OH Doc No. 5C

Recd From: Brid McGarry

Date Recd: 19/4/07

THE HIGH COURT

[2005 No. 840P]

BETWEEN

SHELL E & P IRELAND LIMITED

PLAINTIFF

and

PHILIP McGRATH, JAMES B. PHILBIN, WILLIE CORDUFF, MONICA MULLER, BRID McGARRY, PETER SWEETMAN

DEFENDANTS

and

THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS TO THE COUNTERCLAIM

Unapproved

JUDGMENT of Miss Justice Laffoy delivered on 18th April, 2007

A. Introduction

This judgment is concerned with the following applications:

1. The plaintiff's application on foot of a notice of motion issued on 16th October, 2006 seeking the leave of the court to discontinue its proceedings against the first, second, third and fifth defendants (the discontinuance motion).

2. The application of the defendants to the counterclaim (the State parties) on foot of a notice of motion issued on 16th October, 2006 seeking directions as to the mode of trial (the directions motion); and

3. The following applications in relation to discovery (the discovery motions):

   (a) the application of the second and fifth defendants on foot of a notice of motion dated 22nd September, 2006 seeking to strike out the plaintiff's action and defence to the counterclaims of the second and fifth defendants of the plaintiff for failure to comply with a discovery order made on 31st July, 2006; and to strike out the defence of the State parties to the counterclaim for failure to comply with the said order;

   (b) the application of the State parties seeking an extension of time for the purposes complying with the said order for discovery; and

   (c) an application of the plaintiff for an extension of time to comply with the said order for discovery.

B. The Discontinuance Motion

The motion

The plaintiff seeks an order pursuant to O. 26, r. 1 of the Rules of the Superior Courts 1986 (the Rules) giving leave to the plaintiff to discontinue its proceedings as against the first, second, third and fifth defendants on the basis of alternative terms as to costs: that there be no order as to the costs of the proceedings to date; or that the

costs of the proceedings be reserved to the trial of the defendants' counterclaims. The plaintiff also invokes the inherent jurisdiction of the court. The plaintiff also seeks directions as to the trial of the counterclaims.

The plaintiff's claim

In my judgment delivered on 23rd March, 2006 on earlier applications in these proceedings I outlined the plaintiff's claim as pleaded. The foundation of the plaintiff's claim is its asserted entitlement to enter on certain plants of land in which, *inter alia*, the first, second, third and fifth defendants have proprietarial interests and carry out works thereon in connection with the construction of an onshore gas pipeline pursuant to the following statutory rights and privileges granted by the predecessor of the first of the State parties (the Minister):

(a) a pipeline consent granted pursuant to section 40 of the Gas Act, 1976 (the Act of 1976), as amended, on 15th April, 2002; and

(b) compulsory acquisition orders granted by the Minister pursuant to section 32 of the Act of 1976 in respect of certain plots on 3rd May, 2002 and 5th June, 2002.

The plaintiff's case as pleaded is also founded on the fact that there exists a planning permission granted by An Bord Pleanála on 22nd October, 2004 for the construction of the onshore gas terminal to which the proposed pipeline will bring gas from the Corrib Gas Field. The wrongs which the plaintiff alleges against the defendants are that they obstructed or interfered with the plaintiff's entry on certain plots which are the subject of the compulsory acquisition orders and prevented the plaintiff from carrying out works thereon, which conduct it is alleged amounts to trespass, and that they interfered with the use and enjoyment by the plaintiff of its

interest in those plots, thereby creating a nuisance to the plaintiff. It is also alleged that the third defendant assaulted an agent of the plaintiff and that all of the defendants intimidated servants and agents of the plaintiff. The remedies sought by the plaintiff include perpetual injunctions to restrain obstruction and interference with the plaintiff's entry and carrying out works on the plots. Damages for trespass and nuisance are also claimed, as are damages for assault and intimidation.

The allegations of trespass, nuisance, assault and intimidation in respect of which the plaintiff claims damages are historic and are alleged to have occurred in January 2005. The plaintiff's claim, in so far as it seeks perpetual injunctions, is premised on the plaintiff's belief that it would be prevented by the defendants from doing what it is entitled to do on foot of the consent and the compulsory acquisition orders unless the defendants are restrained by the court.

What precipitated the discontinuance motion

This court is only one of the venues in which the controversies between residents and landowners in the north of County Mayo, on the one hand, and the plaintiff and the State, on the other hand, in relation to the development by the plaintiff of the Corrib Gas Field and the offshore and onshore works connected with it are being played out. A number of events have occurred since the plaintiff initiated these proceedings in March 2005 which it is necessary to refer to in order to explain the context of the plaintiff's motion to discontinue.

In May 2006 the report of Advantica, which had undertaken an independent safety review of the onshore pipeline at the behest of the Technical Advisory Group appointed by the Minister to address safety concerns in relation to the proposed work, was published. The conclusion of Advantica was that, provided the recommendations

contained in the report were followed, the belief was that the pipeline would be constructed to an appropriate standard and would be "fit for purpose". Following publication, the plaintiff made an announcement welcoming the report and giving a commitment to adhering to the report's recommendations and to bringing the onshore pipeline into full compliance with the recommendations.

In November, 2005 the Minister appointed Peter Cassells (the mediator) as independent mediator to assist in resolving the differences between the plaintiff, on the one hand, and the local community and the first, second and third defendants and two other individuals, who have come to be known as "the Rossport Five", who were committed to prison for contempt arising out of the breach of an interlocutory injunction made in these proceedings, on the other hand. The mediator issued his report and recommendations at the end of July, 2006 and it was published at that time. In his report, the mediator stated that it had not been possible to get agreement between the parties on a way forward. However, he made certain recommendations. One of the recommendations was that the plaintiff modify the route of the pipeline in the vicinity of Rossport to address community concerns regarding proximity to housing. The mediator made that recommendation having noted that, while implementation of the Adventica recommendations would make the pipeline safer, some local people were concerned about the proximity of the pipeline to certain houses. Following the publication of the mediator's report, on 3rd August, 2006 the plaintiff announced its intention to modify the route of the onshore section of the Corrib Gas pipeline. It also indicated that it intended to review the position in relation to these proceedings.

By letter dated 25th September, 2006 from the plaintiff's solicitors to the solicitors on record for all of the defendants in these proceedings, having referred to

the publication of the mediator's report and recommendations and the plaintiff's subsequent statement of intent regarding the modification of the onshore pipeline route in consultation with the local community, the plaintiff stated that, in the changed circumstances, the plaintiff's claim in these proceedings is redundant and that the plaintiff intended to discontinue its claim against all of the defendants either by agreement or by leave of the court. In the letter, which was an open letter, the defendants were invited to discontinue their counterclaims so that the entire proceedings might be settled by agreement, in consideration of which it was stated that the plaintiff would not enforce the order of Finnegan P. for costs in its favour (i.e. the order of 7th April, 2006 referred to later) and would discharge the party and party costs to date in the proceedings, including the costs of the interlocutory injunction proceedings, of any defendant who should discontinue his or her counterclaim, such costs to be taxed in default of agreement. It was made clear that the plaintiff's offer was without prejudice to its intention to fully defend the counterclaim of any defendant who decided to continue with the counterclaim.

The fourth and sixth defendants availed of the offer and by order made on 28th September, 2006 the plaintiff's claim against them and their counterclaims were struck out by consent. The other four defendants did not avail of the offer and that has led to the discontinuance motion.

Henceforth, the first, second, third and fifth defendants are collectively referred to as the defendants.

Position adopted by the parties on the discontinuance motion

The position of the plaintiff at the hearing of the motion was that, as it is committed to implementing the recommendation of the mediator and to modifying the

route of the pipeline, the injunctive relief sought is no longer necessary and the plaintiff's proceedings have become redundant. It is the plaintiff's intention, once the modified pipeline route has been selected, to submit an application to the Minister for a new consent under the Act of 1976, as amended and to seek any further consents and licenses as are required. However, in the interim, the plaintiff is continuing to rely on the consent granted on 15th April, 2002, which also regulates the offshore section of the import gas line. Although it was averred in the affidavit of William Aylmer grounding the discontinuance motion that it would be premature for the Minister to revoke any of the compulsory acquisition orders the subject of these proceedings as the modified pipeline route is not yet known, counsel for the plaintiff informed the court at the hearing that the plaintiff's unequivocal position is that the existing compulsory acquisition orders will not be relied on. It is the intention of the plaintiff to seek compulsory acquisition orders in relation to the modified route of the pipeline insofar as it is not possible to procure the consent of a landowner by agreement. The plaintiff's position in relation to costs was that the court should either decline to make an order for costs or, alternatively, reserve the costs to the trial of the counterclaims. Finally, in Mr Aylmer's affidavit it was averred that the discontinuance of the proceedings by the plaintiff arises from the decision to implement the recommendation of the mediator to reroute the pipeline and does not in any way constitute an acknowledgement of any weakness in the plaintiff's case or of possible defeat in these proceedings. In my view, the proper course for the court to adopt for present purposes is to accept that averment at face value, given that it is not possible to come to any conclusion as to the plaintiff's motivation on an application heard on affidavit evidence.

The first and third defendants did not contend that the plaintiff should not be granted leave to discontinue. However, it was urged on their behalf that the ordinary principle that a defendant should be awarded the costs up to the date of discontinuance should not be departed from in this case.

The position of the second and fifth defendants was that the plaintiff should be granted leave to discontinue only on the following conditions:

(1) that there be an inquiry as to the damages due to the defendants on foot of the undertaking as to damages given by the plaintiff to the court when applying for the interlocutory injunction;

(2) that the inquiry as to damages be tried in combination with the defendants' counterclaims;

(3) that the plaintiffs retain the burden of proof in relation to the validity of the consent granted on 15th April, 2002 and the compulsory acquisition orders made in May and June, 2002;

(4) that discovery should be given by the State parties before a decision is made on the directions motion;

(5) that these defendants are awarded their costs to date against the plaintiff;

(6) the plaintiff is not allowed to rely on any contention in relation to the status of the defendants as contemnors on the costs issue;

(7) that the defendants be allowed costs on a solicitor and client basis, not a party and party basis; and

(8) that the plaintiff take all reasonable steps to procure revocation of the compulsory acquisition orders within twenty eight days of the order of the court.

The conditions suggested at (1), (2) and (3) above relate to the future conduct of the proceedings on the counterclaims. The conditions suggested at (5), (6) and (7) relate to costs. I will consider all of those issues in detail later. It seems to me that the condition suggested at (4) does not require to be considered in connection with the discontinuance motion. As regards the condition suggested at (8), the response of the counsel for the plaintiff was that this condition is unnecessary, in that the plaintiff is prepared to furnish a letter setting out the position and to do anything else reasonably required to deal with the redundant compulsory acquisition orders. The landowners affected by the compulsory acquisition orders which are not going to be availed of by the plaintiff clearly are entitled to have the orders cleared off their respective titles. I would surmise that all of the plots affected are registered land and that the orders have not been registered against the relevant folios as required by subs. 7 of s. 32 of the Act of 1976. On the basis of those assumptions, the position will be met by noting the undertaking of the plaintiffs not to rely on the orders and, insofar as is necessary, will take the steps required to cancel the effect of the orders off the title of the defendants remaining in these proceedings.

Order 26, Rule 1

Order 26, Rule 1 provides for a number of different scenarios which, while not relevant here, are instructive in interpreting the portion of the rule which is relevant. First a plaintiff may wholly discontinue his action, or withdraw part of his action, before receipt of the defendant's defence, or after receipt thereof before taking any other proceedings in the action save an interlocutory application, by filing a notice in writing in the Central Office. In that event, the plaintiff is automatically liable for the

defendants' costs, such costs to be taxed. Secondly, the plaintiff may wholly discontinue his action on producing to the proper officer a consent signed by all the parties at any time prior to the setting down of the action for trial. In that scenario it is a matter of agreement between the parties whether the plaintiff is to be liable for costs. Where neither of those scenarios applies, the rule provides:

> "... it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out."

The authorities

The parties have not referred the court to any Irish authority on O. 26, r. 1. However, the court has been referred to a number of authorities from other jurisdictions.

The earliest authority relied on by counsel for the plaintiff was the decision of the Court of Appeal of England and Wales in *J.T. Stratford Limited v. Lindley* [1969] 1 WLR 1547. The rule at issue there (R.S.C., Order 23, rule 3(1)) was in terms very similar to O. 26, r. 1, in that it gave the court leave to strike out an action "on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just". The facts in the case were that the plaintiffs, barge owners and repairers, issued a writ claiming an injunction restraining the defendants, who were trade union officials, from enforcing an embargo on the plaintiffs' barges and for damages. The plaintiff applied for an interlocutory injunction and obtained it at first instance with an order making the costs at first instance "costs in the cause". The defendants appealed and

were successful before the Court of Appeal. However, on appeal to the House of Lords the interlocutory injunction was reinstated and the House of Lords ordered that the costs in the House of Lords and in the Court of Appeal were to be "costs in the cause". Lord Denning M.R. outlined what happened subsequently in his judgment. The pleadings were closed, but then the action went to sleep. Two years later there were discussions as to what was to be done but they came to nothing. Neither side wanted to go on, but neither side wanted to pay the costs of the other side. A further two years elapsed and the defendants brought a motion to dismiss and the plaintiff retaliated with a motion seeking leave to discontinue. Having pointed out that the House of Lords had thought it right to make the costs of the interlocutory proceedings depend on who won or lost in the main action, Lord Denning M.R. continued (at p. 1554):

> "But a situation has arisen which they never envisaged. [Counsel for the plaintiff] has urged us to award the plaintiffs the costs because they would very probably have won if the action had been tried out on its merits. I decline to go into that question. We cannot try the action at this stage. I put aside the respective merits of the dispute. I ask simply: what is to be done in a situation which the House of Lords did not envisage? ... I think the court should give the plaintiffs leave under Ord. 21, r. 3 to discontinue. That rule gives the court a wide discretion as to costs. ... Finding that neither side wishes to go on with this action, I think the master and the judge exercised their discretion wisely in giving leave to discontinue on the footing that each side is to bear its own costs including costs in the cause."

As was pointed out by Henry J., in the next case relied by the plaintiff, that case went on not so much by way of expressing a principle but by way of a general and salutary warning to the courts that at the time of discontinuance it will usually be impracticable to assess the eventual prospects of success in the action.

The case in which Henry J. made those observations was *Barretts & Baird (Wholesale) Limited v. IPCS* (1988) NLJ 357. The passage from the judgment of Henry J. on which counsel for the plaintiff relied was preceded by a reference to a note in The Supreme Court Practice to the effect that, if a plaintiff discontinues, the general rule is that "costs in the cause" are the defendants. In the relevant passage, Henry J. stated as follows:

> "Now in most cases of discontinuance that may well be the general rule because in most cases of discontinuance the discontinuance is effectively a defeat or an acknowledgement of defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now become academic save for the question of costs. In those circumstances where the matter is effectively academic, the Court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply when the discontinuance can safely be equated with defeat or an acknowledgement of likely defeat …"

The facts in that case were that the plaintiff, an abattoir owner, obtained an *ex parte* interlocutory injunction against the defendant trade union restraining a threatened strike by members of the union which was likely to affect the plaintiff. Subsequently at an *inter partes* hearing, the defendant giving an undertaking to

suspend the threatened strike action, the injunction was discharged and it was ordered that the costs be costs in the cause. Very soon after, the dispute was settled but the pleadings in the action proceeded until the plaintiff applied for leave to discontinue. On those facts, Henry J. stated that he was satisfied that the plaintiff had obtained a tangible benefit from the proceedings which it would not have obtained otherwise and that the proceedings might not have been commenced if the undertaking had been given in the first place. He apportioned the costs giving the plaintiff the costs up to the interlocutory hearing and the defendant the costs thereafter.

The Court of Appeal of England and Wales also considered R.S.C. Ord. 21, r. 3 in *RTZ Pension v. ARC Limited* [1999] 1 All E.R. 532. It is true that in that case the Court of Appeal went so far as to recognise a discretion to award costs against a defendant in favour of a discontinuing plaintiff, as counsel for the plaintiff pointed out in their written submissions. The relevant passage of the judgment of Potter L.J. is to be found at p. 541, where he stated:

> "The wording of Ord. 21, r. 3(1) ('on such terms as to costs … as it thinks just') appears to me to be designed to give the court the widest possible discretion on costs, particularly when considered against the contrasting provision in respect of discontinuance before, or immediately following, defence. I accept that it would be rare indeed that an order for payment of a discontinuing plaintiff's costs would be appropriate. Nonetheless, in the prevailing climate, in which the court seeks ways in which to prevent unnecessary costs and delay in the resolution of disputes, it seems to me undesirable that the court should regard itself shackled from making such an order, for instance in the case of a defendant who perversely encourages

a plaintiff into action by concealing the existence of a defence although reasonably invited prior to the proceedings to make disclosure."

However, Potter L.J. did not consider that the circumstances of the case before him were such as to warrant consideration as to whether the discontinuing plaintiff should get costs against the defendant. He continued:

"I approach this case upon the basis that, where discontinuance occurs in circumstances tantamount to an acknowledgement of defeat, then the normal rule as to costs, namely that the defendant is entitled to an order for costs of the action, should apply unless good reason can be shown to the contrary. The nature of that good reason will vary according to the form of order which the plaintiff seeks. The alternative forms are of course 'no order as to costs' or, more rarely, an order that the defendant pay the plaintiff's costs in respect of a particular issue or issues, or a particular period of time, in respect of which costs have been wasted or unnecessarily incurred as a result of the defendant's conduct at the proceedings."

Potter L.J. went on to state that in order to justify an order that there be "no order as to costs", the test should be what is fair and just in all the circumstances. He then went on to consider the application of the "fair and just" test to two different situations in the following passage on which counsel for the plaintiff relied:

"That would be so whether the application is made in respect of some limited issue or aspect of the defendant's conduct of the proceedings, or whether it is made in respect of the proceedings as a whole on the basis

> that for some reason they have become of academic interest only in relation to their subject matter and/or their outcome: see *Britannia Life Association of Scotland v. Smith* [1995] … In this latter type of case, the overall history of the litigation and the circumstances in which discontinuance has taken place will loom particularly large. In the former, while the court must act on the basis of what is fair and just, the starting point, and the principal circumstance to be borne in mind, should be that the plaintiff has abandoned all the pleaded issues without argument or adjudication and must therefore *prima facie* be regarded as having lost the day on all of them."

The foregoing authorities and the decision in the *Britannia* case referred to in the immediately preceding quotation were reviewed by the Court of Appeal in *Walker v. Walker* [2005] EWCA Civ 247, in which judgment was delivered on 27th January, 2005. In the interim, the new Civil Procedure Rules had come into force in England and Wales, the relevant rule being CPR 38.6(1) which provides:

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which notice of discontinuance was served on him."

In his judgment in *Walker v. Walker*, Chadwick L.J. distinguished the *Stratford* case on three grounds: that it had been decided under a different rule, making the point that, insofar as there is a difference between the two rules, the later rule, CPR 38.6, indicates what the normal order should be in a case where the plaintiff seeks to discontinue in a way that the former rule did not; neither side wanted the substantive issue to be determined for its own sake, so that the issue was, in truth,

academic in the sense that neither side had any interest in the outcome of the underlying issue in the litigation; and it was a case between powerful employers and a powerful trade union in which both sides could continue to fight over the question of costs.

As regards the decision in the *Britannia* case, Chadwick L.J. was not prepared to attach much weight to it, because no transcript was available of the judgment at first instance. Apropos of the judgment of the Court of Appeal, he stated (at para 37):

> "The point that was exercising this court, as it seems, is that there had become a perception, following a decision of Mr. Justice Henry in *Barrett* … , that the claimant would only be required to pay a defendant's costs on discontinuance if he was, in effect, surrendering and acknowledging defeat. That perception was laid to rest in *Britannia*; and it is plainly no longer the law in the light of CPR 38.6, if (indeed) it ever was."

Apropos of the decision in the *RTZ* case, Chadwick L.J. (at para. 38) referred to the passage in the judgment of Potter L.J., which I have quoted earlier, in which he stated he was approaching the case on the basis that where discontinuance occurs in circumstances tantamount to an acknowledgement of defeat, then the more normal rules as to costs, namely, that a defendant is entitled to an order for his court costs, should apply unless good reason can be shown to the contrary. Chadwick L.J. added that, if the rule was ever so circumscribed, it is no longer in the light of CPR 38.6.

Later (at para. 40), Chadwick L.J. indicated that he had taken all of the authorities to which he had referred into account and he continued:

> "There is nothing in them which leads me to think that we should accept that it would be a good reason for departing from the general rule under

> CPR 38.6 merely because the plaintiff has become alive at a late stage to the commercial effect of factors which have been there from the outset and which, if properly evaluated, could have led to a decision in 1999 that these were proceedings which were not worth pursuing."

The proceedings in that case were proceedings by a liquidator of a company in a creditors' voluntary liquidation against directors of the company alleging misfeasance and seeking orders for repayment to the company of sums alleged to have been misapplied or misappropriated and also seeking orders in respect of alleged fraudulent and wrongful trading. The reason put forward by the liquidator for seeking to discontinue was that there would be no useful purpose to be served by continuing prosecution of the claim having regard to the cost of the proceedings, the apparent lack of assets on the part of the respondents and the likely recoveries by the liquidator. On those facts the Court of Appeal held that there was no good reason for departing from the normal rule and that it would not be just to allow the liquidator to walk away from the proceedings leaving Mr. Walker to bear his own costs, in circumstances that the relevant factors had not changed in any material respect since the time at which the proceedings were commenced.

Counsel for the plaintiff also referred the Court to a decision of a Federal Court in Australia: *Australian Security Commission v. Aust – Homes Investments Limited* (1993) FCR 194. In that case, Hill J. reviewed Australian authorities and *Stratford* and summarized the propositions which he considered were to be abstracted from them in the following passage on which counsel for the plaintiffs relied (at p. 201):

(1) "Where neither party desires to proceed with litigation the Court should be ready to facilitate the conclusion of the proceedings by making a cost order: *Stratford*…

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a Court determining how the costs of the proceedings should be borne to endeavour to determine for itself the case on the merits, or, as it might be put, to determine the outcome of a hypothetical trial: *Stratford*. This will particularly be the case where a trial on the merits would involve complex factual matters where credit could be an issue.

(3) In determining the question of costs it would be appropriate, however, for the Court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them…

(4) In a particular case it might be appropriate for the Court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation…

(5) Where the proceedings terminate after interlocutory relief has been granted, the Court may take into account, the fact that interlocutory relief has been granted…."

Some of the foregoing propositions, in particular that set out at (5), would appear to have been informed by the nature of the proceedings at issue. The A.S.C. had procured the appointment of receivers over the property of two individuals under a statutory provision, initially on the basis of treating the case as an *ex parte* application for interim orders. On the date the interim orders were due to expire, a consent order was made continuing the appointment of the receivers but allowing the

individuals to deal with most of their assets. Eventually, over a year later, orders were made discharging the receivership, reserving the question of the costs of the application in relation to the individuals. So the context in which the Court in Queensland was determining liability for costs was the termination of a procedure regulated by statute. In my view, that context is not at all analogous to the type of situation governed by O. 26, r. 1, and for that reason alone, in my view, the propositions set out in the judgment of Hill J. are not necessarily apt in determining where liability for costs should lie where the Court is granting leave to a plaintiff to discontinue in accordance with O. 26, r. 1.

The only other authority called in aid in the general application of O. 26, r. 1 were decisions in *Covell Matthews v. French Wools Limited* at first instance (reported at [1977] 1 WLR 876) and in the Court of Appeal (reported at [1978] 1 WLR 1477). Counsel for the second and fifth defendants referred the Court to a passage from the judgment of Graham J. at first instance. Having referred to a number of authorities, including *Stratford*, Graham J. stated (at p. 879):

> "The principles to be culled from these cases are, in my judgment, that the Court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice would be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The Court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved."

In that case, tenants whose tenancy he had expired claimed a new tenancy under statutory provision by issuing an originating summons. Negotiations ensued and the hearing was delayed from time to time. Almost three years later, the tenants applied to withdraw the summons, since they no longer wished to have a new tenancy and had moved out of occupation of the premises. However, the landlord was contending that the negotiations had resulted in a binding contract for the grant of a new lease and that the tenants' application should be adjourned pending the trial of its action for specific performance. Granting leave under R.S.C., O. 21, r. 3, Graham J. imposed terms: that the tenants would not make any fresh application for a new tenancy; and the grant of leave should be expressed to be given without prejudice to the landlord's contention that a binding agreement had been reached between the parties and without prejudice to the effect of such agreement if it was eventually found to be binding. When one considers that the factual background, in my view, neither the vague generalisations in the passage from the judgment of Graham J., nor the comment in the passage from the judgment of Bridge L.J. in the Court of Appeal referred to by counsel for the second and fifth defendants, lay down any principle the application of which would be of assistance in determining the issues which arise on this discontinuance motion. Bridge L.J. (at p. 1485) made the general observation that the granting of leave to discontinue is no mere formality, commenting that an applicant for leave to discontinue may be put in a position by the terms which the Court is minded to impose upon him as a condition of ordering discontinuance of his proceedings, which would be so onerous, that he would not wish to accept them.

Finally, it is necessary to consider what the authorities say about the effect of discontinuance on an undertaking as to damages given by the discontinuing plaintiff on a previous interlocutory application. As submitted by counsel for the second and

fifth defendants, it was held in *Newcomen v. Coulson* 7 Ch. D 764, as long ago as 1876, that discontinuance cannot deprive a defendant of his right to damages on foot of a plaintiff's undertaking.

In the same context, counsel for the second and fifth defendants also referred to the recent decision of the Court of Appeal of England and Wales in *F.S.L. Services Limited and Others v. McDonald and Others* [2001] EWCA Civ 1008. In that case, which I have not found to be of any particular relevance for present purposes because it turned very much on its own facts and on the form of the undertaking at issue, the claimants, in proceedings in which they were alleging fraudulent misrepresentation, conspiracy and deceit against the defendants and claiming restitutionary remedies, obtained a freezing order on an *ex parte* application. The freezing order was renewed from time to time and eventually, some six months later, on the application of the claimants, there were given permission to discontinue the proceedings on the ground that due to the impecuniosity of the defendants there was no commercial purpose in proceeding with the action. However, the claimants had been granted the freezing order on the basis of an undertaking that, if the Court were later to find that the order had caused loss to the defendants and decided that the defendants should be compensated for that loss, the claimants would comply with any order the Court should make. In the order giving the claimants leave to discontinue, the freezing orders were discharged and an inquiry was directed. In the course of the proceedings on the freezing orders, a number of orders for costs had been made in favour of the claimants against the defendants. Subsequently, the claimants sought an order dismissing or striking out the inquiry on the basis that the witness statement furnished on behalf on the defendants in accordance with the directions of the Court had not disclosed any loss. That application was refused at first instance and the decision was

upheld on appeal, although in the Court of Appeal, Jonathan Parker L.J. expressed disagreement with the view that "the court has no power to bring an inquiry as to damages to a summary conclusion where it becomes apparent that further prosecution of the inquiry will serve no useful purpose". However, he was of the view that in the particular circumstances of the case the power to bring the inquiry to a summary conclusion should not be exercised, stating that it seemed very far from clear on the authorities cited that a party against whom an interlocutory order has been improperly obtained, as contrasted with a case where the claimant has merely failed at a trial, cannot recover the costs of opposing the order (including costs which he has been ordered to pay) by way of damages on an inquiry of the kind which had been directed.

Interpretation of O. 26, r. 1

While, in deference to the comprehensive submissions made by Counsel on behalf of the parties, I have addressed the authorities to which the Court was referred in considerable detail, in the final analysis, I have not found the authorities particularly helpful because of the diversity of the factual and procedural matrixes in which they were decided. They contain very little by way of definitive statement of principle. I have found *Walker v. Walker* to be the most persuasive, notwithstanding that it is based on a rule which differs from O. 26, r. 1.

Going back to the wording of O. 26, r. 1, it is clear that in a situation where a plaintiff cannot discontinue without obtaining the leave of the Court the Court has a discretion as to whether to grant such leave or not. There is little or no guidance given as to the basis on which the Court should exercise the discretion and, in that sense, the discretion is a broad discretion. It is also clear that the Court may impose terms as a condition to granting leave, but, again, little guidance is given as to how the

discretion to impose terms should be exercised, save that the Court should strive to maintain justice between the parties. In relation to the imposition of terms as to costs, the provision for discontinuance at an early stage suggests that the underlying precept is that the requirement of justice will normally result in liability for the costs to the date of discontinuance being borne by the plaintiff. Notwithstanding that, it is clear that what is just must be determined in each case having regard to its particular circumstances.

I agree with the submission made by counsel for the plaintiff that it is neither possible nor appropriate on an application under O. 26, r. 1 for the Court to enter upon a consideration of the merits of the issues raised by the plaintiff on its claim. However, I am not satisfied that the plaintiff has adhered to that stricture in making its case that it should be given leave to discontinue without an order for costs, but I will return to that aspect of the matter later. In a case where the core issues on a discontinuing plaintiff's claim remain to be fought out on the defendant's counterclaim, which is being defended, it is difficult to see how a court could properly assess whether the plaintiff's claim has become "academic" in any sense other than that the plaintiff no longer wishes to pursue it.

In general, I find it hard to envisage a situation in which a Court would refuse to allow an unwilling litigant to discontinue his action, because of the probable futility of adopting such an approach.

Conclusions on discontinuance motion

I have no doubt that the plaintiff, subject to terms, should be allowed to discontinue its claims against the defendants. While the defendants wish the core issues which arise on the plaintiff's claim, the validity of the consent under the Act of

1976 and the validity of the compulsory acquisition orders, to be determined, insofar as those issues and the other issues which arise on their counterclaims are justiciable at their suit, they can be determined on the counterclaims.

Terms as to future conduct of proceedings

As regards the submissions made on behalf of the second and fifth defendants that the grant of leave should be conditioned by terms in relation to the future conduct of the proceedings, I find as follows:

(1) It is clear on the authority of *Newcomen v. Coulson*, that, as a matter of law, the defendants' entitlement to an inquiry as to damages on foot of the undertaking given by the plaintiff on the application for the interlocutory injunction is not affected by the discontinuance of the plaintiff's claim. Such an entitlement as the defendants have to such an inquiry will survive the discontinuance of the plaintiff's claim.

(2) As a matter of practicality as much as principle, I do not propose at this juncture making any directions as to when the defendants' entitlement to such an inquiry may be tried and the inquiry conducted. The plaintiff's position is that the consent under the Act of 1976 coupled with the compulsory acquisition orders, which were the foundation of its entitlement to the interlocutory injunction which was in force from April to September 2005, were valid and that is their answer to the defendants' challenge to the validity of those instruments in their counterclaims. In my view, the contention of counsel for the plaintiff that the entitlement of the defendants to such an inquiry depends largely on the outcome of the counterclaims is correct because the determination of the issues on the counterclaim will determine

whether the interlocutory injunction was improperly obtained by the plaintiff or not. Even if the defendants are entitled to an inquiry as to damages on foot of the undertaking, the scope of such inquiry cannot be determined at this juncture, particularly having regard to the claims made by the second and fifth defendants in their counterclaim. For instance, the second defendant has alleged (at para. 23) that the plaintiff is guilty of "the tort of abuse of the legal process", on the basis that it acted in bad faith, maliciously and with ulterior motive and without reasonable and proper cause in instituting and continuing the application for the attachment and committal of the second defendant, who claims damages. It is premature at this juncture to attempt to address the scope of any inquiry as to damages to which the defendants are entitled or the extent to which any such inquiry would overlap with any individual defendant's counterclaim.

(3) I can see no legal basis for ordering that the plaintiff retain the onus of proof on the issues of the validity of the consent under the Act of 1976 and the validity of the compulsory acquisition orders. Indeed, at a practical level, it is debatable whether the defendants' burden of proof will be altered in any way by the discontinuance of the plaintiff's claim because, as I pointed out in my judgment of 23rd March, 2006, counsel for the plaintiff made it clear that the position the plaintiff intended to adopt at the trial of the action was to rely on the maxim *omnia praesumuntur rite esse acta.*

Terms as to costs

The imposition of a term or terms as to costs, on the basis of the submissions made on the behalf of the parties, raises three questions:

(a) Whether, as it contends, the plaintiff should be allowed discontinue without an order for costs;

(b) Alternatively, whether the costs of the plaintiff's claim to date should be reserved to the trial of the counterclaims; and

(c) If the plaintiff is to be made liable for the defendants' costs to date, whether such liability should be on a solicitor and client basis rather than on a party and party basis, as was contended by the second and fifth defendants.

As I understand the plaintiff's argument that it should be given leave to discontinue either without being liable for the defendants' costs to date or, alternatively, on the basis that the issue of the costs of the plaintiff's claim to date should be reserved to the trial of the defendants' counterclaims, it has two strands.

The starting point of the broader strand is that the plaintiff was forced to bring these proceedings and seek injunctive relief because of the unlawful actions of the defendants and, accordingly, the plaintiff acted reasonably in bringing the proceedings. The unlawful actions which necessitated the proceedings were the actions whereby the defendants prevented the plaintiff from entering and carrying out works on the plots the subject of the compulsory acquisition orders. An integral part of this strand of the plaintiff's argument is that, being based on the decisions of a public body, the compulsory acquisition orders enjoy a presumption of validity until quashed by a court of competent jurisdiction. While it is true that the defendants did not move to impugn either the compulsory acquisition orders or the consent under the Act of 1976 before the plaintiff moved onto the lands in January, 2005, but rather obstructed the plaintiff on the ground, the position is that in answer to the plaintiff's proceedings the defendants have challenged the validity of the consent and the

compulsory acquisition orders on various grounds, which I have summarised in my judgment of 23rd March, 2006. If ultimately the court were to find that the defendants' challenge to these instruments is well founded, the decision of the court, as is pointed in the passage in Hogan and Morgan Administrative Law in Ireland (3rd edition), pp. 461 – 462, relied on by the plaintiff, will be that these instruments will be set aside with retrospective affect. At the risk of unnecessary repetition, I reiterate that the core issues arising from the defendants' response to the plaintiff's claim were the issues of the validity of these instruments. The very same issues remain to be decided on the counterclaims. In my view, in asking the court to exercise its discretion on the basis that the proceedings were necessitated by the unlawful actions of the defendants, the plaintiff is failing to adhere to the proposition it has urged on the court and which the court accepts, that the court should not enter upon a consideration of the merits of the issues raised either on the plaintiff's claim or on the counterclaims.

Counsel for the plaintiff went further when responding to the submissions made on behalf of the defendants in submitting that it was the unlawful actions of the defendants which led to the decision to re-route the pipeline. As I have already stated, I consider it proper to accept at face value the averment contained in the plaintiff's grounding affidavit that the discontinuance by the plaintiff of these proceedings arises from its decision to implement the recommendation of the mediator to re-route the pipeline. However, in asking the court to accept that it was the unlawful actions of the defendants which led to the decision to re-route, the plaintiff is once again asking the court to embark on a consideration of the merits.

The narrower strand of the plaintiff's argument arises from the proceedings on the plaintiff's application for an interlocutory injunction, the course of which, although historical, it is necessary to consider.

On the 4th April, 2005, following a hearing which lasted three days, Finnegan P. made an order restraining the defendants and any person acting in concert with them or having notice of the making of the order from obstructing or interfering with the entry of the plaintiff on the land described as "the pipeline corridor and deviation limits" for the purpose of the preparation, construction and installation of the pipeline, such works to be carried out without unreasonable interference with the defendants' rights to use their lands and in such a manner as would facilitate their normal farming activities. The order was subject to the proviso that the pipeline should not be used for transmitting natural gas from the Corrib Gas Field until the proceedings should be determined or until further order. By further order made by Finnegan P. on 14th July, 2005 that order was varied to include an undertaking by the plaintiff that no such works would be carried out otherwise in accordance with the consent issued by the Minister pursuant to the Act of 1976 and the conditions therein contained.

On 29th June, 2005, on foot of a motion of the plaintiff seeking attachment and committal of, *inter alia*, the first, second and third defendants for contempt of court in failing to comply with the order of 4th April, 2005, the first, second and third defendants were by order of this Court (MacMenamin J.) committed to prison. On 30th September, 2005 the plaintiff applied to court to have the order made on 4th April, 2005 discharged and that application was acceded to. At that stage, the first, second and third defendants had been in prison for 94 days, having failed to purge their contempt. On 30th September, 2005 an application was made on their behalf that they be released from prison. As was recorded in the judgment subsequently delivered by

Finnegan P. on 7th April, 2006, it was made clear on that occasion that they were unwilling to purge their contempt and, in particular, they were unwilling to undertake to comply with further orders which might be made in the matter. Notwithstanding that, Finnegan P. directed their release, being satisfied that their detention at that time did not serve any coercive purpose. However, he indicated that he proposed to consider whether, having regard to the contempt found against each of them and their refusal to purge their contempt, it was appropriate that the court should exercise in respect of any of them its punitive powers.

Subsequent to their release, on 25th October, 2005, Finnegan P. heard submissions from counsel on behalf of the first, second and third defendants on that issue. As I understand the position, the plaintiff did not take any part in the proceedings on that issue, although the order made on 7th April, 2006 records the presence of counsel for the plaintiff. Finnegan P. set out his conclusions in the judgment delivered on 7th April, 2006. He concluded that, while contempt is primarily coercive, its object being to ensure that court orders are complied with, in cases of serious misconduct the court has jurisdiction to punish the contemnor. He recognised that in litigation concerning exclusively private rights committal by way of punishment will usually occur only at the request of the plaintiff. However, he found that where the interest of the public in general is engaged or where there is a gross affront to the court, it would be appropriate for the court to proceed of its own motion to ensure that its orders are not put at nought. He was satisfied that such a power must be inherent in the court. The passage from the judgment which the plaintiff submitted that this Court should have regard to in exercising its discretion under O. 26, r. 1 is in the following terms:

> "Having determined that the court has jurisdiction to impose a penalty it is necessary to consider whether in this case it is appropriate that it should do so. Each of the contemnors has spent 94 days in prison. Those who are parties to the action will suffer a further disadvantage in these proceedings. There is a well settled rule that the court will not entertain an application by a person who is in contempt of court until he has purged himself of that contempt…As this litigation progresses there may well be circumstances in which the court will be asked to apply its discretion in favour of the contemnors including its discretion in relation to costs in which case the fact that they remain in contempt will be a factor influencing the court's exercise of its discretion…"

On 7th April, 2006 Finnegan P. made an order that the plaintiff recover "the costs of the Contempt proceedings and of this Order" against the first, second and third defendants and the other two contemnors. The costs order is under appeal to the Supreme Court. As I understand the position, the costs of all other orders made on the plaintiff's claim to date have been reserved.

The observations of Finnegan P. in the passage which I have just quoted were not directed at the fifth defendant because, for whatever reason, although alleging that she was in breach of the order of 4th April, 2005, the plaintiff did not join her in the committal application. Nonetheless, it was submitted on behalf of the plaintiff that her position is indistinguishable from that of the first, second and third defendants. It was submitted that serious allegations had been made against her on affidavit that she was in breach in the course of earlier applications to the court. It was further submitted that those allegations had not been denied by the fifth defendant. However, as I understand the position, no finding has ever been made by the court that the fifth

defendant was in breach. Whether she was or was not is not an issue which is now before the court, the order of 4th April, 2005 having been discharged. In the circumstances, I think it would be improper to express any view or make any finding on that issue.

As regards the first, second and third defendants, there was a finding made on 29th June, 2005 that they were in breach of the order of 4th April, 2005 and in contempt of court. There has been no appeal against that finding. Further, there was a finding made at the time the order of 4th April, 2005 was discharged that they were unwilling to purge their contempt and to give an undertaking to comply with orders of the court in the future. They persisted in that attitude in the proceedings before Finnegan P. in October, 2005. No court could do other than condemn such behaviour and I do so unreservedly.

The issue for the court on this application under O. 26, r. 1 is what provision in relation to costs on allowing the plaintiff to discontinue its claim renders justice as between the plaintiff and the defendants. Because of the history of the proceedings and the wider context of the controversy about the Corribb Gas project, it would be very easy to fall into the trap, as the saying goes, of losing sight of the wood for the trees. To avoid that trap, in my view, it is necessary to pare back to find the essential elements of the plaintiff's claim. It is a private law claim, involving a private law dispute as to whether the plaintiff has a legal right to enter and do works on the defendants' lands, as the plaintiff asserts it has, but the defendants deny. The essence of the plaintiff's decision which has led it to seek to discontinue its claim is that it does not intend in the future to seek to enforce the legal rights it asserts, although not conceding that they do not exist. It is neither permissible nor possible, given the stage

at which the proceedings are, to determine whether the plaintiff is correct in its assertion as to its entitlements, which the defendants continue to controvert.

On an objective appraisal of those bare elements on their own, in my view, just provision in relation to costs would allow the defendants their costs to date. Such provision would be consistent with the rationale which obviously underlies the provision contained in O. 26, r. 1 in relation to the costs of early discontinuance, which is that, by initiating and prosecuting the proceedings to the date of discontinuance, the plaintiff has created the situation in which the defendant has had to incur the costs of defending the proceedings. However, the court has to go further and has to consider whether the factors canvassed on this application would render such provision unjust.

Having regard to both strands of the plaintiff's argument, those factors and my conclusions in relation to them are as follows:

(1) In the context of an application under O. 26, r. 1 in my view, it is immaterial that the legal rights which the plaintiff asserts are derived from the exercise by a public body, the Minister, of statutory functions. The issue between the plaintiff and the defendants remains a private law issue. Irrespective of the presumption of validity on which the plaintiff relied, in initiating and prosecuting the proceedings, the plaintiff assumed the risk of the defendants succeeding in establishing that the decisions and instruments on which the rights asserted depend were void *ab initio*. By discontinuing, the plaintiff is avoiding that risk. I can see no reason way a plaintiff's liability for costs should be any different in a situation where discontinuance avoids that type of risk from the situation where the risk is of a defendant establishing that

the plaintiff does not have rights over the defendant's land at common law, for instance, by prescription or under an enforceable agreement with the defendant. In short, in my view, the plaintiff's reliance on the presumption of validity in this context is misconceived.

(2) It is also immaterial, in my view, that the plaintiff obtained an interlocutory injunction. The interlocutory injunction was granted on the basis of the application of criteria under which the plaintiff demonstrated no more than that there was fair *bona fide* issue to be tried, without regard to the strength or weakness of the plaintiff's case or its ultimate outcome. Moreover, unlike the situation which prevailed in the *Stratford* case, the injunction obtained by the plaintiff has been discharged. Notwithstanding such discharge and notwithstanding the discontinuance of the plaintiff's claim, from the defendants' perspective the substantive dispute between the parties continues, as does an issue as to whether the interlocutory injunction was properly obtained by the plaintiff. In the circumstances, to adopt the pragmatic approach which commended itself to the Court of Appeal in the *Stratford* case, where the only issue outstanding was the issue of costs, would be inappropriate.

(3) Order 26, r. 1 regulates a discrete component of the jurisdiction of this court, which the plaintiff unilaterally wishes to avail of. This is of significance, in my view, in relation to two aspects of the plaintiff's argument. First, while the plaintiff disavowed inviting the court to decline awarding the defendants their costs as a punishment for contempt, in reality, in invoking the judgment of Finnegan P., that is

> what the plaintiff was striving for, in addition to seeking a bounty for itself to which it would not otherwise be entitled on the normal application of O. 26, r. 1. I am not satisfied that such an outcome would render justice, as envisaged in O. 26, r. 1, where the plaintiff is unilaterally electing to abandon its claim without the substantive issues between the parties being determined or resolved, so that the circumstances are such that the full implications of that course are unclear. Therefore, I do not think that, in applying O. 26, r. 1, the court should be influenced by the fact that the first, second and third defendants have failed to purge their contempt. Secondly, it suggests to me that the proper course for the court to adopt is to resist the easy option of acceding to the plaintiffs alternative proposition that the costs be reserved to the trial of the counterclaims. In my view, the fact that the defendants independently intend to pursue their counterclaims is a separate matter which will give rise in due course to separate issues in relation to costs.

For the foregoing reasons I conclude that the court should not depart from the normal rule that the discontinuing plaintiff should pay the defendants' costs to the date of discontinuance in this case.

As to the amount of costs for which the plaintiff is liable, the contention of the second and fifth defendants that the costs should be quantified on the basis of what would be allowable on taxation as between a solicitor and client under O. 99, r. 11 of the Rules, rather than on taxation on a party and party basis under O. 99, r. 10(2), in my view, is wholly unmeritorious. It is true that sub rule (3) of O. 99, r, 10 confers on the court a discretion, where it thinks fit, to direct that costs to be paid by a party to

proceedings by another party should be taxed on a solicitor and client basis. It is also true that the court may exercise that discretion where it considers that the conduct of the paying party merits such a mark of disapproval, as happened in the only Irish authority to which the court was referred: *Geaney v. Elan Corporation plc* [2005] IEHC 111, in which judgment was delivered by Kelly J. on 13th April, 2005. In that case, having heard an application brought by the plaintiff to have the defendants' defence and counterclaim struck out on the ground of failure to comply with an order for discovery, Kelly J. ordered that the defendant make further and better discovery, although he was dissatisfied with the way in which the discovery obligations of the defendant had been met and found that the approach adopted had been seriously substandard. However, in order to indicate the courts displeasure at the way in which the defendant had met his obligations, he awarded the plaintiffs the costs of the application to be taxed on a solicitor and client basis.

The basis on which it was contended on behalf of the second and fifth defendants that the plaintiff should be made liable for costs taxed on a solicitor and client basis may be summarised as follows: the plaintiff, a powerful corporation, has used this litigation to do what it wishes for its own commercial purposes, as exemplified by initiating the proceedings to enforce the legal right it claims, obtaining the interlocutory injunction, then abandoning the injunction, then re-routing the pipeline and finally abandoning its claim. In my view it would not be proper to draw any inference from the manner in which the plaintiffs claim in these proceedings has been prosecuted to date or to infer any conduct on the part of the plaintiff which merits the disapproval of the court, when the substantive issues on the plaintiff's claim have not been determined and the plaintiff's motivation has not been explored at a trial on oral evidence.

Apart from that, in view of the observations of Finnegan P., and having regard to the fact that the first, second and third defendants have not evinced any change of attitude since that judgment was delivered, it is ill behoves the second defendant to ask the court to exercise its discretion contained in O. 99, r. 10(3) in his favour.

Order

On the assumption that the only order for costs made to date was the order of 7th April, 2006, as a condition of the grant of leave to discontinue, there will be an order that the plaintiff pay the defendants' costs of the plaintiff's claim, save the costs of the contempt proceedings and the order of 7th April, 2006, which are under appeal to the Supreme Court, the costs to be taxed, in default of agreement, on a party and party basis. The order will note the plaintiff's undertaking in relation to the compulsory acquisition orders referred to earlier.

C. The directions motion

The motion

The State parties have sought an order giving directions as to the mode of trial of the proceedings and, in particular, they have asked the court to determine that the following matters be heard and decided on:

(a) whether the counterclaims against the State parties have been rendered moot by the discontinuance of the plaintiff's claim;

(b) whether by reason of such discontinuance the defendants have *locus standi* to challenge –

(i) the validity of the compulsory acquisition orders and the consent under the Act of 1976, or

(ii) the constitutionality of the provisions of the Act of 1976 being sought to be impugned by the defendants; and

(c) whether the defendants are out of time to make the foregoing challenges by reason of O. 84, r. 21 of the Rules.

The respective positions of the parties

The oral submissions made by counsel for the State parties had a broader thrust than was signposted by the notice of motion. The case made on behalf of the State parties was that their involvement in this dispute should be dealt with in an economical fashion. They do not want to be dragged into the private dispute between the plaintiff and the defendants. Recognising that the defendants' case is based on the alleged invalidity of the consent and the compulsory acquisition orders, counsel for the State parties advocated that the public law issues be segmented out of the proceedings and that the issues as to whether they are justiciable in these proceedings now should be dealt with first. It was submitted that the issues whether the public law challenges are moot or, alternatively, whether they are time-barred, are capable of being dispositive of the State parties' involvement in the proceedings, although, on the issue of mootness it was recognised that the determination of the issues which arise from the defendants' allegations of past trespasses by the plaintiff in 2005 are based on alleged invalidity. It was also recognised that it would be appropriate to leave issues in relation to the constitutionality of the Act of 1976 over until the other public law issues were determined.

In relation to the courts jurisdiction to structure the proceedings on the lines suggested, counsel for the State parties submitted that there are two alternative courses open to the court: either to invoke O. 36, rr. 7 and 9, referring to *Emma Silver*

Mining Company v. Grant (1879) 11 Ch. D 918; or alternatively, to invoke O. 34, r. 2. It was emphasized that a trial pursuant to O. 36 would not be the trial of a preliminary issue; it would be a full trial.

I discerned no real objection on the part of any of the other parties to the proposal made by counsel for the State parties. It was supported by counsel for the plaintiff, who submitted that the pleadings should be reconstituted and that the time bar issue should be determined first, on an agreed statement as to the facts. Insofar as he was entitled express a view on the State parties' application, the position of counsel for the first and third defendants, whilst questioning whether the approach would result in economy and whether the invalidity issue could be regarded as moot, was that his clients were not standing in the way of the approach advocated. Counsel for the second and fifth defendants, in their written submission, referred to the authorities on O. 25, r. 1 and O. 34, r. 2 of the Rules and to the well established principle that a preliminary issue of law cannot be tried *in vacuo*, but must be tried in the context of established or agreed facts and, if the relevant facts are not agreed, the moving party must accept, for the purpose of the trial of the preliminary issue, the facts as alleged by the opposing party (*McCabe v. Ireland* [1999] 4 I.R. 151). At the hearing, counsel for the second and fifth defendants submitted that the issues are not moot. He also submitted that the plaintiff and the State parties should be required to comply with the discovery orders made against them on 31st July, 2006 before the time bar issue is tried.

Conclusions/orders

Before outlining the order I propose making on the State parties' application, which I consider to be meritorious, I have some observations to make on the course of the proceedings to date.

First, in my judgment of 23rd March, 2006, I dealt with an application which was before the court at that juncture, in which the plaintiff sought various alternative remedies based on their contention that the public law remedies were not justiciable. I intimated that I was disposed to direct the trial of a preliminary issue as to whether the defendants were entitled to raise public law issues, but adjourned the matter pending the closing of the pleadings. However, as I recorded in my judgment of 31st July, 2006, by the time the matter next came before the court the plaintiff did not wish to pursue its application to have a preliminary issue determined, so the plaintiff's application was dismissed.

Secondly, in my judgment of 31st July, 2006, in the context of dealing with an application for discovery by the first and third defendants against the Minister, I dealt at some length with the manner in which public law issues have been pleaded by these defendants and, in particular, that the State parties are not defendants to their counterclaim, that the only relief they have sought in relation to the compulsory acquisition orders relates to the alleged unconstitutionality and incompatibility with the European Convention on Human Rights of the Acquisition of Lands (Assessment of Compensation) Act, 1919, and that the manner and timing of their allegations as to the invalidity of S.I. No. 517 of 2001 and the scope of their notice under O. 60 of the Rules were unsatisfactory. None of these matters have been addressed by these defendants in the interim.

Thirdly, the second and fifth defendants seem to be attempting to broaden the parameters of their case. For instance, on the hearing of these applications, a complex submission was made on behalf of the second and fifth defendants to the effect that the compulsory acquisition orders were made under the wrong legislation. Apart from arguing that the submission was incorrect, counsel for the plaintiffs submitted that the point was not explicitly pleaded by the second and fifth defendants. Furthermore, on the hearing of the discontinuance motion, counsel for the second and fifth defendants raised another new matter: the decision of the European Court of Justice delivered on 11th January, 2007 in *Commission v. Ireland* (Case C-183/05) and the Court's finding in relation to the State's non-compliance with Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and its observations in relation to the offshore section of the pipeline in Broadhaven Bay.

The three matters I have just outlined are examples of the continual shifting of position by the parties. They suggest to me that the parties are not really focussed on structuring this litigation process so that it can be brought expeditiously to a meaningful conclusion. It is necessary to emphasise that the issues between the parties are defined by the pleadings, which are closed, although, of course, they can be amended by consent.

I propose making the following orders on the State parties' application:

(1) Being satisfied that the issues can be addressed on a modular basis, I propose making an order under O. 36, r. 9, that the following public law issues be tried as between the defendants, as claimants, and the plaintiff and the State parties, as respondents, before any other issues are tried:

(a) all issues raised by the defendants in relation to the validity of the consent under s. 40 of the Act of 1976, as amended, granted on 15th

April, 2002 and the compulsory acquisition orders pursuant to s. 32 of the Act of 1976, as amended, granted on 3rd May, 2002 and the 5th June, 2002; and

(b) all issues as to the justiciability of issues raised by the defendants as to the constitutionality of any Act impugned by the defendants on the ground that the defendants do not have *locus standi* or mootness.

The following directions in relation to pleadings will be made: that the defendants deliver points of claim to the plaintiff and the State parties within three weeks of receipt by the defendants of discovery pursuant to the order made on 31st July, 2006, such points of claim to outline the facts on which the defendants rely as showing that the public law issues have been raised in time; and that points of defence be delivered by the plaintiff and State parties within three weeks of receipt of the points of claim. Save with the consent of the opposing party or parties, the points of claim and points of defence must fall within the parameters of the pleadings already delivered.

(2) I also propose ordering that the issue as to whether the defendants are out of time to challenge the validity of the consent and/or the compulsory acquisition orders by reason of O. 84, r. 21 of the Rules, be tried as a preliminary issue within the public law issues module. There will be a direction that the plaintiff and the State parties have liberty to bring a motion for further directions as to the trial of the preliminary issue once pleadings in the module have been closed.

Finally, I am satisfied that issues of *locus standi* and mootness in relation to the constitutional issues can be conveniently tried in the public law module without breaching the practice of judicial self-restraint.

D. The Discovery Motions

Both the plaintiff and the State parties have advanced reasonable excuses for failure to furnish discovery within the time limits prescribed in the order of 31st July, 2006. In the circumstances, the time prescribed in that order will be extended for a further three weeks from the 18th April, 2007. The motion of the second and fifth defendants will be struck out.