Neutral Citation: [2013] IEHC 411

THE HIGH COURT

[2009 No. 316 SP]

IN THE MATTER OF THE TRUST ESTABLISHED BY DEED EXECUTED RELATING TO CERTAIN BOG LANDS IN COUNTY CAVAN

BETWEEN/

JOHN O'REILLY, JOHN REILLY, JAMES BRADY, THOMAS GILLICK, JOHN TARRAGON, JAMES SHERIDAN, JAMES FITZSIMONS, JOSEPH HENRY, EDWARD DUFFY, MATTHEW MULDOON, SEAN KELLET AND PETER FOX

PLAINTIFFS

AND

PATRICK O'CONNELL, SEAN O'REILLY AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 19th June, 2013

1. On 7th March, 1921, the Marquis of Headfort entered into an arrangement by deed of trust with certain named farmers who were tenant purchasers of the Marquis' lands contained in the Headfort Estate under the provisions of the Irish Land Act 1903. The principal object of the deed was to preserve the rights of turbary in respect of some 900 acres of bog land. To this purpose the deed conveyed the lands in question in fee simple "subject to such rights of turbary and other rights as the tenant purchasers or any tenants of the Marquis now have over and upon the said lands". It is likewise plain from the recitals to the deed that one of its objects was to secure the rights of turbary of the tenant purchasers.

2. To anticipate somewhat, the principal issue which I am required to determine in this judgment is whether the plaintiffs who are the trustees under the trust deed are obliged to use monies received in 1999/2000 and 2006 from the Minister for Arts, Community and the Gaeltacht by way of compensation in return for sterilising the major remaining functioning bog, Cloughbally Upper, to compensate in turn those who were accustomed to use that bog for turf cutting purposes. But before considering any of these questions it is necessary first to set out the relevant provisions of the trust deed.

3. Clause 2 of the trust deed provides that:

> "The trustees shall permit the said tenant purchasers and their sequels in title registered owners for the time being of the holdings purchased by the said tenant purchasers as aforesaid (hereinafter called 'the registered owners') and all persons holding under cottier tenancies for the time being resident on the lands in the County Cavan settlement…and also all tenants of the Marquis in occupation of lands in the Counties of Cavan and Meath comprised in the said indenture of settlement who have been heretofore accustomed to cut turf on the premises hereby granted or on any part thereof and the sequels in title of such tenants in their holdings and (all of whom are hereinafter referred to as 'the beneficiaries') to cut, make and save turf upon the premises hereby granted at such times and places but not so as to prevent any beneficiary cutting turf in the place where he has been heretofore accustomed to cut same upon such condition and subject to such regulations as to payment and otherwise as the trustees may from time to time direct or prescribe and may be in accordance with the rights to which the beneficiaries may be entitled otherwise than under these presents."

4. The trustees are further given the power:

> "to define and fix as aforesaid the portions of the premises granted which may from time to time be used for each of the several purposes hereby contemplated."

5. The trust deed also gives the trustees power to fix according "to a uniform scale the annual or other contributions to be made by each of the beneficiaries as to the costs and expenses of an incidental to the carrying out of the trusts". Thus, for example, the first defendant, Patrick Connell, paid the sum of IR£25 in 1998 for an annual bog ticket in respect of a particular plot at Cloughbally.

6. Over the years the range of bogs identified in the trust deed as being suitable for the exercise of the rights of turbary has diminished. In some instances the bogs have been sold (the trustees having the power of sale and lease under the deed) and in other cases it has not been considered worthwhile to exercise these rights. Nevertheless, in the years since 1921 turf cutters have purchased tickets from the trustees enabling them to go unto the bogs in order to cut turf.

7. The present application relates, however, to one of the largest bogs which was the subject of the trust deed, namely, Cloughbally Upper (or Killconny) Bog. This is a raised bog 235 acre bog which is situate near Mullagh, Co. Cavan, close to the Cavan/Meath border. The other functioning bog under the control of the trustees is at Lislea, perhaps some 10km. distant. It is necessary, however, at this juncture to describe the Lislea bog.

The Lislea Bog

8. The evidence before me established that Lislea occupies about 55 acres, of which the total spreadground was just under 15 acres, leaving just over 40 or so acres of actual bog. Turf cutting on this bog commenced in 1998. Mr. Sean Canny, an agricultural consultant and valuer, gave evidence that this would accommodate 600 tonnes of dry turf per year. To put this in context, Mr.Canny's expert report noted that in 2011, 87 householders purchased 656 hoppers of wet peat. One such hopper was estimated to hold approximately 7.2 cubic metres of wet peat. Given a 32% moisture content, this translates into the equivalent of 0.9 tonnes of dry turf, given a total output of 590 tonnes. Mr. Canny stated in evidence that he considered that, given existing production levels, Lislea bog would last for well over another 100 years. Indeed, with improved drainage, the capacity of the bog might itself be increased.

The Cloughbally Bog

9. The deed nominated certain persons as trustees appointed by the tenant purchasers. Orders were made by the Circuit Court in 1957 and in 2007 appointing new trustees. The present issue arises following the designation of the Cloughbally Bog as a special area of conservation under the Habitats Directive 1992/42/EEC, which Directive was transposed into national law by the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997)("the 1997 Regulations").

10. The background to this designation was as follows. In March, 1997 the Minister for Arts, Culture and the Gaeltacht proposed to designate the bog as a special area of conservation. One consequence of this designation was that turf cutting on the bog would no longer be permitted. Mr. Liam O'Reilly, an assistant principal in the Department gave evidence (which I naturally accept) that the entire object of the designation was to protect this raised bog and that there was no reason to think that the Department would ever agree to release the trustees from this particular restriction.

11. It appears throughout 1999 the trustees were in discussion with Dúchas (as representatives of the Minister) regarding a possible sale of the bog and, alternatively, a compensation regime. While Dúchas appears to have been anxious to purchase the bog, the trustees, having consulted with the tenants, agreed not to sell the bog, but to opt for a regime of compensation instead.

12. Article 20(1)(a) of the 1997 Regulations provides that where the Minister refuses to consent "to an operation or activity under Chapter III", then the Minister shall (subject to exceptions) pay:

> "to the owner or occupier or user as the case may be by way of compensation an amount equal to the loss suffered by the owner, occupier or user *by the depreciation of an interest in the land to which he or she is entitled*." (emphasis supplied)

13. The underlined words are of some importance in this context. It is plain from these words that the compensation is referable only to persons with a proprietary interest in the land. In other words, it is irrelevant as such that the occupier or user might have suffered some financial loss by reason of the cessation of a particular activity. Rather the compensation was payable under Article 20(1)(a) of the 1997 Regulations only in respect of an actual depreciation of an interest in the land.

14. What, then, is an interest in land for this purpose? It clearly refers to all species of proprietary rights in immoveable property. In the present case, therefore, Dúchas paid compensation to the trustees. The issue of paying compensation to those who frequently used the bog for turf cutting purposes was examined, but as Eamon Brennan, the Assistant Director of Dúchas explained by letter dated 15th July, 1999, to Mr. Joe Duffy, the then secretary of the Killyconny Trust, Dúchas considered that it could only "deal with registered title holders, which would not appear to include the tenants". Mr. O'Dwyer gave evidence that the Department had accepted statements from the trustees (along with the terms of the trust deed itself) regarding the right of ownership.

15. A compensation agreement was subsequently concluded between the plaintiff trustees and the Minister on 4th February, 2000, as a result of which it was agreed that the sum of IR£257,692 would be paid. A further sum of €212,021 was paid to the plaintiffs by the Department on 21st February, 2006. As of the end of February, 2013 the trustees had a combined total of just over €580,000 standing to their account. One of the current trustees, Mr. James Brady, gave evidence that some capital gains tax may nevertheless ultimately be payable on this amount.

16. The agreement recited that pursuant to Article 20 of the 1997 Regulations the trustees acknowledged that the:

> "compensation represents the loss suffered by the applicants by the depreciation of their interest in the property as a result of their not being in a position to exercise their right to issue licences and/or permissions to any person to cut and remove turf on the property from this day forward [and further agree] that they will not from this day forward exercise their right to issue licences and/or permissions to any person to cut and remove turf on the property to the intent that the right shall hereinafter be extinguished."

17. It is accordingly clear that the plaintiff trustees remain owners of the bog and that the compensation which they received was in respect, essentially, of the loss of turbary rights, as cutting on this bog ended in 1999. This brings us directly to the issues at the heart of this litigation. The plaintiffs have in essence filed a construction summons asking whether they are at liberty to distribute the compensation monies to the persons who were cutting turf on the Cloughbally Bog or whether such monies should be retained by the trustees. In the alternative they ask whether the trust is a charitable trust and in the event that it is not, whether these funds can be applied *cy prês*.

18. This judgment addresses the first of these questions only, as by consent the other issues have been postponed pending the determination of the first question. Indeed, the charitable trust and the *cy prês* questions arise only where the first question is answered adversely to the defendants. I should pause here to explain that the Attorney General has elected to take no part in the proceedings. The first defendant, Patrick Connell, is sued as a representative of the beneficiaries under the trust deed and the second defendant, Sean O'Reilly, is sued as a representative of claimants comprising beneficiaries who cut turf up to 1999 on the lands comprised in the turf which are now a special area of conservation.

The nature of rights of turbary

19. Although the status of turbary rights is not an issue which has exercised this Court or the Supreme Court in recent times, the issue here is nevertheless covered by authority. In *Re King-Harman's Estate* [1908] 1 I.R. 202 the Land Commission had purchased land - on which a Mr. Acheson was the occupying tenant - comprising a quantity of turf within its ambit. Prior to the sale to the Land Commission, it was the custom for the erstwhile landlord to supply other tenants on his estate with "bog tickets" which authorised them to cut and take turf on from the lands in Acheson's holding. The latter subsequently purchased his holding from the Land Commission, but there was no express reservation of any turbary rights.

20. The old Irish Court of Appeal held that in those circumstances the Land Commission could not make regulations permitting Acheson's neighbours to come onto the lands for the purposes of cutting or making of turf. While it is true that this case largely concerned the powers of the Land Commission under the Irish Land Act 1903, the case nevertheless proceeds on the assumption that the bog-tickets did not give the holders any easement or quasi-easement in respect of the lands. As FitzGibbon L.J. put it ([1908] 1 I.R. 202, 210):

> "It was within the landlord's discretion to give bog tickets or not, and to charge what he pleased for them. No right or privilege could be acquired under that course of dealing, beyond what each 'ticket' gave him; and no ticket was outstanding when the sale to Acheson was completed."

21. A similar view was taken by the King's Bench Division in *Callinan v. McMahon* [1918] 2 I.R. 1 in respect of a case with not

dissimilar facts to *King-Harman*. Here both the plaintiff and the defendant had purchased their lands from a landlord, Mr. Burton, and neither sale contained a reservation of turbary. Prior to this purchase there had been a tract of bog which had extended over three tenant holdings, A. B and C. The defendant and his father had worked a particular turf bank on A.'s lands until about 1903 when it was exhausted. The landlord's bog-ranger than directed the defendant to a new bank of bog on which he was to cut his turf, but unlike *King-Harman*, the defendant was not required to purchase a bog ticket. This particular bank was situate within the plaintiff's then tenancy, but the lands were then subsequently purchased by him without any saver for turbary rights. The King's Bench Division (Gordon, Kenny and Gibson JJ.) found for the plaintiff.

22. While the three judges differed slightly in their reasoning, the following views of Gordon J. put it ([1918] 2 I.R. 1, 8) may be taken as representative:

> "Before the vesting the only privilege which the defendant had was to cut turf on such part of the bog in such part of the three holdings – on which the plaintiff's was one – as should be pointed out to him by the landlord. The privilege was not to take the plaintiff's turbary, but to take the turbary which belonged to the landlord; and, so far as the plaintiff's holding was concerned, the only privilege [the] defendant enjoyed was to go over it, and take this turbary when permitted or directed by the landlord to do so. As a matter of fact, the defendant had been allowed by the landlord to take turbary on the plaintiff's holding for about fourteen years before the vesting of the holding in the plaintiff. This was not such a length of time as, if the holding belonged to a different owner from the rest of the estate, would have created an easement or right".

23. In my view, it is difficult to distinguish the present case from that of *King-Harman*. The beneficiaries are, in fact, the member of a class of persons who enjoy a contractual licence to go onto the trustees' bog in the manner directed by them upon the payment of a fee. This is borne out by the standard form bog tickets issued by the trustees which gave the holder an annual licence during the cutting period in return for a stipulated fee.

24. It is true that the ticket holder was called a "tenant" and the fee payable was called a "rent". Yet the ticket holder enjoyed no interest or estate in land by reason of this fact alone and the very fact that the ticket holder agreed to remove all turf cut and saved by him by the end of the cutting season is indicative of this. In reality, this was little different in law than, for example, a daily green fee paid by a golfer which gives him or her the right to play golf on a particular golf course in return for payment of that fee.

The right of the beneficiaries under the trust deed

25. While the trust deed contemplated that there might well be categories of tenants on the Marquis' estate who prior to 1921 had "been heretofore accustomed to cut turf on the premises hereby granted or any part thereof", it appears to be accepted that it would be all but impossible at this remove for any successor in title of such persons to establish such a right or practice. Certainly, no evidence has been led to this effect. It is, accordingly, clear that such rights as the representative defendants have derive entirely from the trust deed itself.

26. So far as the identification of the successors of the registered owners is concerned, this also presents its own logistic difficulties at this remove. Much of the individual tranches of land purchased in the years before and after 1921 by the tenant purchasers has since been sold off and sub-divided. Not least in recent times, some of the land has been sold for one-off housing developments. The plaintiff's solicitor, Mr. Condon, testified as to these practical difficulties. He stated that the 2006 census returns showed that there were 1,002 households and 2,049 persons in the 31 townlands named in the trust deed. On this basis it was estimated that there were probably some 800-1,000 registered owners, albeit that no meeting of the registered owners (as that term is defined in clause 2 of the trust deed) has apparently taken place since about 2000.

27. It is nevertheless the case that some registered owners can be identified. The first defendant, Mr. Connell, is, of course one such owner and is sued in a representative capacity of such owners.

28. The secretary of the trustees, Mr. Alan Duffy, gave evidence that his late father, Joe Duffy, had prepared a list of cutters for the Cloughbally bog, but this was neither scientific or comprehensive. Another trustee, Mr. Brady, stated that the late Mr. Duffy had endeavoured to work out a list of registered owners with incomplete success, although it was acknowledged that the compilation of such a list might now be easier given the computerisation of the Land Registry records. Even if this task could be performed, it would present huge logistical difficulties for the trustees, since even if such a list was to hand, the task of determining who did (or did not) consistently cut turf on the Cloughbally bog in (say) the five years prior to 1999 would not be an easy one.

29. In fact, the evidence available suggests that the total number of cutters on the Cloughbally varied between a high of 64 in 1990 and 78 in 1998. Of these a significant proportion have been identified as beneficiaries by the trustees, but it is equally acknowledged that the trustees permitted significant numbers of persons not otherwise strictly entitled to cut turf *qua* beneficiaries on the Cloughbally bog.

30. The evidence establishes nevertheless that both representative defendants, Mr. Connell and Mr. O'Reilly, were granted tickets to save turf on Cloughbally bog for at least five years prior to 1999. By this stage technology had moved on and turf was being cut by automated hopper machines, with the tenants being allocated plots to dry and save the turf. The advent of automation – a world away from the idyllic paintings of turf-cutting beloved of Jack Yeats and Paul Henry – was, in any event, inconsistent with any assertion of an entitlement to cut turf in any particular bank within a bog.

31. Here it must be observed that the trust deed does not give any of the beneficiaries the right to cut at a particular place or even on a particular bog. It is true that the trust deed referred to a particular place ("…but not so as to prevent any beneficiary cutting turf in the place where he has been heretofore accustomed to cut same upon such condition and subject to such regulations as to payment and otherwise as the trustees may from time to time direct or prescribe..."), but this must be clearly understood as a right personal to particular beneficiaries as it existed immediately *prior* (or, in the words of the trust deed, "…where he has been heretofore accustomed to cut…") to the execution of the trust deed in March, 1921. It does not mean that registered owners have a right to use a particular bank on a bog or even the right to use a particular bog. Even if they had, this right was subject to the express power of the trustees contained in the next few words of the trust deed to prescribe otherwise.

32. All of this is of some importance because it means that all that the entitlement of a beneficiary was simply to cut and save turf, but not to cut and save turf on any particular bog. Viewed in this light, the beneficiaries have not lost the right of turbary vested in them by the trust deed by reason of the sterilisation of Cloughbally Upper bog. They still have that right, but it must be exercised elsewhere.

33. It is true that the Lislea bog may not be quite as convenient for some and undoubtedly reservations have been expressed about

its capacity to accommodate all potential beneficiaries. Yet there were some 87 cutters on that bog in 2011, a figure which roughly corresponds to the highest figure for Cloughbally Upper in the late 1990s. There is, moreover, the evidence of Mr. Canny which suggests that Lislea has sufficient capacity to accommodate turf cutting for the more than another 100 years.

Conclusions

34. If we endeavour, therefore, to piece together the remaining elements of this complex legal jigsaw, a number of conclusions stand out. First, the right of the beneficiaries under the trust deed is, like in *King-Harman*, that of a contractual licensee. In other words, the beneficiaries under the trust deed enjoyed the sole right to pay the trustees for the right to go onto the bog to cut turf in the manner directed by the bog ticket for the cutting seasons. In strictness, the beneficiaries also had the right to object to the benefits of this contractual licence being afforded to those not otherwise entitled under the deed, but in practice this never happened. Critically, however, this right under the deed did not confer an estate or interest in land.

35. Second, it being accepted that no person can presently establish turbary rights in respect of the Marquis of Headfort's bogs by virtue of established pre-1921 user, the rights of any present beneficiary derive *entirely* from the terms of the trust deed.

36. Third, none of the beneficiaries have the right to cut at any particular place or bank or even bog. Even if they had, such a right could be overridden by any reasonable direction of the trustees. Their right is rather to cut and save turf on a bog as directed by the trustees. Viewed thus, that right has not been interfered with.

37. Fourth, the right conferred by the trust deed is in the nature of a contractual licence to come on to land to cut and save turf on payment of a fee and is not in the nature of an interest in land as such. It may be that some of the beneficiaries such as Mr. Connell would be able to show such established user on their own part and that of their predecessors in title that their contractual licence had ripened into some form of quasi-easement, but even if they engaged such a right it is not exercisable *over any particular bog* as such.

38. Fifth, the critical point under Article 20 of the 1997 Regulations is that the compensation was payable in respect of "an amount equal to the loss suffered by the owner, occupier or user by the depreciation of an interest in the land to which he or she is entitled." In this context, the loss in the interest in the lands is clearly that of the trustees, since they are the registered owners of the lands. The sterilisation of the lands in this fashion has affected their proprietary interest in the lands and this is why the compensation was correctly paid to them.

39. Sixth, it may well be that Mr. Connell (and other members of the class of beneficiaries which he represents) enjoy some form of quasi-easement in respect of turbary rights. But even if this is so, their rights in law were not directly affected by the effective closure of the Cloughbally Upper bog, since the only right they enjoyed was to cut turf, but to not cut turf at any particular location. One can, I think, naturally understand their sense of grievance and upset by reason of the closure of the Cloughbally Upper bog and the fact that they received no compensation. Turf cutting on the bog had undoubtedly been, for many of them, an important feature of their lives which should properly be acknowledged. Yet, I think, on reflection they will appreciate the limited – if to them important – nature of the right they enjoyed under the trust deed. It could scarcely have suggested in the past that when some of the smaller bogs were sold or acquired that the beneficiaries were thereby entitled to compensation.

40. Nor for this very reason can I agree with the arguments advanced on behalf of the defendants to the effect that the trustees hold the land as bare trustees for the beneficiaries. Rather, they are the owners of the lands who have no personal interest in the lands, but who hold the lands subject to certain trusts for the benefit of a class of beneficiaries whose right to cut and save turf they can properly regulate.

41. It follows, therefore, that the trustees were and are entitled to the monies paid to them by Dúchas by way of compensation in respect of the cesser of turf cutting at Cloughbally Upper bog.