drawn vehicle engaged in the carriage of passengers for reward shall enter the Demesne Section of the Park unless the vehicle has been duly licensed by the Commissioners for operation in the Park and the driver is in possession of a drivers permit from the Commissioners."

So, a regulatory system by way of permission was established, as a condition of entry.

18. The respondents did not seek to invoke these bye laws until 1975. When they did, no distinction was made between licenses and permits and since then the form and content of the document has not changed significantly. Copies of one such document existing both prior to and post June, 2009 were put in evidence. The document doubles as both a permit and a license. Note: both state that the same has been issued "in accordance with" the 1932 Act and the State Property Act 1954: there is no reference to bye laws. In any event the permit, which the document is more commonly called, covers such matters as authorised entry points, time restrictions, directional flow *etc*. In addition, however, since June, 2009 the impugned condition now appears in all permits: it reads:-

> "3. Each jaunting car entering the Killarney National Park on or after the 8th June, 2009, must have a dung-catching device as approved by the National Parks and Wildlife Service fitted to the car. It is the responsibility of the Licensee to ensure that horses used with jaunting cars are fully accustomed to a dung-catcher device prior to entering Killarney National Park."

The Applicants' Submissions

19. Despite the numerous reliefs sought in the statement grounding the application for judicial review, and in respect of which leave was given, the principal issue in this case is one of *ultra vires*. Have the respondents a legal basis upon which to impose the above requirement? If so, can due compliance become a precondition of Park entry? A number of secondary matters were also aired: these included whether the actions of the respondents amounted to an unauthorised delegation of their responsibility: whether such actions were unreasonable, unfair, arbitrary or capricious: whether the same constituted an unconstitutional attack on the applicants' right to work and finally, whether as a sub-group within a larger group they were being unequally treated, and thereby discriminated against.

20. The jarveys say that in looking at the 1932 Act, one must remain conscious of the settlors' generous gift and the donee's grateful acceptance of it. That unique relationship is demonstrated by the exclusion of the donated lands from the provision of the State Property Act 1954. The purpose and intention of the gift must remain to the forefront of one's consideration: it was to provide land for the general purpose of recreation and enjoyment by the public at large and, therefore, the powers given to the respondents must be understood as against this background.

21. The primary issue is put simply: it is whether or not the respondents have the statutory power to do what they purport to do. In that regard such power, if it exists, can only be found in the 1932 Act and/or in any lawful bye laws made thereunder. In this context the State Property Act 1954 has no application.

22. Regarding firstly, the 1932 Act. It is claimed that there is no power thereunder to impose the condition and if there is, there is no power to execute it by exclusion. The NPWS is not the owner and yet purports to exercise incidences of ownership. It cannot do so: as a matter of law, the Park is publicly owned, a fact known to them. Verification of this is evident from its previous conduct in obtaining the agreement of the jarveys to obtain insurance and to follow safe operating procedures: it did not seek to impose these requirements. Accordingly, this is self evident proof of the limitations imposed on the respondents by the scheme under review. Therefore the power is *ultra vires* the parent Act. In addition, it has been executed in a disproportionate and unlawful manner. *Ashbourne Holdings Ltd v. An Bord Pleanála & Anor* [2003] 2 I.R. 114, and *Radio Limerick One Ltd v. Independent Radio & Television Commission* [1997] 2 I.R. 291 are cited.

23. Regarding the 1971 bye laws, it is alleged that their making lack validity as it does not appear, on the instrument obtainable from the Government Publication Office that such complied with s. 14(4) of the 1932 Act.

24. Without prejudice to the last point and in parallel with the *ultra vires* argument, the applicants further assert that the enforcing provisions, such as they might be, are sourced in the enabling s. 14 and are to be found only in the implementing s. 15 of the Act: the bye-law provisions. These, apart from creating criminal offences, permit, in certain circumstances, the removal of a person from the Park but effectively only for the remainder of the day on which the infringement takes place. This reflects the tone, tenure, spirit and letter of the gift to the State. That being so, it is self evident by reference to such bye-laws that (i) the respondents have no statutory basis for imposing a licensing regime on the jarvey operators; (ii) even if same should exist, they have no enforcing power by way of access restriction; and (iii) they have no right, legal or equitable, to exclude the applicants from the Park. Further, the requirement of mandatory dung-catchers is a condition which is not in any way referable to the purpose of the underlying settlement and, therefore, is alien to that settlement.

25. Section 12 of the 1932 Act imposes a non-delegable power of maintenance and management on the respondents. It leaves no discretion in that disregard: they must manage and maintain. Therefore, they cannot pass this duty on to the jarveys regarding horse dung. In attempting to do so, whether couched under the guise of cost, smell, underfoot conditions or the like, they are in this regard also acting *ultra vires* their powers as contained in the statute. *State (F.P.H. Properties S. A.) v. An Bord Pleanála* [1987] I.R. 698; *Hoey v. Minister for Justice* [1994] 1 I.L.R.M. 334; and *Ashbourne Holdings Ltd v. An Bord Pleanála & Anor* [2003] 2 I.R. 114, are referred to.

26. Finally, the applicants assert that they have been treated unfairly. It is not entirely clear whether this is a "reasonableness" argument, or one based on fair procedures or on equality or discrimination. All are rolled together linking the suggestion that preventing access is a denial of their right to earn a livelihood. Several cases are mentioned in support such as *East Donegal Co-Operative Livestock Mart Ltd & Ors v. Attorney General* [1970] I.R. 317; *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297; *O'Brien v. Manufacturing Engineering Co. Ltd* [1973] I.R. 334; *Killiney & Ballybrack Development Association Ltd v. Minister for Local Government* [1978] 1 I.L.R.M. 78; *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *Murphy v. Stewart* [1973] I.R. 97.

The Respondents' Submissions:

27. The respondents argue that the imposition and enforcement of the restriction is fully within their powers as laid down in the 1932 Act and in the 1971 bye-laws. They refer in particular to ss. 10, 11 and 12 of the Act as obliging them to manage, control and maintain the Park for the purposes of recreation and enjoyment by the public at large. To this end, s. 12(1) empowers them to execute all works and do all things, which in their "opinion" shall be necessary to further this purpose. Many people use the Park in different ways and, therefore, it is essential to regulate behaviour so that all can have a reasonable level of enjoyment.

28. As pointed out in the submission to the Minister of the 23rd December, 2008, (para. 12 *supra*) there are real and anxious concerns

about the inadequacy of the former system of dung removal. For many reasons that situation could not be allowed to continue. Whilst merit could be seen in the use of mechanical sweepers, problems were also evident. Therefore, in their best judgment the use of dung-catchers is to be preferred. Given the high level of consultation, the advice of many experts including the opinion of the Society of Prevention of Cruelty to Animals, and the lack of viable options, the respondents were well justified in seeking approval for the solution which they now seek to implement.

29. The steps taken by the NPWS were in the nature of an administrative decision and not in the form of a legislative instrument. This is perfectly consistent with and, in fact, is provided for in s. 12 of the 1932 Act. Such form of implementation does not constitute a usurpation of legislative power. (See *Casey v. The Minister for Art, Heritage, Gaeltacht and the Islands* [2004] IESC 14, (Unreported, Supreme Court, 24th February, 2004)). The legislative regime in place vests in the respondents the responsibility of balancing a variety of interests regarding the users of the Park of which only one are the jarveys. This was perfectly justified. The question of delegation does not even arise. (See *Crofton v. Minister for the Environment, Heritage and Local Government* [2009] IEHC 114, (Unreported, High Court, Hedigan J., 10th March, 2009)).

30. Even if s. 14(4), of the Act, which requires that bye laws be laid before each House of the Oireachtas has not been complied with, this does not alter the character of the decision as made. It remains an administrative one. Any failure to comply with the subsection simply means that a person cannot be prosecuted for an offence under the bye laws. Otherwise such failure, which in any event does not exist, is simply irrelevant.

31. The assertion that the respondents have violated any right of the applicants to earn a livelihood is unsustainable: this applies howsoever the underlying arguments are either phrased or put. Such a right, which enjoys protection under Article 40.3.1 of the Constitution, is not absolute and may be restricted or regulated for reasons associated with the common good. (See *Attorney General v. Paperlink* [1984] ILRM 373 at 385, and *Rodgers v. IT&G.W.U.* [1978] I.L.R.M. 51). For the reasons so advanced, the requirement to attach dung-catchers is a minimalist imposition on the jarveys who otherwise remain totally free to ply their business within the Park. There can, therefore, be no question of a violation of this or any other right.

32. Finally, there are ample and sufficient grounds to distinguish the applicants as a group from all other users of the Park, in particular from their colleagues who operate out of the Gap of Dunloe and pony trekkers.

Decision:

33. It is important to recognise what is in issue in this case and what is not. The central point is one of *vires*: is the requirement within the power of the respondents or not? Matters touching on one's right to earn a livelihood and those alleging, in whatever way, some form of inequality, unfairness or discrimination as between the applicants and others, are very much of a secondary nature. Further, there is no constitutional attack on the 1932 Act nor is it suggested that the 1971 bye-laws are *ultra vires* the parent Act. The only legal issue raised about the bye-laws is an allegation that the same were not laid before each House of the Oireachtas as required by s. 14(4) of the 1932 Act. This is factually incorrect as on the copy put in evidence by the respondents, the stamp of the Dáil shows that the instrument was tabled on the 20th October, 1971. However, it is noted that no similar indication appears on copies of the instrument available from the Government Publication Office: whether a change is called for perhaps needs consideration. In any event, apart from their application, no other point arises on the bye laws.

34. In addition, the immediate events surrounding the erection of the bollards on the 14th July, 2009, are not material. Questions like the existence of an arguable case, adequacy of damages and balance of convenience are well distant and have no application to this review. It is of particular significance to note that the applicants have not sought to make any case on the merits, or otherwise, of having the subject device fitted to their jaunting cars. The review taken by them has not touched on the core factual issue which is whether any of the complaints so advanced regarding animal welfare, public safety, utility and suitability of device, are or not justified. Therefore, evidence in this regard, in particular that from the veterinary and insurance side, is not relevant and can be ignored.

35. Before addressing the issues upon which submissions were made, I should say that it is a matter of regret to this Court that the jarveys steadfastly have refused to countenance the use of such devices even on a trial basis. One would have thought that the most profound way of demonstrating the inappropriateness of dung-catchers was to show how unsuitable they were when in actual use. This could have been done by the jarveys under controlled conditions without any danger to animal or person. It was not: in fact all overtures from the NPWS in this context were rebuffed. Apparently the jarveys took a stance on principle. This, purely from a practical point of view, if not a legal one, must be regretted.

36. For the purpose of the 1932 Act "the Minister" is described as meaning the Minister for Finance and "the Commissioners" as the Commissioners of Public Works in Ireland. By virtue of s. 9 of the Ministers and Secretaries Act 1924, s. 6 of the Ministers and Secretaries (Amendment) Act 1939, and by reference to a series of statutory instruments including the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 1995 [S.I. No. 61 of 1995], the Heritage (Transfer of Functions of Commissioners of Public Works in Ireland) Order 1996 [S.I. No. 332 of 1996], and the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2002 [S.I. No. 356 of 2002], I am satisfied that the Department, of which the NPWS is a section, is now the body in whom is vested the responsibilities laid out in the 1932 Act and the regulations made thereunder. Therefore, no point arises as to the transmission of interest or the correct identity of the respondents in this case; (para. 4 *supra*). Secondly, ss. 10 (Sale, exchange, gratuitous grant and leasing of State land) and 11 (Other powers of State authorities in relation to State lands) of the State Property Act 1954, have no application to the Bourn Vincent Memorial Park. Read subs. (1) of each section in conjunction with the First Schedule to the Act. Furthermore, while some debate was had as to the meaning of "State authority" and "State lands" in the context of ss. 5 and 6 of the 1954 Act, no point turns on that issue in this case.

37. That the gift by Senator Arthur Rose Vincent and the Bourn family to the State was remarkable and remarkably generous has been repeatedly acknowledged over time and once more, may this Court echo that appreciation. The National Park in its entirety is a truly unique destination as evidenced by the one million or so visitors annually. That jarveys, both present and past, have been an integral part of this experience, must likewise be acknowledged. They have added distinctiveness to the area and their charismatic presence has undoubtedly enhanced the overall status, value and appeal of this attraction.

38. There is no doubt but that the lands, the subject of the 1932 gift, are the lands of the Nation and, therefore, are state owned. In this context I use "Nation" as a synonym for "State", although a distinction between both is, on other occasions, clearly maintained: Clarke 'Nation, State and Nationality in the Irish Constitution' [1998] 16 I.L.T. 252 and 'Nationalism, The Irish Constitution and Multi-cultural Citizenship; [2000] 51 NILQ 100. Most of such land is governed by the State Property Act 1954: not so for the issues in this case where it is the 1932 Act.

39. The scheme of the Act, once the Minister had entered into possession and occupation of the Park, is clear:

> (i) the Minister is responsible for the management and control of the Park (s. 10), (emphasis added);
>
> (ii) the function of managing and controlling the Park is vested in the Commissioners with the exercise of such power and the discharge of such duty being subject to ministerial direction (s. 11), (emphasis added);
>
> (iii) the Commissioners, as part of their obligations must maintain and manage the Park as a national park, for public recreational and enjoyment purposes and to that end, they have full power, subject to ministerial sanction, to execute all works and do all things as "shall in their opinion" be necessary for the purpose of;
>
> > (a) maintaining and managing the park, and
> >
> > (b) enabling the public to access, use and enjoy the facilities and benefits to be derived from the Park (s. 12(1)), (emphasis added)
>
> (iv) the Commissioners in furtherance of their duties may, with the approval of the Minister, make bye laws for the purposes of regulating the use and enjoyment of the Park and of maintaining, managing and preserving the Park (s. 14(1)), (emphasis added);
>
> (v) any person who breaches a bye law shall be guilty of a minor offence triable summarily (s. 14(2));
>
> (vi) in addition, if the offending act is witnessed by a park constable, the latter may demand the name and address of the offender and order him to leave the Park (s. 15(1));
>
> (vii) if such a person refuses to comply, he may be removed or arrested, and
>
> (viii) If such a person, on request being made, refuses to give his name and address, or gives a false or fictitious one, or refuses or fails to leave the Park, or having left returns on the same day, he shall be guilty of a minor offence again triable summarily.

40. It is therefore clear that the Minister by way of statutory duty is responsible for the Park: his imprint runs throughout the entire underlying scheme: the Commissioners can make bye laws only with his approval and sanction: he is therefore not only the owner, (see 4 of Act and the schedule thereto) holding on behalf of the State, but he also has overall responsibility and control of the Park.

41. The Commissioners, subject as aforesaid, have also responsibility in respect of the Park: they are to maintain, manage and control the Park and are required to ensure that the public enjoy the full extent of the facilities and benefits thereby provided and which can be derived therefrom. For that purpose they can do, what in their opinion or judgment, is necessary. Such powers and duties are statute based.

42. The overriding objective of the Act is to ensure that the Park is a place for further recreation and enjoyment and that, through its facilities, maximum benefit can be derived to that end. This objective is neither sector nor activity specific. It is clear, from the tenure, tone and motivation of the gift that the intention was to utilise the Park for the greater number and the greater good. The words of ss. 11 and 12 of the Act make this self evident. To achieve this end, full power is given to carry out works and do all things necessary, including the creation of facilities, so that benefit may be provided.

43. This power, as given to the respondents, is to be exercised by reference to their opinion and their judgment, not by reference to the opinion of the jarveys or the judgment of this Court. Subject to the parameters of such provisions, it seems to me that, ss. 10, 11 and 12 confer very considerable and wide ranging powers on the respondents to create conditions, including the establishment of facilities, so that public utility can be maximised. "Public" in this regard can be taken as referring to the wider public preferring a diverse range of interests. In my opinion the exercise of the power so conferred may vary to meet changing circumstances, but is likely to include the accommodation of (i) the natural environment with current demands of serving public visitors; and (ii), the conflicting demands of all users including those plying their business within the Park as well as those present whether purely for recreational or enjoyment purposes.

44. The imposition of a rigid, fixed or determined approach in this regard would not enhance the reconciliation of the various requirements of the multiple and diverse park uses. Such an approach must forever be capable of review and must respond to change and demands as these emerge and evolve. For example, there is a much higher level of environmental awareness today than there was at any stage in the past, in particular, twenty or thirty years ago. What might have been commonly acceptable then is not now; what may be commonly acceptable today may not be acceptable in the near future. So therefore, those vested with responsibility, over matters such as environmental control, health and safety issues, must likewise respond. This is the challenge facing not only the respondents in this case, but on a much larger scale, society as a whole and each one of us individually. The response must, therefore, be both collective and personal.

45. From the respondents viewpoint the old system of dung control had several problems attached to it. These, in today's environment, had to be addressed: tourists/visitors are by common accord now much more discerning. Therefore to reflect value, a good quality product must be offered particularly in such a gold standard setting. To recap by way of illustration: (i) the underfoot conditions where the material is present, constitute a hazard for personal safety and wellbeing: this is exacerbated by rainfall which can result in slurry; (ii) the foul and distasteful smell is off putting and pervades the air: it is worse in dry weather; (iii) flies gather and accumulate, are annoying and can sting; (iv) the scene is unsightly and aesthetically displeasing; and, (v) cross contamination is inevitable and affects all users including children, joggers, buggies and wheelchair users. Therefore, in the respondents judgment corrective action was required so as to respond to current times and requirements. The preferred solution was the best solution namely prevention, and so the requirement to fit these devices.

46. It is said by the jarveys that the imposition of this condition, by way of permit inclusion, is beyond the power of the respondents under the 1932 Act. It is claimed that the required power is nowhere to be identified in the Act and in particular, is not within ss. 10, 11 or 12 thereof. With respect, I cannot agree with such a submission.

47. It is clear what is being imposed: it is equally clear for what reasons. Both are set out above. Against this background one must ask what is the purpose of the condition? What does it seek to achieve? Will it make the Park more pleasant, enjoyable and amenable for all users? By giving the relevant words, in the context of the Act as a whole, their ordinary and natural meaning, the answer must

be yes. Continuing, is dung removal an act of maintenance? If dung was not removed, could one say that the Park was not being maintained? The likely answer is yes. Does it affect or "contribute towards affording to the public the facilities and benefits to be derived from the Park"? (s. 12(1)). I am confident of the answer. Accordingly, it can be said that the power of imposition is a power exercised for the management, maintenance and control of the Park. If that is so, it seems to me that it must follow that preventative steps should also be classified as acts or incidents of management, maintenance and control. Therefore, I am quite satisfied that the suggested requirement is squarely within the powers of the respondents as set out in the 1932 Act.

48. Cases such as *State (F.P.H. Properties S.A.) v. An Bord Pleanála* [1987] I.R. 698, and *Ashbourne Holdings Ltd v. An Bord Pleanála & Anor* [2003] 2 I.R. 114, are of no particular assistance. Both essentially turn on the power of a planning authority or An Bord Pleanála to impose conditions pursuant to s. 26 of the Local Government (Planning and Development) Act 1963: the decisions were therefore specific to that section. If anything of materiality emerged it was that a power so given must be exercised for the intended purpose and be within the confines of the enabling source. I readily accept this and have not in any way sought to depart from it.

49. Although not substantially relied upon, it seems to me that, at least arguably, a further legal basis may exist for the respondents' action. The respondents are the owners of the Park. As such, they are entitled to exercise rights of ownership. Normally these would include the right to stop, restrict or condition entry as well as removing or ejecting those unlawfully present. The mere fact that the ownership of the Park is impressed with and is subject to the public obligation outlined in the 1932 Act, including the schedule thereto, does not of itself deprive the owner of his rights of ownership. What it does is to make the exercise of such rights subject to the obligation: such rights therefore are restricted but not eliminated, very much like situations involving national monuments. See *O'Callaghan v. The Commissioner of Public Works in Ireland* [1985] 5 I.L.R.M. 364, where O'Higgins C.J. reached a similar conclusion when describing the impact which a preservation order had on an owner's right to deal with his land on which exists a national monument. In this case the condition under review is not in any way incompatible with the trust requirement imposed by the 1932 Act. Therefore, had it been asserted, I may well have been satisfied that this also would be a lawful basis for such condition.

50. It might be said that this argument could not succeed in that the "imposer" of this condition was the NPWS, which is not the owner. That is not so. On the 23rd December, 2008, a submission was made to the Minister setting out in full the underlying problems, the consultation process engaged in and the solutions debated. A decision had to be made so his approval was sought: that was given in February, 2009. It was his authorisation which triggered the move: implementation which is quite a different matter, was well within the power of the NPWS, preceded as it was by the process referred to. I would therefore not accept such criticism in this regard.

51. Having come to this conclusion it is strictly not necessary to deal with the following point, but I do so because of the submissions made. It is claimed that the only regulatory approach within which the respondents could consider imposing the condition which they have, is via the bye-laws.

52. The bye-laws as made deal with matters typically found in this method of secondary legislation; for example, they cover vehicular traffic, animals, persons riding or in charge of horses, camping and caravanning, musical performances and dancing, public addresses and assemblies *etc*. One such bye-law, 3(9), establishes a licensing system for entry into the park of jaunting cars and other such vehicles carrying passengers for reward; (para. 17 *supra*). There is therefore nothing unusual in their provisions.

53. It seems to me that the respondents could have utilised this method of implementation if they so wished. The power to do is available in s. 14 of the Act. That section does not, however, by express words, seek to impose its terms on the generality of the duties, powers and responsibilities previously contained in ss. 10, 11 and 12, or *vice versa*. I can see no basis to imply such an imposition, which if it existed, would restrict and prohibit the utilisation of such provisions. Accordingly, I believe that the respondents could have opted for either approach to impose the impugned condition. One did not exclude the other. The phrase "*expressio unius est exclusio alterius*" has no application. Either was available: once lawfully done it was a matter for them. Therefore, I would reject this submission.

54. A suggestion has been made that by insisting upon this requirement, the respondents are indirectly delegating to the jarveys their statutory power to manage and maintain the park, which they cannot do. This is a rather surprising submission. Far from delegating responsibility, the real complaint is that the respondents are in fact exercising responsibility. Moreover, it is seriously inconsistent with the primary claim that dung removal by way of dung catchers is not in fact, an act of maintenance or management. Perhaps what is intended is an argument to the effect that the exercise of the power is for an impermissible purpose *i.e.* costs savings. I cannot accept this. Whilst some savings will undoubtedly result, the same is an incidental benefit of the requirement and no more.

55. A number of cases were opened on the rule, '*delegatus non potest delegare*': I cannot see how any are relevant. *Hoey v. Minister for Justice* (para. 25 *supra*) related to the responsibility of the Minister for Justice and/or Local Authorities to secure suitable court house accommodation under the Courthouses (Provision and Maintenance) Act 1935. Unless the passage at p. 343 of the report is the one upon which reliance is based, I cannot think that the decision has any influence on this case. *Crofton v. Minister for the Environment, Heritage and Local Government* (para. 29 *supra*) is very definitely not a delegation case: it is a case where the exercise of a discretionary administrative power was under challenge as being controlled, and not simply influenced, by policy considerations. It really has no relevance to the present issues.

56. The applicants submit that even if the incorporation of the requirement is lawful, its enforcement by way of access denial is wrong *simpliciter*; alternatively, the only deprivation available is that provided for in s. 15(5) of the 1932 Act. (para. 16 *supra*) As noted, neither the 1932 Act nor the bye-laws are being impugned as such. Therefore, both are and must be regarded as valid and lawful. That means that under bye law 3(9) the jarveys can only enter the park in accordance with and pursuant to a permit. Otherwise they have no right to enter. The Commissioners are in charge of this regime: they have now with approval, inserted the impugned requirement. This Court has held that it is valid. Therefore compliance with it and the other permit conditions is a pre-condition to entry. Consequently, I am satisfied that enforcement by restriction is lawful. Further, I would be equally satisfied that the power to make, includes the power to enforce, provided that the method adopted is otherwise lawful and respects matters such as fairness, proportionality, reasonableness and the like. In my view, no concern arises in relation to such matters in this case. Finally, although not relied upon, ownership rights are also relevant. (paras. 60 and 61 *infra*). Consequently in my view the enforcement steps taken were both justified and lawful.

57. It is claimed that by the imposition of this condition the applicants are being discriminated against by reference to their fellow jarveys who operate from the Gap of Dunloe and secondly, by reference to others who saddle horses in the Park. Immediately may I say that I have grave doubts if any basis whatsoever exists for this submission: however, since the respondents dealt with the issue, (whilst maintaining the point), this Court should likewise do so. The evidence in this regard clearly demonstrates that the situation out of the Gap is entirely different to that existing on the other routes. The reasons for this, include the fact that the number of jarveys is much smaller and that the area of the Park travelled by them is much shorter. Therefore, the difficulties encountered from the

applicants' use of the Park are greatly different in scale, frequency and effect than the comparable difficulties relative to their fellow jarveys of the other category. This differentiation has long since been recognised by the respondents, and is witnessed by the fact that no licensing requirement has ever existed in respect of such jarveys. Therefore, I conclude that any difficulties with the Gap of Dunloe jarveys are entirely different from those experienced with the applicants.

58. The second group referred to in this submission are those who pony trek within the Park and those who otherwise saddle horses therein. This group cannot be identified with the applicants in any way material to this case. The frequency of use is entirely different, and is much less intense. In any event they predominantly use bridle paths which are disconnected from the main thoroughfares.

59. As a result I cannot identify by reference to either group any attack on the applicants' constitutional rights, much less, an unjust attack. If it can be said that there is some element of unequal treatment which I do not accept, this can be both explained and justified by the differing circumstances attaching to each group and their members as distinct from the jarveys as a group and their members.

60. The applicants have also asserted that, their right to earn a livelihood, as guaranteed by Article 40.3.1° of the Constitution has been breached. That Article reads:-

> "40.3.1° The State guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

That a person has such a right to earn a livelihood, from any lawful vocation, trade, business or profession, is not in dispute. This right is not absolute and may be regulated in certain circumstances. (See *Blake & Ors v. The Attorney General* [1981] ILRM 34, and *A.G. v. Paperlink* [1984] ILRM 373). However, before any such evaluation becomes necessary, it is essential for the applicants to establish that there has been an 'attack' on their rights and that such is an unjust 'attack' on such rights.

61. The Park in question is State owned: it is not owned by the jarveys. Therefore, access as of right for business purposes cannot be said to exist. The public "impress" arising out of the 1932 Act does not confer such a right and neither can it be grounded on any vague assertion such as customary, traditional or citizens user. Consequently, permission is required. This applies whether the owner is a private individual or the state. Therefore, on first principles it is very difficult to see how the specified requirement could constitute an attack, much less an unjust attack, on the applicants' rights to earn a livelihood. (See *Casey v. Minister for Art, Heritage, Gaeltacht and the Islands* [2004] IESC 14).

62. If however, one had to further consider this issue, it is clear that the requirement applies to the Park only and not elsewhere: that the obligation is simple and straightforward and that it is at most a minimalist requirement of entry. Indeed, the respondents have provided specifically sourced disposal skips located at each of the five junction stations in the Park into which the waste is put. Thereafter, these skips are emptied by the respondents at their cost with no further involvement from the applicants. Further t should be noted that the jarveys are an exceedingly privileged group of people: they have a magnificent arena in which to carry on business: more than one million people visit annually: no other National Park in Ireland permits jarvey cars, and all for the cost of €25.00. Consequently, if the condition was an impediment, it could only be described as *de minimus*.

63. In the written submissions it is claimed that the actions of the respondents are unreasonable and disproportionate: both can be addressed together, although it must be said that little debate was had on either during the course of the hearing. The reasonableness point can be tested by asking whether the decision "plainly and unambiguously flies in the face of fundamental reason and commonsense". See *the State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 at 658. A consideration of the overall circumstances is necessary in this respect. These circumstances are also relevant to the second aspect which can be assessed by evaluating the relationship between the condition and the method of enforcement on the one hand and the aims and objectives sought to be achieved on the other. (See *Radio Limerick One Ltd v. Independent Radio & Television Commission* [1997] 2 I.R. 291. Without trespassing on the substantial merits of the case, it can be said that the pertinent context centres on this facility, (with its multiple diverse users), which is the envy of many outsiders. It is of international importance and is designated in the manner described at para. 2 of this judgment. It is recognised as being a high quality National Heritage Centre with some beautiful landscape and scenery, and it is both a local and national asset which generates significant revenue for the economy. Within the Kerry region, it has been justifiably described as the "jewel in the crown". Over one million people visit the National Park annually. It is imperative to exploit this amenity, to maintain this level of attraction and, of course if possible, to grow it. Its importance therefore, well transcends the jarveys and their interest in it.

64. Further the difficulties which the respondents sought to address arose out of their desire to retain the natural environmental beauty of the area whilst responding to an ever more discerning visitor who demands a quality product and value. To be successful in this regard, the problems identified at para. 45 *supra* had to be addressed.

65. The process by which this task was undertaken demands an acknowledgement of the commitment which the NPWS had in seeking an accommodation with the jarveys. I will not repeat the efforts they made, all of these are well documented. Rarely have I seen such willingness to try, test, re-test, change and if necessary, even commence afresh. They must be commended. The response was the antithesis of the effort. Nothing further needs to be said in that regard.

66. Given the mischief sought to be remedied, can it be said that the imposition of the requirement was unreasonable as judged by the test in *the State (Keegan*)? Can it be said that the requirement was disproportionate to the underlying problems or the method of enforcement disproportionate to the jarveys refusal to engage? In my view, both propositions are unstateable.

67. I would, therefore, dismiss this action.