APPROVED

THE HIGH COURT

[2024] IEHC 191

[Record No. 2008/7621P]

BETWEEN

HARRY MCHUGH

PLAINTIFF

AND

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT

DEFENDANT

JUDGMENT of Mr Justice Nolan delivered on the 11th day of April, 2024

1. This is an application to strike out the proceedings pursuant to Order 19, rule 28 of the Rules of the Superior Courts or in the alternative pursuant to the inherent jurisdiction of the court. The background to the case is somewhat complicated, as Noonan J., noted in a judgment given in the Court of Appeal on a procedural issue.

2. In a nutshell the plaintiff's case is that the lands of which he was the beneficial owner and is now the legal owner, being Folio 13609 of the Register of Freeholders in the County of Donegal at Cashelgolan, Port Noo, ("the lands"), were illegally designated as a candidate special area of conservation ("cSAC"). Therefore, he seeks declarations that the designation of the lands was null and void on the basis that the defendant unlawfully transposed certain EU Directives and Regulations into Irish law. He also seeks compensation for the depravation of the use and benefits of the lands.

3. The defendant says that the directives were correctly transposed, and that the plaintiff has no *locus standi* since at the time that the lands were designated, he did not own them and even if he did the claim is statute barred. Further that the plaintiff is seeking double recovery since he is also maintaining a second claim seeking the same or similar reliefs. Finally, the Minister says that this is a judicial review masquerading as a plenary case and therefore the plaintiff is very much out of time given that the events in question occurred decades ago.

Background

4. Prior to 1997, the lands were owned by the plaintiff's uncle, Peter McHugh. He died in 2002 and thereafter the plaintiff became his executor and beneficiary and in due course, legal owner of the lands.

5. In 1997, pursuant to Council Directive 92/43 EEC of 21 May 1992, known as the Directive on the Conservation of National Habitats and of wild fauna and flora ("the Directive"), was transposed into Irish law by SI 94 of 1997 European Communities (Natural Habitats) Regulations 1997. Proposals to designate certain lands were publicly notified nationwide. A vast area known as West of Ardara/Maas Road was designated for the purposes of protecting the habitat, animal and plant species. Annex I of the Directive sets out the natural habitat types for community interest whose conservation requires the designation of special areas of conservation, whilst annex II sets out the animal and plant species of community interest whose conservation requires the designation for special areas of conservation. The animal and plant spices may be separately, together or independently present in an area land.

6. A small part of the total area included the lands owned by the plaintiff's uncle, were chosen and proposed as a cSAC.

7. Crucially from the perspectives of the defendant, Peter McHugh did not challenge the designation.

8. As time went on, the boundaries of the cSAC, in consultation with local landowners, farming groups and other associated individuals, were changed. There seems to have been a general collaborative attitude between landowners and the Minister in relation to how this was achieved for the benefit of the landowners.

9. In 2002, Peter McHugh died. On the 24th of January 2003, the plaintiff received a letter from the defendant entitled "special area of conservation West of Ardara/Maas Road" and a booklet setting out that his lands may be included in the area indicated on the map. It also told them that if he wanted to make any significant changes to farming on the lands, he would require the written agreement of the Minister. The booklet set out why the area was of ecological interest, noting that it contained at least 23 habitats, which were listed in annex I of the directive, including blanket bog and other areas of ecological interest. Whilst the wording of the letter is somewhat opaque, it is clear that this was not the first notification since the actual designation had occurred in 1997 and was simply a notification of a change of boundaries.

10. He sought to appeal the original designation and, in a letter, dated the 11th of December 2003, his then solicitor acknowledged that the area in question had been expanded on three separate occasions. He also sought the scientific evidence which justified the designation. Much correspondence continued between the parties but to no avail. It was clear the plaintiff was not happy.

11. On the 4th of December 2006, he received another letter from the department. It noted that in August 2004, a new agreement on cSAC boundaries for rivers had been negotiated. The key points where that there would be a reduction in the area of land included on either

side of the river, unless it was a floodplain or a wildlife habitat within close proximity, as well as extensions to include salmon spawning areas.

12. A map of the revised area proposed for designation was enclosed, setting out why the area was of ecological interest, the areas to which it would apply, species affected and the works which required the consent of the Minister.

13. The booklet set out a method to object to the designation as well as two forms of appeal on scientific grounds only, the second to a Designated Areas Appeals Advisory Board.

14. Farmers would be entitled to a modest compensation in the event that their lands were affected by the designation. The compensation scheme was identical to those which would apply to lands included in any proposed natural heritage area. There was also compensation available for actual losses incurred as a result of restrictions imposed on the land.

15. Following receipt of that notice the plaintiff raised objections and sought compensation but was unsuccessful since in the meantime he had applied for approval for afforestation of 28.73 hectares of his lands. Not surprisingly he was refused since it would adversely alter or detrimentally damage the area of cSAC.

16. Between 2007 and 2008, he appealed many times, but it would seem from information obtained in July 2015, that these appeals were never processed and could not be traced.

17. Arising from the designation and the refusal he says that he has sustained losses of at least €1.5 million.

18. However, crucially neither of the boundary changes in 2003 or 2006 actually affected the lands of the plaintiff. But that is not how he sees it. He says that the receipt of the two notifications gave rise to his cause of action.

The Plenary Summons

19. On the 17th of September 2008, the plaintiff's then solicitors issued a plenary summons. In it, he sought declarations and damages for losses arising from the refusal to designate the lands to conversion to afforestation which, he alleged, was in breach of statutes, regulations and directives. He alleged that the selection criteria used in the designation process were incorrectly applied and in breach of law. Finally, he wanted an order directing the defendant to reassess his lands for the purposes of his application for afforestation. The whole thrust of his claim related to seeking either overturn the refusal to plant trees in the cSAC or in the alternative compensation.

The Statement of Claim

20. Nothing happened for years until the 21st of May 2014 when the plaintiff delivered a statement of claim.

21. In it he alleged that 86 hectares of his lands were designated as a cSAC, noting that the planting of trees was a notifiable action which would require the Minister's consent which was refused, as was compensation. He alleged that the lands were designated based upon a crude rapid survey done in areas of scientific interest with no correlation to ecological boundaries. The minister had failed to apply due process and had refused to provide evidence justifying the designation. He sought damages or alternatively the appointment of an arbitrator pursuant to the Acquisition of Land (Assessment of Compensation) Act 1919 to measure his losses.

22. Over the following four years he served a number of amended statements of claim without order of court. However, in June of 2018, Barniville J. allowed the plaintiff to amend his pleadings, but crucially provided that the defendant had the right to plead any defence that may arise from the amended or original statement of claim.

The Amended Statement of Claim

23. The amended statement of claim introduced over 45 new paragraphs, 32 new reliefs and materially altered the thrust of his case. At this stage, the plaintiff was now a personal litigant and even by his own admission, some of the reliefs were not appropriate to any legal proceedings.

24. He alleged a multiplicity of matters including negligent misstatement, fraudulent misstatement, arbitrary decision-making and the compulsory taking of his land as well as breaches of his constitutional rights. The plaintiff went on to seek multiple declarations often repeating the same claims in slightly different wording.

25. At para**.** 34 the plaintiff refers to the appointment of a property arbitrator which is relevant to the defendant's contention that he seeks double recovery.

The Property Arbitrator

26. In September 2014, the plaintiff sought the nomination of a property arbitrator ("the arbitrator") pursuant to the Property Values (Arbitration and Appeals) Act, 1960 and the Acquisition of Land (Assessment of Compensation) Act 1919. In that document, the plaintiff set out the reason why he was seeking the nomination of a property arbitrator namely compensation for "*the compulsory acquisition of lands."*

27. Following that nomination in October of 2014, the Chief Justice, as chairperson of the reference committee, nominated Michael Neary, as a arbitrator under the Act. On the 28th of October 2014, he wrote to all the parties directing service of pleadings and appropriate evidence. A statement of claim and points of reply were delivered**.** Thereafter, submissions were made and, ultimately, a hearing was opened in July 2015.

28. The defendant submitted that the arbitrator did not have jurisdiction in relation to the claim for compensation on the basis that compensation was not payable under the

Regulations. The arbitrator then wrote to the parties identifying certain issues which he believed involved statutory interpretation that could only be resolved by way of a case stated to the High Court. He invited the parties to submit draft questions for a case stated, together with legal submissions. The defendant did so but the plaintiff did not. Ultimately, the arbitrator adjourned the matter *sine die,* noting that it was a matter for either party to initiate legal proceedings to determine his jurisdiction. He confirmed that the arbitration hearing would not resume until such time as the legal proceedings were heard and determined.

29. No proceedings were instituted either by way of case stated or by any otherwise while Mr. Neary remained as the arbitrator.

30. In due course, Mr. Nearly retired and his successor, Mr. Paul Goode, was appointed in his place. He came to a similar view in relation to his jurisdiction, which prompted the plaintiff to issue judicial review proceedings entitled HJR 2022 258 *Harry McHugh v. The Property Arbitrator (Paul Goode)*. The defendant is *legitimus contradictor* in those proceedings. I will refrain from commenting any further upon them, save to note that they are in the Non-Jury list to seek a date for hearing.

The Defence

31. In September of 2018, the defence was filed. It noted that the order of Barniville J of June 2018, expressly provided that the defendant could raise any appropriate defence. The Minister pleaded that the amended statement of claim did not disclose a reasonable cause of action, it was not pleaded with any degree of particularity and was impermissibly vague and imprecise and constituted a departure from the original cause of action.

32. Among a number of pleas, it pleaded that the plaintiff was not the owner of the property when the site was designated as a cSAC and that any notices served, either in 2003 or 2006, did not affect his property rights, nor did they create a new cause of action.

Therefore, the plaintiff lacked *locus standi* and that either way the case was statute barred whether it was a plenary matter or a judicial review.

33. The plaintiff brought many procedural applications, but one is worthy of comment. He sought a declaration that the defendant was not entitled to raise the statute of limitations as a defence, on the grounds of estoppel.

34. In the Court of Appeal, Noonan J. found that the Rules did not provide for the bringing of a pre-emptive application to prevent parties pleading their case if they wished to advance an argument.

35. He then brought an application for interrogatories and, after another torturous route through the Master's Court and the High Court, certain interrogatories was allowed to be served. He believes that the answers are important since it is clear that the species covered by the Directive, are not on his property, showing clearly that the defendant never carried out any proper assessment of his lands as he submits, he was obliged to do.

The Application

36. The defendant makes submissions, based upon the defence. The plaintiff does not have any *locus standi* because the property was not his at the time of its designation. The defendant says that this is fatal. The designation occurred in 1997 when Mr. Peter McHugh owned the property.

37. The plaintiff says that he does have *locus standi*. He received two notifications in 2003 and 2006. He challenged both and brought his proceedings in 2008. He says the document which he received clearly allows for compensation, thus he has *locus standi.*

38. The defendant says that the two notifications are simply that, and do not create or reactivate a cause of action. Further the notifications of the change of boundary did not affect

the lands of the plaintiff, so therefore he could never have claimed compensation, nor could he institute proceedings based upon their receipt.

39. The defendant submits that the plaintiff is statute barred since the matters of which he complains arose in 1997.

40. In response the plaintiff argues that once he was in receipt of the notifications, time ran from that point onwards. On that basis, he clearly was within time. The notifications gave rise to a reset of time and, thus, he is able to challenge the original designation in 1997.

41. The defendant says that the plaintiff is simply incorrect when he says the Minister must specify with particularity the species and habitats which are on his lands. The plaintiff responds by saying that the interrogatories he received includes references to mussels and salmons and otters, none of which could be on his land.

42. The defendant submits that there never was any attempt to compulsory purchase the lands, a reference which is littered throughout his amended statement of claim. While the plaintiff accepts that there was no CPO order made, he uses the term on the basis that his lands have been deprived of him by virtue of the designation.

43. The defendant says that the plaintiff is riding two horses and is seeking double recovery, since he has proceedings in train in relation to the appointment and jurisdiction of the second property arbitrator. Again, as set out above, that is the subject matter of separate proceedings and, therefore, I will not visit that issue, save to deal with the concept of double recovery.

44. When I asked the plaintiff as to what he was really seeking, he readily accepted it was compensation. I posed the question as to how his proceedings might look if the reliefs from paras. 2 to 32 were struck out but leaving him with a claim for compensation. He hedged his bets somewhat by saying that he would reserve his rights to seek damages for breach of constitutional rights.

45. The final submission of the defendant is that these proceedings are a collateral attack on the Directive itself, and therefore**,** should be brought by way of judicial review. As such, they are an abuse of process since he is well out of time to mount any such under Order 84, either in relation to the transposition of the Directive, or the steps taken by the Minister.

The Legal Principles

46. There are a number of different legal principles in play in this application. In relation to the court's jurisdiction to dismiss pursuant to Order 19 and its inherent jurisdiction to strike out proceedings where there is no possibility of success, it seems to me that the law is clear. (See *Ruby Property Company Ltd v. Kilty* [1999] IEHC 50 and *Salthill Properties Ltd v. Royal Bank of Scotland* [2009] IEHC 207). In in *Keohane v. Hynes* [2014] IESC 66, Clarke J. (as he then was) said as follows:-

> *"The function of the court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontrovertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself."*

47. The law relating to *locus standi* stems from the case of *Cahill v. Sutton* [1980] IR 269 which made clear that there was a requirement on the part of a plaintiff or claimant to establish standing before a court was obliged to entertain a challenge to the validity of legislation.

48. In relation to the Statute of Limitations, the defendant submits that s. 11(1)(a) of the Statute of Limitations Act 1957 provides that any action *"shall not be brought after the expiration of six years from the date on which the cause of action accrued"*.

49. The plaintiff makes no challenge to this submission.

50. Whilst there are other legal issues which arise from some of the other limbs of the claim, it seems to me that the three set out above are comprehensive enough to enable a decision to be made.

Discussion and Decision

51. At all times, Mr. McHugh was courteous and knowledgeable and made his submissions often without reference to notes. It was an impressive presentation.

52. However, notwithstanding his impressive presentation, I cannot find for him. The fact remains that when these lands were originally designated, he was not the owner. If there was any merit in challenging the designation, and I am in no way certain there was**,** that should have been done in 1997. That did not happen and by the time he became the beneficial owner in 2002, time had already passed.

53. The notification of designation of the boundary changes after review and following consultation with interested parties**,** did not give rise to a cause of action or reignite some latent cause of action, it was a revision of boundaries only.

54. That did not give him the right to issue proceedings, for a number of reasons. Firstly, his lands were not part of the revisions which took place in 2003 or 2006. Secondly, if any cause of action arose, it arose to somebody who is materially affected by having their lands redesignated in 2003 or 2006, that was not the plaintiff.

55. Finally, the document itself makes clear that all appeals must be on scientific grounds. The landowner can only seek compensation for actual losses incurred as a result of the restrictions imposed on the land.

56. At no time during this long case has the plaintiff furnished any cogent scientific grounds challenging the basis of the designation relating to his lands.

57. The plaintiff has claimed significant alleged losses, but only after he had sought permission to plant trees on his land, something which he knew was clearly contrary to the whole purpose of the Directive. His calculation of his alleged losses of over €1.5 million must have been based on some interpretation of the potential economic benefits which might have arisen from intensive tree plantation. Given the nature of the habitat in question, which had already been designated a cSAC, there was little or no chance that such permission would ever have been granted, something I suspect the plaintiff knew.

58. Therefore, in those circumstances, I cannot see how it can be argued with any degree of cogency that the notice of intention to designate gave rise to a cause of action or somehow brought to life a cause of action which may have arisen in 1997.

59. Having read the Directive, it is clear that the Member State is not obliged to carry out an examination of the plaintiff's land before it is designated. Nowhere in the Directive is it provided that species have to be identified to a level of precision, such as to identify them on a precise piece of land. Instead, the designation of the site provides for the protection of species in their natural range, which is the overall site, which happens to include the plaintiff's property. Therefore, I cannot agree with the plaintiff's interpretation of the requirement on the defendant to furnish him with actual evidence of the various species which may or may not be in his land or of its habitat.

60. In those circumstances it seems to me, not only does the plaintiff not have *locus standi*, but even if he did, his case is well out of time. On his own case that time ran from 2006, the service of the amended statement of claim in 2018, created an entirely new cause of action. That claim was not sought in the plenary summons served in 2008 or in the statement of claim served in 2014. He cannot go back to 2008 and say that the case that he made in 2018 started then. Therefore, he was clearly out of time no matter which way one looks at the issue.

61. His case involving the property arbitrator, the reference committee and other associated matters are also out of time pursuant to Order 84 of the Rules, given that they are clearly matters for judicial review.

62. Finally, I turn to the case made that the plaintiff is seeking double recovery. Since this is already the subject matter of another judicial review, I will restrict my comments to those argued before me. It is clear that the first arbitrator felt he did not have jurisdiction to hear the arbitration based upon the submissions made to him. It is not for this Court to comment whether he had jurisdiction or not. However, he did leave open the opportunity to the parties to state a case to the High Court. This did not happen.

63. The second arbitrator, recently appointed, came to the same view. The plaintiff has issued judicial review proceedings. In those circumstances, as things stand, the plaintiff is litigating two cases which have as their intent, the awarding of compensation to him in relation to the same matter. This gives rise to the risk of double recovery. Whilst the plaintiff has argued that he does not want to receive a double recovery, he was not prepared to abandon these proceedings because he seeks other types of damages, namely damages for breaches of constitutional rights.

64. It seems to me, that the plaintiff**'s** constitutional rights have not been breached in any way given that he did not own the lands at the time when the designation was made.

Conclusion

65. The plaintiff**'s** basis for bringing this case is misconceived since, in my opinion, he does not have *locus standi*. When he became the beneficial owner in 2002 and onwards, *locus standi* was not created by virtue of the receipt of the notification of changes of boundaries in 2003 and 2006, because the changes of boundary did not affect his property.

66. If I were incorrect in relation to that view, it seems to me that the plaintiff's claim is statute barred. If he did have a claim, as now constituted, (which I find he did not) it should have been brought well before now. In his plenary summons**,** he sought damages for the refusal to designate his lands for conversion to afforestation. That claim is very different to the claim as now constituted following the order of Barniville J.

67. Any attempt to litigate matters which took place between 1997 to 2006 cannot be litigated by a service of an amended statement of claim in 2018 and are clearly statute barred.

68. I find that the plaintiff is seeking double recovery by ligating the same matter in different proceedings, something which is not permissible.

69. For the sake of completeness, I should say that I find that the defendant was not obliged to identify the species on the plaintiff's property and, therefore, no cause of action arises from the fact that they were not so identified.

70. Finally, I should say something about the pleadings. They were verbose to the point of being an abuse of process. Whilst the plaintiff has litigated his case in a courteous manner, that does not mean that his arguments can be allowed to roam far and wide. It is quite clear to me that he is perfectly capable of calibrating his arguments so as to state his case clearly. On that ground alone, I would have been inclined to grant an application to strike out the proceedings as being an abuse of process and frivolous and/or vexatious, however given my findings above I do not require to decide matters on that basis.

71. For the reasons set out above**,** I find the case is bound to fail**.** I shall make the orders sought and strike out the proceedings pursuant to the inherent jurisdiction of the court and Order 19, rule 28 of the Rules of the Superior Courts.