Blascaod Mor Teoranta v. Commissioners of Public Works in Ireland [1998] IEHC 38 (27th February, 1998)

THE HIGH COURT
1991 No. 6620p

BETWEEN
AN BLASCAOD MÓR TEORANTA, PETER CALLERY, JAMES CALLERY, KAY BROOKS AND MATTHIAS JAUCH

PLAINTIFFS

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND, THE MINISTER FOR THE GAELTACHT, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND BY ORDER
THE MINISTER FOR THE ARTS, CULTURE AND THE GAELTACHT
SUBSTITUTED DEFENDANT FOR THE FIRST AND SECOND DEFENDANTS

Judgment of Mr. Justice Declan Budd delivered on the 27th day of February 1998

The background setting to the enactment of An Blascaod Mór National Park Act, 1989

1. The Blasket Islands lie off the coast of the Dingle Peninsula in County Kerry. The seven islands and several islets and rocks are in the barony of Corca Dhuibhne on the north side of the entrance to Dingle Bay. As one looks out at the archipelago from Slea Head below Mount Eagle on the peninsula, Innisvickillane is to the south-west; Innisnabro to the west; and further west, behind the Great Blasket is Tiaracht, which has a lighthouse; to the north, lies Inis Tuaisceart; and off the east of the Great Blasket are Beiginis and Oiléan na nÓg. The Great Blasket, or An Blascaod Mór, is across the Blasket Sound from Slea Head and is a narrow island about five kilometres long by one kilometre wide. It is the largest of the islands with the remnants of a village behind the beach known as the White Strand or Trá Bán at the east end closest to the mainland. Although the island, at its closest point to the mainland, is only just more than one kilometre off Dun Mór Head, it is a sea journey of about five kilometres from the harbour at Dun Chaoin to the small breakwater below the village. The seas in the Blasket Sound can be treacherous. Access on to the cliff girt Blasket Islands, with the exception of Beiginis, is difficult.
2. In the 19th century, the population of the islands seems to have varied between about 100 in 1861 and 150 in 1901. In 1916, Tomás Ó Criomhthain, in a letter to Robin Flower, wrote that there were 176 people in the islands. The islanders used currachs called naomhóg. They lived by fishing and by hunting seals, birds and rabbits and by collecting birds' eggs. By 1939, the population had dropped to under 100 and, by 1947, there were only 50 people. The salt laden gales prevented trees growing on the islands, but the community on the Great Blasket produced an extraordinary literary legacy. Their books about their island life have been recognised as an unique and vibrant literary flowering. This included three famous autobiographies: Twenty Years A-growing by Muirís Ó Sullivan, An Old Woman's Reflections by Peig Sayers, and The Island Man by Tomás Ó Criomhthain. These writers of international renown inspired others of the islanders to write. The islands also attracted a number of remarkable scholars from abroad including Carl Marstrander, Robin Flower and George Thomson, who all encouraged the islanders to write of their own community and the

world of their archipelago. There was always much movement to and from the island from the Dingle Peninsula and indeed the islanders would cross the strait to attend mass, to purchase provisions and to bring their dead for burial. Muirís Ó Sullivan spent his earlier years in Dingle and Peig Sayers came from the mainland. There was the close contact between the folk on the island and those on the mainland which one would expect across a strait. Many of the islanders emigrated and at the time of the final evacuation of the island on 17th November, 1953 there were only some 20 people left. It is common case that the islands are places of a wild and remote beauty and that the Great Blasket in particular was the home to and source of inspiration for a remarkable literature.

3. The Plaintiffs, within the last 25 years, have become entitled to many areas of land in the village on the Great Blasket and the first four Plaintiffs are entitled to 17/25ths of the great commonage which is 1,060 acres of the 1,132 acres of the entire island. Dr. Matthias Jauch, the fifth named Plaintiff, is a lecturer at University College Cork and is a brother of the late Arne Jauch who was the owner of an undivided moiety with Muirís Cleary in two registered holdings in the village and "fine lands" along with an unregistered holding which includes a comparatively modern beehive hut and also the old post office building. Their registered holdings included 2/25ths of the great commonage. The "fine lands" are the fertile but separated plots behind the strand. The late Arne Jauch and another brother, Tilman Jauch, often stayed on the island and were both drowned while fishing in the seas off the Great Blasket in 1978.

4. On 7th June, 1989, An Blascaod Mór National Historic Park Act, 1989 (No. 11 of 1989) was enacted. This "1989 Act", among other things, made provision for the acquisition, by agreement or compulsorily, of any land situated on the island. The Plaintiffs had been for some years the largest owners of the land and buildings on the Great Blasket
island. C.P.O. notices were served on the first four Plaintiffs in March 1991. The Plaintiffs promptly issued proceedings to challenge the constitutionality of a number of provisions of the Act and also the procedure incorporated into the 1989 Act whereby the Acquisition of Lands (Assessment of Compensation) Act, 1919 was made part of the 1989 Act. They also challenged the validity of the notices served by the Defendants under the authority of the Act.

5. A synopsis of the background to the passage of the Act and the history of how the Plaintiffs acquired their lands on the Great Blasket may assist in an understanding of the grounds for the challenge to the constitutionality of the Act.

6. In this century, many of the Blasket islanders left the islands for the mainland and some emigrated particularly to Massachussetts in the U.S.A. The final evacuation of the last 20 inhabitants took place with government assistance on 17th November, 1953. In the early 1970s, an American national and Irish citizen of colourful personality, Taylor Collings, began to purchase properties on the Great Blasket from the former inhabitants. He was attracted by the beauty and history of the area and the cultural traditions of the Corca Dhuibhne region. He and his wife spent a considerable amount of time, energy and money in restoring some of the houses on the Great Blasket and he was assiduous in tidying up refuse which had accumulated on the island and in trying to preserve the buildings in the village from depredation. In January 1972, Mr. Collings sold half of his interest in the properties which he had purchased on the Great Blasket to Phillips Brooks, an American diplomat, and, in September 1972, he sold his other half interest to Peter Callery and James Callery, the second and third named Plaintiffs. Phillips Brooks died in January 1975 and his interest passed to his widow Kay Brooks. Most of the property formerly held by Taylor Collings has since been transferred to the first named Plaintiff, An Blascaod Mór Teoranta, which was incorporated in September 1972. The first four Plaintiffs are by far the largest owners of land
on the Great Blasket, owning 17/25ths of the village property and fine lands therewith and 17/25ths of the great commonage, which is actually held in undivided shares in fee simple. The fifth named Plaintiff, Matthias Jauch, has been served with C.P.O. notices in respect of a moiety of the property which his late brother Arne Jauch owned jointly with Muirís Cleary.

7. It is specifically pleaded that the Minister for the Gaeltacht at the time of the preparation and passing of the 1989 Act had an interest himself in the Blasket Islands. The aspect which has concerned the Plaintiffs is that, in or about 1974, the island of Innisvickillane was purchased by a company under the control of Charles J. Haughey (the then Minister and Taoiseach) or members of his family. A dwelling house has since been built by them on that island.

Part of the Plaintiffs' contention is that if a national park is appropriate, then it should comprise the entire of the Blasket Islands and in particular Innisvickillane should not be excluded as it has monastic remains and a role in the folklore tradition of the Blaskets. About that same time, in or about 1975, the Office of Public Works made it known that it had an interest in buying property on the Great Blasket and in fact purchased one holding from an islander known as "Kearney the Yank" and this comprised a house property in the village together with some fine lands and a 1/25th interest in the great commonage. This holding has been left untouched and deteriorating since the purchase but does ensure that the State has had a property in the village.

8. The 1989 Act is confined in its operation to the Great Blasket and does not extend to any of the other islands or the adjacent mainland being all in the Corca Dhuibhne area. The Plaintiffs make a series of complaints about this Act and seek declarations that the sections of, and the entirety of, the Act are repugnant to the provisions of the Constitution. The action has given rise to three judgments, the first by Murphy J. in respect of discovery of documents, the second delivered by Kelly J. on 18th December, 1996 in respect of a series of preliminary issues with regard to the validity of the compulsory purchase notices; and thirdly on the 17th June, 1997, my judgment with regard to the scope of the evidence which is admissible and eligible for scrutiny by the Court in such a constitutional action. The Plaintiffs complain, inter alia, of invidious discrimination, and infringement of constitutional guarantees of equality and property rights. They also object to the role given to Fondúireacht An Bhlascaoid Teoranta ("the Foundation") which is described in the Act as "being the body incorporated for the purpose, inter alia, of preserving and promoting the knowledge of the historic heritage, culture, traditions and values of An Blascaod Mór and Corca Dhuibhne generally".

9. The first named Plaintiff, An Blascaod Mór Teoranta, is the registered owner in respect of the lands in 15 folios and claims beneficial ownership of several more properties and is registered as the owner of 9/20th undivided shares of the lesser commonage besides being the owner of 17/25ths of the greater commonage. A map which was referred to as the "Patchwork Quilt Map", on which the property of the company is coloured pink and blue, with the lesser commonage in brown, and the interspersed properties depicted in white (not owned by the company) gives an helpful visual indication of the village and fine land properties at the back of the White Strand. The landing area is to the south of this map and one can also see the two pathways running roughly from south to north traversing the hillside.

10. The second named Plaintiff, Peter Callery, was brought up in County Roscommon and has practised as a solicitor in Dingle, County Kerry, for more than 30 years having come there in 1963. His office, Murtagh E. Burke & Co., acted for Taylor Collings in the purchase of property on the Great Blasket. Taylor Collings, in or about 1970, had come to the island and found it to be uninhabited with the buildings deteriorating. For over 18 months, Taylor Collings and his wife worked energetically on restoring the buildings and employed an islander, Sean Kearney, to assist them in the preservation of the properties and he acted as their intermediary in making contact with islanders who were willing to sell their interests on the Great Blasket. Mr. Collings and his wife from their own resources restored a number of the houses, including the home of Peig Sayers, and provided accommodation and facilities by way of a guest house where visitors to the island could be accommodated. The Plaintiffs have since, at their own expense, maintained such a facility on the island, particularly for summer visitors, without any financial assistance from the State. In his capacity as solicitor for Taylor Collings, Peter Callery has gained expertise with regard to the land holdings and titles to the property on the Great Blasket. He belongs to a County Roscommon family with an enviable reputation, not only for an interest in Irish history but also for putting their own resources into preserving Irish heritage properties. The purchase of Strokestown House in County Roscommon by the third named Plaintiff's company, the preservation of that great house, and the opening thereof to the public in 1987, and the exhibition on the famine and emigration put together and displayed there since 1994 is well known and now attracts 50,000 visitors each year.

11. Efforts to preserve and restore the houses of the Blasket writers are part of the background to the present case. The State could have taken the steps which were taken by Taylor Collings and his wife to purchase the deserted homes of the former inhabitants but chose not to do so except in the one instance. No money has been spent on the restoration or preservation of that one property but this is perhaps explicable in that the property was acquired so that the State would have an interest on the island and any overall scheme for preservation of the village by the

Office of Public Works would probably be based on careful and considered plans. However, as the years have passed and the deterioration of the authors' homes progresses, one might be forgiven for fearing that the village houses on the Great
12. Blasket may suffer by delapidation and by sinking into a waterlogged hillside. In 1973 overtures were made by the Office of Public Works in respect of purchase of lands on the island but a meeting by Peter Callery with an official proved inconclusive. It is significant that Peter Callery offered cooperation on the part of his clients in respect of works intended on the island and in particular the restoration of buildings, however this offer was then and since refused by the Defendants. On 13th April, 1984, the Office of Public Works wrote to Peter Callery as solicitor indicating that the Commissioners of Public Works intended to acquire all the lands on the island and to develop them in the national interest so that they would be available for all to enjoy. Neither at that stage nor before enactment of the 1989 Act were offers were made by the State or the Office of Public Works. It was suggested in evidence that the first four named Plaintiffs were prepared to sell all their commonage and most of their other lands voluntarily and to cooperate in relation to the restoration of houses some of which they have preserved and kept in a usable condition out of their own resources for over 20 years. I accept their evidence and it is noteworthy that at no stage did the Department of the Gaeltacht or any other State agency write to the Plaintiffs setting out the reasoning behind the need for acquisition of the Plaintiffs' lands for a national historic park or seeking their cooperation in respect of this objective.
13. In about 1986, a private association called Fondúireacht an Bhlascaoid Teoranta ("the Foundation") was established being a company limited by guarantee incorporated under the Companies Acts. The directors and members of the Foundation, under the chairmanship of the late Patrick J. Moriarty, Chairman of the ESB, have played a considerable role in encouraging the setting up of a Visitor Centre at Dun Chaoin to demonstrate the literary heritage and way of life of the former inhabitants of the Blaskets. The Foundation has been influential in advising and has also funded and commissioned
research into the cultural heritage of the Blaskets from folklore and literature to buildings. I accept the evidence of Michael Begley, T.D., that he attended a function in early 1989 at the ESB where the heads of a Bill, including compulsory acquisition in respect of the Great Blasket, were discussed and I am satisfied that at least some of the directors of the Foundation were inspirational and influential in seeking to have legislation passed to preserve the cultural tradition of the Blasket Islands and especially to enable the compulsory acquisition of lands on the Great Blasket.
14. In 1985, the first four Plaintiffs contemplated selling their interest in the Great Blasket and had caused an advertisement to be published in the Wall Street Journal through Michael Collins, an Irishman who was working as a realtor in the United States. At this time, Peter Callery was approached by members of the Foundation and was asked to defer any sale of the property. The first to fourth named Plaintiffs agreed to this postponement at the behest of the Foundation in the expectation and on the understanding that an offer would subsequently be made for their interest. No such offer was forthcoming. Instead, in May 1989, the 1989 Act was introduced in the Seanad and was passed in both Houses of the Oireachtas and was enacted into law on 7th June, 1989. It emerged in evidence that while the agents of the Defendants conferred at no less than 43 meetings with members of the Foundation in West Kerry, there was no communication made on the part of the State with the Plaintiffs in respect of the imminence and content of the 1989 Act, despite the fact that as Michael Begley put it "the dogs in the street in Dingle knew that Peter Callery was involved in the first Plaintiff". In any event, the State authorities were well aware that Peter Callery was the solicitor who represented the interests of An Blascaod Mór Teoranta and the other Plaintiffs. Furthermore, the offer of future cooperation made by Peter Callery on behalf of the Plaintiffs in 1973 would have been on the files of the State authorities.

15. The 1989 Act is unlike any other Irish statute in a number of respects. It provides for the establishment and maintenance on the Great Blasket island of a national historic park. The long title reads as follows:-

"An Act to provide, in the interests of the common good, for the establishment and maintenance on An Blascaod Mór of a park to be known as An Blascaod Mór National Historic Park and for those purposes to confer

appropriate powers (including the power to acquire land), functions and duties upon the Commissioners of Public Works in Ireland and to authorise the delegation of certain of those powers, functions and duties to Fondúireacht An Blascaoid Teoranta and to provide for connected matters."

16. From the title and tenor of the 1989 Act it is clear that the role envisaged for the Foundation is unusual and significant.
17. Compulsory acquisition notices dated 4th March, 1991 were served on the Plaintiffs. The Plaintiffs took objection to the compulsory acquisition of their property on a number of grounds. On 7th May, 1991 a plenary summons issued challenging not only the validity of the compulsory acquisition notices but also the validity of a number of the provisions of the 1989 Act as being repugnant to the provisions of the Constitution of Ireland. A judgment of Mr. Justice Peter Kelly was delivered on 18th December, 1996 in respect of a number of preliminary issues. The Act contained no express provision permitting the making of regulations of the type contained in S.I. 340 of 1990. Having stated that it was not for the Court to act as a revising chamber for ill drafted legislation such as the Act in suit, Mr. Justice Kelly decided that the Court does in general have jurisdiction to infer that Parliament intended to confer a power to make regulations, even though it did not expressly do so and went on to consider whether the Court ought to do so, and reached the conclusion that the Oireachtas clearly was minded to confer a power to make regulations of the type in suit upon the Minister. He concluded that, notwithstanding the absence of an express power in the Act to make regulations of the type in question, and furthermore, notwithstanding the express power to make regulations of a different type, there was nonetheless a clearly implied power contained in the statute itself which authorised the making of the regulations. After further strictures on the sloppy draughtsmanship of the Act and the schedule thereto, he concluded secondly that the regulations did come within the terms of the 1989 Act including the schedule. Thirdly, he concluded that while there were omissions from the notices these were not substantial and accordingly the notices, the subject of the preliminary issue, were valid. I was told that the costs of this preliminary issue were reserved to await the outcome of the constitutional challenge.
18. The fifth named Plaintiff and his co-owner, Muirís Cleary, each received a letter dated 28th February, 1991 from the Heritage Service of the Office of Public Works. The letter to Dr. Jauch is worth quoting in part:-

"An Blascaod Mor National Historic Park: Acquisition Reps. Arnie Jauch
Dear Dr. Jauch,
I refer to our letter of 16 November 1990 in which we made an offer for your holdings on An Blascaod Mor.

We are about to serve compulsory acquisition notices on a company called Blascaod Mor Teo. to acquire all of its property on the island including undivided shares in
the commonages which it claims to own. We are advised that in order to do this we must purchase the fee simple interest in the commonages i.e. acquire outright ownership. Unfortunately therefore we will be obliged to serve an acquisition notice on you for any shares you may have in the commonages.

Please note, however that this notice does <u>not</u> extend to any land or buildings you may own outside of the commonages. However we are still interested in acquiring this property and we would be happy to continue negotiations regardless of the compulsory acquisition notices. Indeed even after the notices are served we would prefer to reach an agreed settlement with you for your interest in both the commonages and other land."

19. This letter may well have been sent to Dr. Jauch and Muirís Cleary in error under the misapprehension that they were owners of land to which compulsory acquisition powers did not apply by reason of the lands being owned or occupied by persons within the exemption in section 4(2) of the Act, i.e. those who before 17th November, 1953 were "ordinarily resident on the island" and their relatives. In fact, neither Dr. Jauch nor Muirís Cleary, despite both having considerable personal involvement with the Great Blasket, were within the category of exempted person and

indeed on 8th April, 1997 second sets of C.P.O. notices were served on the fifth named Plaintiff and on his co-owner, Muirís Cleary.
20. The Plaintiffs contend that the 1989 Act in reality targets the Plaintiffs and that they will be deprived of all their property on the Great Blasket whereas other landowners with substantial holdings in the village and fine lands will be excepted and will be able to sell on the open market. The Plaintiffs submit that at the very least they should have been given advance notice of the 1989 Bill and should have been given an opportunity to make representations in relation to its contents since it was not a normal Act of general application but one of narrow focus and was going to affect their vital interests. They suggest that they should be permitted to retain ownership of some property on the island in the same manner as the relatives of those who left before or were evacuees in 1953 who are exempted from acquisition in respect of the fine lands and thus have a continuing proprietary interest. The Plaintiffs object to the mechanism for the determining of compensation and make the point that this is not a consensual arbitration but the imposition of a valuation from which no appeal lies; furthermore, they complain that no reasoned judgment is required or given in respect of the award. The Plaintiffs also object to the provisions in the 1989 Act whereby the State acting through the Office of Public Works can expropriate their interests and can then subsequently transfer the running and management of the Park, being likely to be most of the island, to the Foundation which is privately owned. This especially irks them as some of the leading members of the Foundation were actively involved in lobbying for the compulsory purchase legislation.
21. The headings under which the several grounds of constitutional challenge are mounted can be set out in summary as follows:-

Summary of Grounds of Constitutional Challenge

(a) **Property**

22. Infringement of property rights (apart from any question of discrimination) because of

(i) an insufficiently pressing public purpose;

(ii) the stated objective of preserving the amenity and affording access to the public could have been achieved by less drastic means, i.e. protective legislation and subvention rather than outright expropriation;

(b) **Equality**

23. Infringement of guarantees of equality and property rights, i.e. Articles 40.1 and 40.3.2, on the grounds that
(i) the Act does not encompass all of the Great Blasket;

(ii) the basis for excluding the pre-1953 residents who have since been owners or occupiers of land, and their relations, i.e. their pedigree, is particularly obnoxious;

(iii) the Act is targeted at the Plaintiffs alone, i.e. it is in substance a "Bill of Attainder and aimed 'ad hominem' or at least at a tiny specific group;

(iv) the Act does not encompass all of the Blasket archipelago.

(c) **Constitutional Justice**

24. The Plaintiffs submit that there was an infringement of fair procedures because the 1989 Act in substance is a "private Act" of the Oireachtas but none of the usual protections accorded in respect of a private Bill were invoked. The Plaintiffs also submit that the role of the Foundation was objectionable because some of the members were heavily involved in procuring and drafting the Act and this very lobby group has been given statutory rights of

consultation and administration notwithstanding that neither the Foundation nor any of its members had any significant proprietary interest in the island.

(d) **Objection to the incorporation into the Act of the Acquisition of Land (Assessment of Compensation) Act, 1919**

25. The Plaintiffs object to the mechanism prescribed by section 4(3) and paragraph 5(2) of the schedule to the 1989 Act in respect of the assessment of compensation on the basis of the repugnancy to the Constitution of provisions of the 1919 Act .

26. Paragraph (5)(2) of the Schedule to the 1989 Act states that the compensation to be paid under this paragraph in respect of any estate, right, easement, title or interest of any kind in, over or in respect of land shall, in default of agreement, be determined by arbitration under and in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919. The Plaintiffs object to this incorporation into the 1989 Act of the 1919 Act provisions on the grounds that:-

(i) the 1919 Act provides for an imposed expert valuation and not for a consensual arbitration;

(ii) the 1919 Act procedure provides for a simple award without reasons being given; and

(iii) the Plaintiffs allege there is no recourse to the Courts by way of judicial review or by way of an appeal.

27. The Plaintiffs suggest that there is no access to the Courts otherwise than by way of a limited Case Stated on a point of law. The Plaintiffs also contend that the assessment of compensation for expropriation of land is not an administrative matter but is justiciable exclusively in the Courts.

(e) **Delegation of functions and powers**

28. The Plaintiffs challenge the allocation to the Foundation by section 5(2) of the 1989 Act of certain functions under the Act as being an impermissible delegation of executive power to an entirely private association, the members, directors or managers of which are not accountable to the public or to duly elected representatives.

(f) **Section 5(4) of the Act - Power to Adapt**

29. The Plaintiffs challenge section 5(4) which authorises the Minister by order to amend the Act in any way he considers expedient as being an impermissible delegation of legislative authority equivalent to an "Henry VIII clause".

(g) **Discrimination by impact or indirectly against EU nationals such as Dr. Jauch by the exempting of land held by the pre 1953 residents, who have since been owners or occupiers of land, and their relatives as excepted by sections 4(2)(a) and 4(4)** . (***The Bloomer -v- Incorporated Law Society*** point).

(h) **Lack of fair notice and procedures in respect of compulsory acquisition.**

30. The Plaintiffs also contend that there was a lack of fair procedures in that prior to issuing the C.P.O.s there should have been communication with the Plaintiffs with regard to the reasons for and objectives of the intended park so as to afford an opportunity to the Plaintiffs to make representations in respect thereof. The first four Plaintiffs also contend that their offer to consent to arbitration by an international expert valuer should have been given serious consideration by the Office of Public Works. It is also contended that Dr. Jauch should have been given advance notice and an opportunity to make representations in respect of the C.P.O. notice that was served on

him around 28th April, 1997 particularly in the light of the false sense of security which had been engendered in him by the letter dated 28th February, 1991 from the Heritage service.

(i) **Discrimination in respect of the administration of the C.P.O.'s.**
31. The Plaintiffs contended that there was discrimination in that the first four Plaintiffs' lands were subjected to C.P.O.'s in 1991 whereas only the commonage lands belonging to Dr. Jauch and Muirís Cleary were similarly treated. However, on 28th April, 1997, service of C.P.O. notices in respect of the rest of the Cleary and Jauch lands were served and accordingly this issue became moot by this step taken by the Defendants on 28th April, 1997. The Plaintiffs have argued that they are entitled to an order for costs incurred up to then in that the service of these notices came very late indeed in the day and just before the case was to be heard and that this should bear on the situation with regard to the matter of costs. In this respect, the Plaintiffs cited ***Dudley -v- An Taoiseach*** [1994] I.L.R.M. 321 and the order of Johnson J. therein where costs were awarded to the applicant on the respondent making the issue in dispute moot on the day before the trial was to commence, in that instance by taking the appropriate steps for the calling of a by-election.

(j) The Plaintiffs say that the 1989 Act is an anti-American measure and in breach of the 1950 Treaty with the U.S.A. and, consequently, of the European Convention on Human Rights.

Judicial restraint enticing but inappropriate in respect of the challenge to the validity of the 1919 Act.
32. An issue has arisen between the parties as to whether the Court should defer dealing with the arguments in respect of the repugnancy of the 1919 Act since the question of compensation can only arise if the 1989 Act is found to be valid despite the various challenges. Counsel for the Plaintiffs points out that this issue only comes into play as a sequel to a finding that the 1989 Act is valid; he submits that their challenge to the 1919 Act represents their "fall-back position" and is necessary because it is incorporated into the 1989 Act. From a practical point of view, the Court has to deal with such a plethora of points in this case that there is much to be said for deferring consideration of the validity of the 1919 Act for the present. One practical advantage of exercising judicial self-restraint in respect of tackling these issues is that the 1919 Act is being constantly invoked and any finding with regard to its repugnancy would have widespread reverberations affecting much litigation and many arbitrations. Counsel for the Defendants on the other hand has argued cogently that this Court should hear all the arguments and decide on this issue as well and has submitted that if the Court defers giving a decision on this aspect then this might lead to a further delay in the conclusion of the eventual outcome of the case. I am conscious of the view that the question of assessment of compensation logically follows as a second step and that the primary matter should be dealt with fully before any decision is given in respect of the 1919 Act in view of the widespread repercussions of any decision undermining the validity of the 1919 Act. However, Counsel for the Defendants argued convincingly that this aspect should be confronted as well as the other challenges for reasons of convenience, practicality and expedition. The evidential background has been adduced, the contrary arguments made and this aspect also should be dealt with and concluded.
33. A further issue arose with regard to the Plaintiffs' claim for damages. It would seem that two questions arise with regard to this aspect, namely,

(1) are damages an adequate remedy instead of a declaration of invalidity?
and
(2) can damages be awarded in addition to a declaration of invalidity?

34. I expressed the view at an early stage of the case that the arguments in respect of this aspect should be deferred until after a decision with regard to the question of the validity of the 1989 Act. After all, if the 1989 Act is valid in its entirety, then the Court would not have to consider the above two questions posed as the question of damages would not arise.

The 1989 Act in Synopsis

35. An Blascaod Mór National Historic Park Act, 1989 was enacted on 7th June, 1989. It contains the long title which I have already quoted and ten sections together with a schedule dealing with compulsory acquisition of land. While it was passed by the Oireachtas as a public general Act, nevertheless it contains some highly unusual provisions particularly those relating to compulsory acquisition. I have already adverted to some of the strictures on this Act made by Mr. Justice Kelly in the course of his judgment with regard to the question of whether the regulations and notices thereunder were ultra vires. The Act contains only ten sections and has already spawned three judgments. Several sections are the subject of cogently argued and substantial challenge by the Plaintiffs. The first section is an interpretation section; "the Commissioners" means the Commissioners of Public Works in Ireland; "the island" means An Blascaod Mór; "the Minister" means the Minister for the Gaeltacht; "the Park" means An Blascaod Mór National Historic Park established by section 2. It is interesting to note in passing that the role of the Foundation was envisaged in section 1 of the 1989 Act as covering not only the Great Blasket but Corca Dhuibhne generally being not only the archipelago but also the mainland area on the other side of the Blasket Sound. One of the points made by the Plaintiffs (see (b)(iv) above) is that the Act by singling out the Great Blasket is under-inclusive and discriminatory and that any such legislation for the preservation and protection of the Blasket culture should include the entire archipelago and
the part of the Dingle Peninsula known as Corca Dhuibhne as being one cultural entity from the point of view of the folklore and literary tradition. Section 2 provides for the setting up of An Blascaod Mór National Historic Park being the land on the island vested in the Commissioners upon the passing of the Act together with the land acquired by the Commissioners under the Act. At the time of the passing of the Act, the Commissioners only held the lands in one folio so that it seems that "the land acquired by the Commissioners under this Act" must mean land acquired subsequent to the enactment on 7th June, 1989.

36. Section 2 is important from the point of view of the intention of the Oireachtas.

"S. 2(2) The park shall be maintained, managed, controlled, preserved, protected and developed by the Commissioners for the use and benefit of the public as a park in which the historic heritage, culture, traditions and values of the Island and its inhabitants will be preserved and demonstrated and its flora, fauna and landscape will be protected."

37. Subsection (3) deals with the Commissioners' duties and reads:-

"(3) Without prejudice to the generality of subsection (2), the Commissioners shall, in performing their functions under that subsection -

(a) foster and promote the use of the Park by the public as a place of culture, education, leisure and recreation,

(b) foster and promote the use of the Irish language, an awareness of and pride in the national heritage and the study of that heritage and the history, heritage, culture, folklore and values of the Island and its inhabitants,

(c) endeavour to preserve the traditional character of the Island,

(d) conserve such of the flora and fauna of the Island and its surrounding seas as they consider appropriate,

(e) introduce to the Park and protect and encourage the cultivation and breeding of such flora and fauna as they consider appropriate,

(f) conserve or restore and maintain such of the traditional dwellings and other buildings on the Island as they consider appropriate, and

(g) provide and maintain or arrange for the provision and maintenance (upon terms and conditions that may, if it is considered appropriate by the Commissioners, provide for the payment by them of a subsidy in respect of the service) of such a transport service (including piers, landing stages and other facilities) between the Island and the mainland as they consider appropriate for the purposes of the Park and of ensuring reasonable access to it, having regard to all the circumstances, by the public.

(4) The Commissioners shall have all such powers as they consider necessary or expedient for the purpose of the performance of their functions under this Act including, but without prejudice to the generality of the foregoing, power to reserve
any part of the Park for any particular purpose, to construct and provide buildings and other facilities in the Park, and to lease or let, or license the use of, any part of the Park or any such buildings or facilities to any person for the purposes of the provision of services or facilities for the public by that person and, in relation to any such lease, letting or licence to exercise the powers conferred by paragraphs (f) to (h) of section 11(2) of the State Property Act, 1954, and to let any grazing in the Park."

Section 3 enables the Commissioners to make bye-laws for the management, preservation and development of the park and the regulation of the use of the park and the maintenance of good order therein. Unusually, the section contemplates that the Commissioners may consult with the Foundation in respect of the making of bye-laws. A bye-law under the section should be laid before each House of the Oireachtas as soon as may be after it is made. Section 4 deals with acquisition of land on the Great Blasket by the Commissioners.

"4(1) Subject to subsection (2), the Commissioners may, for the purposes of this Act, acquire, by agreement or compulsorily, any land situated on the Island.

(2)(a) The power conferred on the Commissioners by subsection (1) to acquire land compulsorily does not apply to -
(i) land that is owned or occupied by a person who has owned or occupied it since the 17th day of November, 1953, and was ordinarily resident on the Island before that date, or

(ii) land that is owned or occupied by a relative of a person, where that person owned or occupied it and was ordinarily resident on the Island before that date.

(b) In subparagraphs (i) and (ii) of paragraph (a) "land" does not include -

(i) the area of land comprising 1,060 acres or thereabouts whereof upon the passing of this Act the Commissioners stand registered under the Registration of Title Act, 1964, as full owner of one undivided twenty-fifth part, or

(ii) land that is subject to rights in common of grazing or turbary, or

(iii) land the owner or occupier of which cannot be ascertained by the Commissioners by reasonable inquiries, or

(iv) land required for the purpose of the construction, maintenance, inspection, repair, extension or improvement of, or of access to, any piers, landing stages or other facilities of a transport service provided under section 2.

(3) The provisions of the Schedule to this Act shall have effect in relation to the acquisition of land compulsorily under this section.

(4) In this section, "relative" in reference to any person means parent, lineal ancestor, spouse, widow, widower, child, lineal descendant, uncle, aunt, brother, sister, nephew or niece."

38. I have quoted this section in full as there is a conflict between the parties as to the meaning and as to the scope of the phrase by reference to time of "a relative of a person" and also because the Plaintiffs challenge the constitutionality of the powers of acquisition. They strongly contest the validity of the exemption contained in section 4(2)(a) of land owned or occupied by certain persons (pre-17th November, 1953 residents) or in their stead relatives of their lineage.
Section 5 deals with the exercise and delegation of functions of the Commissioners which are to be performed by them subject to the general superintendence and control of the Minister. Section 5(2) states that the functions or specified functions of the Commissioners under this Act (other than sections 3 and 4 and the schedule to this Act) or under bye-laws under section 3 may be delegated by the Minister by order to the Foundation. The Plaintiffs also challenge this delegation of functions on the basis that their property may be compulsorily acquired from them and may subsequently end up being put under the control of a private body of persons, the Foundation, despite the Plaintiffs' property having being acquired from them on the grounds of public necessity.
Section 6 excepts the land vested in the Commissioners as part of the park from sections 10 and 11 of the State Property Act, 1954 which relates to powers of sale or lease of State lands.
Section 7 allows the Commissioners to accept gifts of money, land or other property in respect of the Park. Section 8 deals with the powers of the Garda Síochána and
authorised persons to deal with contraventions of bye-laws including powers of arrest and removal of persons from the Park. The Commissioners may appoint in writing a person to be an authorised person for the purposes of the section.
Section 9 deals with expenses incurred by the Minister or the Commissioners which are to be paid out of monies provided by the Oireachtas. Under section 10 the Act may be cited as An Blascaod Mór National Historic Park Act, 1989. The schedule deals with compulsory acquisition of land.

Unusual features of the 1989 Act

39. Several features of this Act are abnormal. First, the phraseology is highly unusual for an Act containing powers of expropriation as this Act is not couched in general terms with application throughout Ireland or even affecting all the islands off the western seaboard but, on the contrary, the focus is on one island in a group of islands off County Kerry. This is borne out by the first part of paragraph (1) in the schedule which reads:-

"(1)(1) Where the Commissioners propose to acquire any land compulsorily under this Act, they shall -

(a) deposit in the Garda Síochána station at Dingle or Ballyferriter in the County of Kerry a map or plan of the land and make the map or plan available for inspection there by members of the public at all reasonable times,

(b) publish a notice stating their intention to acquire the land compulsorily under this Act in a newspaper circulating in the County of Kerry."

40. While no question is raised at this stage with regard to notice of the map or plan of the land, one would have thought that the map or plan would have been available for inspection either at Dingle or Ballyferriter or at both Garda stations. More significantly, there is an objection procedure whereby the occupier or owner of land in respect of which a notice has been published may submit to the Commissioners an objection in writing to the proposed compulsory acquisition and, if such objection is not withdrawn, the objection should be considered by the Minister and the land shall not be acquired compulsorily without the consent of the Minister. Since the evidence in the case made it clear that the Commissioners were serving the notices on the directions of the Minister, this may seem at

first to be a strange procedure but may be explicable as giving the Minister a role with regard to the workings of the exemption in section 4(2)(a) of the Act.
41. In answer to my question as to whether Counsel were aware of any statute compulsorily acquiring specific heritage land in this State, I was informed that this Act was unique. The National Monuments Acts, 1930 to 1987, the Heritage Act, 1995 and the National Cultural Institutions Act, 1997 are all statutes of general application rather than being aimed at a specific target. Phoenix Park, St. Stephen's Green and in Kerry, Derrynane House and the Muckross Estate, all came into State ownership either by gift or by voluntary acquisition. Many instances come to mind of heritage properties in private hands with access for the public and I was told that, in the North of Ireland, heritage properties are often owned by the National Trust but inhabited by their former owners. The 1989 Act is particularly unusual in that one small group of landowners may be expropriated whereas another group of landowners, who may not even be Irish residents or Irish citizens or have set foot in Kerry, are to be exempted on grounds of their lineage or pedigree. This discrimination is sought to be justified by the Defendants on grounds of the preservation and demonstration of the island culture. The second and third named Plaintiffs made clear that, as Irish citizens in a democratic republic, they did not accept the validity of a discrimination in favour of a "pedigree folk" or the necessity for compulsory acquisition from some landowners but not from others in order to demonstrate the life and culture of the former inhabitants of the island. The Plaintiffs submit that the exemption from expropriation contained in the 1989 Act is based on lineage and discriminates in favour of a "pedigree folk" as against other landowners on the island. It is necessary to overcome initial antipathy to such grounds of discrimination and to examine objectively the reasons why the Oireachtas has chosen to treat two categories of landowners in such a contrasting manner with security of tenure for one group and expropriation for another group.
42. Early on in the case, Counsel for the Defendants made it clear that objection would be taken to the admissibility of much evidence proposed to be adduced by the Plaintiffs. This was dealt with in the judgment dated 17th June, 1997 and by certain rulings thereafter including a ruling on 1st July, 1997 that the Plaintiffs had laid the ground for the production in evidence of An Blascaod Mór National Historic Park Bill, 1989 as initiated in the Oireachtas. The Bill was handed in after reference to section 5 of the Documentary Evidence Act, 1925. Other rulings were made to the effect that the ground had not been laid for the admission in evidence of the record of the debates in the Seanad or Dáil.

Locus standi of Plaintiffs and ripeness of challenges

43. A further challenge was made by Counsel for the Defendants at the outset of the case in respect of the locus standi of the Plaintiffs to attack the validity of the Act and also as to the readiness and maturity of their grounds of challenge. Counsel for the Defendants relies on ***Madigan -v- Attorney General*** [1986] I.L.R.M. 136, ***Norris -v- Attorney General*** [1984] I.R. 36 and ***Cahill -v- Sutton*** [1980] I.R. 269 for the propositions that in respect of certain aspects of the Plaintiffs' challenge to the provisions of the 1989 Act either the Plaintiffs have no locus standi to make the challenge or else their challenge is premature. In ***Madigan's*** case, the plaintiffs' attack on the constitutionality of the residential property tax was held to be confined to their own circumstances; they were not entitled to suggest hypothetical circumstances under which the Finance Act, 1983 would operate particularly unfairly. Similarly, in ***Norris -v- Attorney General*** [1984] I.R. 36, Senator Norris as a declared homosexual was not entitled to make the argument that parts of the 1861 Act, which were being challenged, encroached on the right to marital privacy.
44. Three principles emerge from the cases on locus standi. Firstly, the Courts will only entertain a constitutional challenge to legislation where it is demonstrated that the litigants' rights have either been infringed or are threatened (see ***Cahill -v- Sutton***). Secondly, the Courts will only listen to arguments based on the plaintiff's own personal situation and generally will not allow arguments based on a jus tertii (see ***Norris -v- Attorney General*** and ***Madigan -v- Attorney General***). Thirdly, since every member of the public has an interest in seeing that the fundamental law of the State is not defeated, the Courts will permit a citizen to challenge an actual or threatened breach of a constitutional norm where there is no other suitable plaintiff or where the threatened breach is likely to affect all citizens in general (***Crotty -v- An Taoiseach*** [1987] I.R. 713; ***SPUC -v- Coogan*** [1990] I.L.R.M. 70).
45. The Plaintiffs clearly have a very real and direct interest and have locus standi with regard to such provisions of this Act as set up a park on the Great Blasket and give powers of compulsory acquisition with regard to the

Plaintiffs' lands. Counsel for the Defendants acknowledged this but went on to submit that the Plaintiffs do not have locus standi to make challenges to two provisions in section 5 of the 1989 Act. Firstly, section 5(2) states that the functions or specified functions of the Commissioners under the Act (other than sections 3 and 4 and the schedule to the Act) or under bye-laws under section 3 may be delegated by the Minister by order to the Foundation. The Plaintiffs contend that the allocation to the Foundation by section 5(2) of functions of the Commissioners under the 1989 Act is an impermissible delegation of executive power to the Foundation which is an entirely private company and not accountable to the public. The Plaintiffs particularly take exception to the fact that some of the leading members of the Foundation actively lobbied for and inspired the inclusion of the powers of compulsory acquisition contained in the 1989 Act. Counsel for the Defendants, on the one hand, makes the points that the Park is defined in section 2(1) of the Act and that the only delegation of functions which could be made under section 5(2) to the Foundation would be in relation to the Park as defined; if the Plaintiffs' lands have not been acquired then their lands are not part of the Park. He argues that if their lands have not been taken then the Plaintiffs would not be affected by such delegation of functions as takes place. I do not accept this argument. The Plaintiffs at present own at least 17/25ths of the lands on the island. Such delegation of functions as the Commissioners make to the Foundation in respect of lands owned or acquired by the Commissioners would have an effect upon the Plaintiffs and their holdings particularly when one takes into account the patchwork quilt of holdings in the village and fine lands and their 17 of the 25 undivided holdings in fee simple in the great commonage. The activities of the

46. Foundation in respect of delegated functions would be sure to affect the Plaintiffs on an island of the size of the Great Blasket. The Defendants' Counsel argued that, on the other hand, if the Plaintiffs' lands have been acquired so as to have become part of the Park then the Plaintiffs would no longer own any lands on the island which might be affected by the delegation of functions from the Commissioners to the Foundation. This submission is too simplistic and is unacceptable. For part of the Plaintiffs' case is that expropriation of their interest is unnecessary and too draconian and that the objectives of the Oireachtas could be secured by using existing general legislation to preserve and demonstrate the historic heritage. If, on these grounds, the Plaintiffs are entitled to retain their lands or part of their lands then they would again be affected by any delegation of functions by the Commissioners to the Foundation. Furthermore, the Plaintiffs are entitled to have the Court consider not just specific provisions in isolation but also the entire of the 1989 Act and the intention of the Oireachtas as deduced from the thrust of the Act as a whole as well as the wording of individual provisions of the Act. Put bluntly, the Plaintiffs clearly regard it as unfair and unjust and contend that it is invalid that an Act which contains powers of expropriation of their property should also in the next section contain provisions whereby the expropriating agency of the State may delegate functions to the Foundation, the very body which the Plaintiffs perceive as being a private group of people, being neither elected nor representative of the democratic electorate nor responsible to the State authorities, and which has among its leading members lobbyists for the powers of compulsory acquisition being used against the Plaintiffs.

Secondly, section 5(4) reads:-

"An order under this section may contain such ancillary or subsidiary provisions as the Minister considers necessary or expedient including provisions adapting provisions of this Act."

47. The Plaintiffs argue that this provision authorises the Minister by order to amend the Act in any way he considers expedient and that this is an impermissible delegation of legislative authority on the lines of what is known as an "Henry VIII clause". Counsel for the Defendants says that this challenge is premature as the Minister has not made any such orders adapting provisions of the Act and submits that adaptation does not amount to an amendment

in any event. However, the delegation of functions provision under section 5(2) and the adapting power in section 5(4) are both relevant parts of the 1989 Act with likely repercussions for the Plaintiffs. The Plaintiffs clearly have standing to challenge the general thrust of this Act and the acquisition provisions thereof. Since evidence has had to be heard with regard to the background to the Act and the circumstances of the Plaintiffs and of the Foundation, the

common sense and the economics of the situation would seem to favour the Court dealing with the delegation and the adaptation points. Furthermore, these aspects of the case involve arguments based on the separation of powers. There is more scope for allowing a challenge in what is regarded as a "structure of government case". In this category of case, the Courts will permit a citizen to challenge an actual or threatened breach of a constitutional norm, since every member of the public has an interest in seeing that the fundamental law of the State is not defeated; this is illustrated by the case of ***Raymond Crotty -v- An Taoiseach & Others*** [1987] I.R. 713. The Supreme Court held that the plaintiff had locus standi to challenge the Single European Act in the particular circumstances where its coming into force would affect every citizen, notwithstanding the plaintiff's failure to prove
the threat of any special injury or prejudice peculiar to him arising from the Act. The principle that a citizen is entitled to challenge a perceived violation of a constitutional provision, even though he or she may have suffered no actual or tangible injury, was further emphasised in the case of ***S.P.U.C. -v- Coogan*** [1990] I.L.R.M. 70.
48. The Defendants suggest that these two challenges are premature and the time for them is not yet ripe. The Plaintiffs counter this by pointing out that in ***East Donegal Co-operative Livestock Mart Ltd. -v- The Attorney General*** (the" ***Marts*** case") [1970] I.R. 317 although the four individual plaintiffs, each of whom was a shareholder in a livestock mart, had not yet actually been affected adversely by the sections under challenge, nevertheless they had the necessary standing to question the constitutionality of the statutory provisions in issue because those sections (assuming that they gave to the Minister the powers suggested) constituted a threat to the existence of the mart in which the plaintiffs had an interest. This ruling in favour of the three plaintiffs who were cooperative societies or livestock marts and the four individual plaintiffs (each of whom was a shareholder in a livestock mart) was made by O'Keeffe P. in the High Court and affirmed when the case came on appeal to the Supreme Court. There was a sufficiently proximate risk in that case of the provisions of the Act causing economic loss to the plaintiffs. In the present case, the legislative mechanism exists under which at any time the delegation to the Foundation and the adapting of the Act can be carried out by executive action. Ripeness is peculiarly a question of timing; it is prudent to exercise judicial restraint to avoid making unnecessary decisions on constitutional issues. However, the factual background to these provisions has been largely established in evidence and the issues are predominantly legal ones which can be conveniently dealt with at this stage rather than by being left over to be argued in the future at further cost. Such a delegation of functions and adaptation of provisions seems to me to be clearly envisaged by the legislation, even if not the comprehensive delegation envisaged in the Heads of Bill distributed by the Foundation and given to Mr. Begley. In all the circumstances, the delegation and adaptation are likely to be imminent. Thus the arguments in relation to them are not simply moot but, on the contrary, have been in respect of provisions which are likely to become effective. In ***Madigan's*** case, O'Hanlon J. at page 145 stated:-

"The Plaintiffs must be confined to argue the unconstitutionality of the statutory provisions challenged, insofar as they themselves are prejudiced thereby, and not by reference to other hypothetical cases which may arise for consideration under the Act."

49. The Plaintiffs are raising no hypothetical case in respect of the broad general thrust of the 1989 Act and, in my view, are entitled to have the Court look at the entire framework of this Act since part of the Plaintiffs' contention is that the objectives of preserving the folklore, literary and built heritage of the Blasket can be achieved by the existing general legislation without the need for the draconian powers of acquisition in the 1989 Act, and the Plaintiffs argue that at the very least proportionality requires that they should be left with some of the buildings and the fine lands therewith and their interest in the commonage. If the Plaintiffs continue to own property on the island then they will be affected by the delegation of functions to the Foundation under section 5(2) . While such delegation would be in relation to the Park as defined in section 2(1) of the Act, nevertheless it is clear that it would affect the management of the entire island and the identity of the authority with whom the Plaintiffs would have to correspond and cooperate.
In ***Iarnród Eireann / Irish Rail -v- Ireland*** [1995] 2 I.L.R.M. 161 at page 187 to 190, Keane J. helpfully reviews the law with regard to locus standi. Any lingering apprehensions which I had as to the need to grasp the nettle now

in respect of the delegation and adaptation aspects have been dispelled by consideration of the analysis. In that case, it is clear that Keane J. was satisfied that Iarnród Eireann had locus standi to question in those proceedings the validity of the relevant sections of the Civil Liability Act, 1961 having regard to the provisions of the Constitution. The first named Plaintiff likewise should be entitled to challenge the validity of the 1989 Act. While the U.S. Courts have been unimpressed by the argument that every citizen has an interest in ensuring that the Constitution is observed, nevertheless in Ireland the Courts have entertained a succession of challenges to enactments in which the plaintiffs were not in a position to claim that their rights had been any more adversely affected by the impugned legislation than other citizens (see, for example, ***O'Donovan -v- Attorney General*** [1961] I.R. 114; ***Ryan -v- Attorney General*** [1965] I.R. 294; ***Crotty -v- An Taoiseach*** [1987] I.R. 713; and ***S.P.U.C. -v- Coogan*** [1989] I.R. 734). However, as Keane J. points out, despite the generous approach to the question of locus standi adopted by the Courts, either expressly or by implication in the above cases, it cannot be said that, because every citizen has an interest in ensuring that the Constitution is observed, everyone is entitled to invoke its provisions, irrespective of any actual or threatened injury to him or her resulting from the operation of the impugned statute. In ***Cahill -v- Sutton*** [1980] I.R. 269, the Supreme Court declined to allow locus standi to a plaintiff who challenged the validity of a provision of the Statute of Limitations, 1957 on the ground that its application in certain cases but not hers would unjustly deprive a person wrongfully injured of access to the Courts. the plaintiff had brought an action for personal injuries against her doctor based on what she said was his negligence in treating her in 1968. She did not begin her action until 1972. The Statute of Limitations, 1957, section 11(2)(b) prescribed a three year limitation period for bringing such actions and the defendant successfully pleaded this limitation period against her. The plaintiff challenged the constitutionality of that provision prescribing the limitation period and failed both in the High Court and on her appeal to the Supreme Court. She herself had admitted that she had been aware of the facts of her case since immediately after the allegedly negligent treatment in 1968; thus she herself could not have benefited even had an exception been made in favour of plaintiffs who did not become aware of the facts on which their claims might be based until after the expiry of the limitation period. Henchy J. emphasised the plaintiff's position (at p. 280) thus:-

"The Plaintiff is seeking to be allowed to conjure up, invoke and champion the putative constitutional rights of a hypothetical third party, so that the provisions ... may be declared unconstitutional on the basis of that constitutional jus tertii - thus allowing the Plaintiff to march through the resulting gap in the statute."

50. While Henchy J. did say at p.282:-

"this general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right",

nevertheless Keane J. points out that this should be read in the context of the next passage viz.:-

"This general, but not absolute, rule of judicial self-restraint has much to commend it. It ensures that normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first hand reality to what might otherwise be an abstract or hypothetical legal argument."

51. Henchy J. went on to say at page 285:-

"This rule, however, being but a rule of practice must, like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure the persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal locus standi on the part of the person questioning the constitutionality of the statute

may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked ... ".

52. He finally summarised (at page 286) the legal position as follows:-

"The primary rule as to standing in a constitutional matter is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."

53. Keane J. points out, at p. 189, that it will be observed that Henchy J. in this passage is careful to state the rule in terms of damage, existing or genuinely apprehended to interests and not to rights:-

"It is clear from these authorities that the cases in which questions of locus standi have arisen tend to fall into two broadly different categories. In the first - of which O'Donovan, Boland and Crotty are typical - the nature of the constitutional challenge is such that it is extremely improbable that a plaintiff will emerge whose interests may be said to be either immediately or prospectively affected in a manner specific to him or her. Such claims typically arise in the context of purported changes to the structure of government itself or its relationship to other sovereign governments. In such cases, the Courts have evinced a readiness to afford locus standi to concerned citizens so as to ensure that constitutionally suspect legislation does not remain on the statute book because of the absence of a suitably qualified challenger.

The second category consists of cases - of which East Donegal Co-operative and Cahill -v- Sutton are typical - in which the impugned legislation is of such a nature that it is probable that a plaintiff will emerge of whom it can be said that he or she is affected by the legislation in question in a manner peculiar to him or her. In such a case, the Courts are unwilling to afford locus standi to a plaintiff unless they are satisfied that his or her interests, although not necessarily his or her constitutional rights, are either immediately or potentially affected by the application of the challenged provision.

This case clearly falls into the second category and thus the application of the test propounded by Henchy J. in Cahill -v- Sutton is appropriate. I am satisfied that Iarnród Eireann meets the threshold requirements set out by the learned Judge in the passages which I have cited. It is beyond argument that if the provisions which it claims to be constitutionally invalid are allowed to operate in respect of the many claims now pending, its financial interest would be gravely effected. Its position is in stark contrast to that of the plaintiff in Cahill -v- Sutton. Nor could it conceivably come within the category of the 'busybody and the crank' or 'the obstructionist, the meddlesome, the perverse' to mention some of the categories referred to respectively by O'Higgins C.J. and Henchy J. in Cahill -v- Sutton as being categories of litigants who should not be encouraged by the courts."

54. All the Plaintiffs, both An Blascaod Mór Teoranta and the individual Plaintiffs, who have interests as landowners personally or as shareholders in the company in property on the Great Blasket, have expended time, energy and money on trying to preserve the ambience of the island and buildings on the island. None of the Plaintiffs are conjuring up some hypothetical case and no suggestion has or could be made that they are cranks or busybodies. On the contrary, they took an active and idealistic interest in trying to preserve the buildings on the Great Blasket when enthusiasm for preserving the heritage on the Great Blasket was not evident on the part of the State authorities. The repercussions on the Plaintiffs and their interests of delegation of functions to the Foundation under section 5(2) of the 1989 Act and of the adapting provisions for expediency under section 5(4) of the 1989 Act are not similar to the hypothetical situation in ***Cahill -v- Sutton*** . On the contrary, the Plaintiffs are likely to be

directly affected by the actual provisions in the 1989 Act which are probably imminent in application. Counsel for the Defendants makes the point that if the Plaintiffs' land is acquired
then they no longer own any property in the park and so lack locus standi. This argument is refuted by the fact that the Plaintiffs claim that the objectives of the Act can be achieved by less Draconian measures which leave them in possession of part of their lands on the island. There is much to be said for the view that the Plaintiffs are entitled to have the entire of the related provisions of this Act considered since this is the very Act which purports to expropriate the Plaintiffs in return for compensation. While " *the delegation provisions* " under section 5(2) and " *the ministerial power to adapt provisions as he considers necessary or expedient* " may not yet cause unique detriment to the Plaintiffs, nevertheless the issues raised here are essentially points about structures of government and separation of powers and, since the evidential basis has been laid by the Plaintiffs, it would appear that the Plaintiffs are in a particularly relevant position to challenge the validity of laws purporting to authorise the delegation of functions in a national park to a private Foundation. Likewise, the Plaintiffs would appear to be appropriate persons, having laid the evidential background, to challenge the Minister's authority to adapt provisions of the 1989 Act when he deems it expedient. Furthermore, it would clearly be practical and economic to have these matters dealt with at this stage rather than in a separate subsequent challenge.
55. As for the Defendants' contention that these aspects are not ripe for decision until the relevant orders have been made under section 5 in respect of delegation and adaptation and under section 3(5) in respect of fees or charges received by the Foundation in pursuance of bye-laws to be made after consultation with the Foundation, I think that the facts are sufficiently clear and as the points in dispute are predominantly legal issues they can conveniently be resolved. the situation is analogous to the ***Marts*** case where there was a sufficiently proximate risk of the Act causing economic loss to the plaintiffs. The legislative mechanism exists under the 1989 Act for the imminent coming in to effect of the very steps
which the Plaintiffs complain are invalid, that is the delegating of functions to the Foundation and the adapting of the Act by the Minister. In Senator Norris's case, it was held that it was not necessary to wait for a prosecution under the 1861 Act to be brought. It is not requisite for the Plaintiffs to have to wait until the relevant statutory instruments are tabled before the Houses of the Oireachtas. The Defendants suggest that the Plaintiffs are raising these points prematurely in that they are raising unduly hypothetical or abstract issues. However, the present detriment being done to the Plaintiffs and their interests in contemplation of the implementation of these provisions, and the fact that the legal questions involved do not depend for their resolution on an extensive factual background beyond the matters already adduced in evidence, support the argument that it would be expedient, timely and economic to deal with these aspects at this stage.
56. Dr. Matthias Jauch was added as a Plaintiff in the amended statement of claim delivered on 23rd October, 1996. He is a lecturer in chemistry at University College Cork and has resided in this State for many years having been brought up by his parents for most of the time in County Kerry. He is a German citizen. At paragraph 11(A) of the amended Statement of Claim, Dr. Jauch and his sister Ebba (through their deceased brother Arne) claim that they own property on the Great Blasket Island, in particular, the only beehive hut there, the old post office and fields overlooking the Trá Bán. Their family have had very close associations with the Dingle area and the islands since 1956 and, in August 1978, two of their brothers, Arne and Tilman, were drowned in an accident while fishing off the Great Blasket. Dr. Jauch and his brothers in the 1970s carried out renovation work on the island and he visits the island about three times each year and on occasion sleeps there overnight. In evidence, it became clear that the late Arne Jauch and his friend Muirís Cleary spent summers on the Great Blasket and fished extensively. They earned enough to buy the lands in at least
two registered folios, including the properties mentioned above, and 2/25ths of the great commonage. They were inspired by respect and enthusiasm for the island way of life and a desire to preserve that tradition. The defence expressly denies any title to land on the island claimed by Dr. Jauch and his sister Ebba. In evidence, it emerged that the late Arne Jauch died intestate, unmarried and without issue; he was an Irish citizen and domiciled in Ireland. It would seem that Arne Jauch's interest in the land on the island would have passed to his parents who have both since died and that letters of administration intestate to his estate were extracted. Dr. Jauch has declined to extract a grant of administration to his brother Arne's estate nor has any order been made under the rules

appointing him to represent the estate of the late Arne Jauch. Seemingly, the reason why Dr. Jauch has not taken out a grant is that he has been advised that a point can be made that the 1989 Act indirectly discriminates against him as a German national under E.U. law. I will deal with this aspect which has been referred to as the "EC/Bloomer Point" below. Dr. Jauch would appear to be in the dilemma that if he takes out a grant to his late brother Arne's estate then as Arne was an Irish citizen there is a difficulty in making the point about indirect discrimination against a German E.U. national, at least in his role as the personal representative of Arne's estate. However, as Keane J. cogently pointed out above, the rule in respect of locus standi is stated in terms of damage to interests and not to rights. On 16th November, 1990, the National Parks and Monuments Service wrote to Dr. Jauch referring to discussions in respect of his family's interest in property on the Great Blasket Island and made an offer for his family's total interest in the island, subject to title being shown to the satisfaction of the Chief State Solicitor, and warned that this was a final offer and that if he was not prepared to accept this offer then they would proceed with compulsory acquisition under the 1989 Act. Further letters have been written to Dr. Jauch about his interest in the island and compulsory purchase notices have been served on him in
or about the 4th March, 1991 in respect of the Jauch interest in the commonages and as recently as the end of April 1997 in respect of the Jauch interest in the village buildings and fine lands being two registered and one unregistered set of plots. While Dr. Jauch may not have produced evidence of title as yet to the late Arne Jauch's landholding, nevertheless he has been treated as having an interest in the property and C.P.O. notices have been served on him on behalf of the Defendants. He and his sister Ebba would appear to be the persons interested in their brother Arne's estate and in view of this interest in the land and Dr. Jauch's own investment of time and work on the island property and his family's strong involvement in the Great Blasket, including his brother Arne's idealistic attachment to the island and the untimely death of Arne and Tilman Jauch while fishing off the island, it would seem that Dr. Jauch has a very real interest in the outcome of these proceedings. He has been involved in the challenges to the two separate C.P.O.s served on him under the 1989 Act and he shares the involvement of the other Plaintiffs in challenging the validity of the provisions of the 1989 Act. He has a very real concern in the outcome of the challenges to the validity of this Act. If there was no challenge to the 1989 Act then the Defendants would still be treating Dr. Jauch and his sister as the persons in possession of the Jauch interest and actual evidence of title would await the completing of a sale.

The Role of the Court and the Approach of the Court to the Constitutionality of the provisions of the 1989 Act

57. Counsel for the Defendants firstly stressed that the 1989 Act enjoys the presumption of constitutionality and that there is also the implication that the Minister will act in a constitutional manner in relation to powers which the Minister may, or may not, at his
discretion bring into effect. This presumption also implies that the provisions of the Act will not be administered or applied in a way that will infringe constitutional rights. The ***Marts*** case [1970] I.R. 317 supports both propositions. The passage in the judgment of Henchy J. in ***McMahon -v- Leahy*** [1984] I.R. 525 at page 541 was also relied upon:-

"The fact that parliament is debarred by Article 15 section 4 subsection (1), of the Constitution from enacting 'any law which is in any respect repugnant to this Constitution or any provision thereof' carries with it not only the normal presumption that laws enacted by the National Parliament are not repugnant to the Constitution but also the presumption that the provisions of such laws will not be administered or applied in a way that will infringe constitutional rights. The presumption of constitutionality extends to both the substance and the operation of a statute: it is a presumption that admits of rebuttal only by a contrary intention appearing in the terms of the statute itself."

58. Counsel for the Plaintiffs concedes the presumption of constitutionality of the 1989 Act and agrees that the ***Marts*** case indicates that where an Act confers discretions on the Executive that Act is presumed to intend those

discretions to be exercised in an entirely constitutional manner in accord with the "double construction principle". However, Counsel for the Plaintiffs submits that this has little bearing on the issues to be decided in the present case because these issues do not primarily involve the exercise of discretions in respect of a law of general application as was the situation in the ***Marts*** case.
59. Secondly, Counsel for the Defendants correctly says that the Court has power to determine only whether a particular provision is constitutional or not (see ***The State (Woods) -v- Attorney General*** [1969] I.R. 385 at page 399, Henchy J. quoted infra). The Court is thus confined and cannot usurp the function of the Oireachtas by enacting or putting in place words to fill a legislative void.
60. For example, in ***Bloomer -v- Incorporated Law Society of Ireland*** [1995] 3 I.R. 14 at page 58, Laffoy J. declined to give relief against the State for the specific reason that the granting of such a declaration would have effectively involved the Court itself in putting in place a piece of legislation which had not been enacted by the Oireachtas. She said:-

"To make the declaration sought would be tantamount to purporting to enact an alternative regulation to article 15 of the Regulations of 1991, which the court, on the authority of the principles enunciated by the Supreme Court in ***MacMathúna -v- Attorney General*** *[1995] 1 I.R. 484 has no jurisdiction to do. Accordingly, I refuse that relief."*

Thirdly, ***MacMathúna -v- Ireland*** was further relied on by the Defendants. This case is also authority for the proposition that where an Act was passed through the Oireachtas as a money Bill, the court's concern, on a challenge to the Bill's constitutional validity, was whether what had been done adversely affected constitutional rights, obligations and guarantees; the Court could not enter into the area of taxation policy or concern itself with the effectiveness of the choices made by the Government and the Oireachtas. The Courts should be wary of being drawn in to adjudication on the fairness or otherwise of the manner in which other organs of State have administered public resources. Counsel for the Plaintiffs agrees that the Courts have been reticent about holding that some groups are more deserving of benefits than are other groups. In ***MacMathúna***, the Court was dealing with unequal treatment allegedly suffered by the plaintiffs as married parents in respect of social welfare payments, and held that there were abundant grounds for distinguishing between the needs and requirements of single parents and those of married parents living and rearing a family together and that once such a disparity had been justified, the Court could not interfere by seeking to assess what the extent of that disparity should be. Counsel submits that where the State is conferring benefits on various groups, such as the social welfare allowances in ***MacMathúna***, then the Courts have been reluctant to adjudicate on the fairness or otherwise of how public resources are allocated. However, Counsel distinguishes the present case as it does not concern legislation with regard to the distribution of welfare benefits or tax allowances but, on the contrary, imposes a significant burden on the Plaintiffs as it authorises the compulsory acquisition of their property. The principle in ***MacMathúna*** would be in point if the Court were dealing with an Act which designated the part of the Great Blasket which belongs to relatives of former islanders as a Park with entitlement to generous grants and tax exemptions but with the Act then excluding from this beneficial regime the properties owned by the Plaintiffs. Provided that there was a stateable basis for conferring these benefits on the relatives of former inhabitants but not on the Plaintiffs, then the ***MacMathúna*** case would be authority for the proposition that the difference in treatment was not repugnant. The 1989 Act does not concentrate on the allocation of public funds in a particular manner. On the contrary, it deals with the establishment of a Park for the preservation and demonstration of the heritage, culture, traditions and values of the former inhabitants of the island and at the kernel of the Act is the power of compulsory acquisition. This drastic power and the exempting provisions in favour of certain landowners are not at all comparable to the allocation of social welfare benefits and single parent allowances.
61. Counsel for the Defendants also referred to ***Dandridge Chairman Maryland Board of Public Welfare et al. -v- Williams et al.*** (397 U.S. 471 at 487) where Justice Stewart said in the Supreme Court:-

"The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second guess State officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

62. The Court was dealing with allocation of funds and decided that the State of Maryland had great latitude in dispensing its available funds and, given the State's finite resources available for public welfare demands, it was not prevented by the Social Security Act from sustaining as many families as it could although providing the largest families with somewhat less than their ascertained per capita standard of need. The Court recognised a rational basis test when taking cognisance of the handing out of public funds. The thinking in this Maryland case is similar to the approach in ***MacMathúna*** with regard to the allocation of public funds. The Maryland scenario is different from the issues in this Court. In short, this case does not involve the allocation of benefits which would particularly be a matter for the legislature and executive but rather concerns issues about encroachments on the fundamental rights of property and equality of the Plaintiffs.
63. Fourthly, Counsel for the Defendants has referred to "the fluoridation case" and, in particular, the words of Kenny J. in ***Ryan -v- Attorney General*** [1965] I.R. 294 at page 312:-

"In my opinion, the High Court has jurisdiction to consider whether an Act of the Oireachtas respects and, as far as practicable, defends and vindicates the personal rights of the citizens and to declare the legislation unconstitutional if it does not. I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State. It is, however, a jurisdiction to be exercised with caution. None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen. Moreover, the presumption that every Act of the Oireachtas is constitutional, until the contrary is clearly established, applies with particular force to this type of legislation."

64. The Plaintiffs do not contest the overall approach indicated by Kenny J. but make the point that Kenny J. stressed that the Court defers to the manner in which the Oireachtas reconciles the competing interests subject to at least two qualifications, namely, that the law is "not oppressive to all or some of the citizens" and that there is a "reasonable proportion" involved between the objectives sought and the means used. The Plaintiffs contend that the 1989 Act gives rise to both disproportionality and unreasonable discrimination and is simply unjust, unfair and oppressive to the Plaintiffs. Counsel submits that Kenny J. was dealing with an unenumerated right within the ambit of Article 40.3 being the right to bodily integrity which the State shall protect as best it may from unjust attack. The Plaintiffs question whether such similar deference is warranted in respect of the 1989 Act as it contains powers of expropriation which Counsel contends are in contravention of the protective guarantees given for property rights enumerated in Article 40.3 and Article 43. Kenny J. also posited the test whether there was a reasonable proportion between the benefit which the legislation would confer on citizens and the interference with the personal rights of the citizen. The Plaintiffs contend that the representatives of the State should have contacted them bearing in mind especially that offers of cooperation had been made by Peter Callery since 1972. The Plaintiffs complain that no approach was made to them whereas the agents of the State had no less than 43 meetings with the members of the Foundation. Peter and James Callery both gave evidence that if a reasonable proposition had been made to the Plaintiffs then they would have been prepared to consider it and to cooperate in respect of preservation of the village and of the amenities of the island. There is reason to accept their evidence as they have an enviable record in respect of heritage preservation and James Callery has already set an enlightened

example by the preservation of Strokestown House and the mounting of the Famine exhibition there. On the Great Blasket, they have both already contributed substantially of their own time, energy and funds in preserving the buildings and environment on the island and by ensuring that there is a place for visitors to stay at least in summer. Kenny J. in ***Ryan's*** case was dealing with the unenumerated right to bodily integrity. By contrast, the right to private property is given a special position in the Constitution by Article 43 and Article 40.3. Such wide discretion as the Oireachtas is allowed is qualified in two ways in that the legislation must not be oppressive or unfair and there must be an element of proportionality. The Plaintiffs suggest that the Minister is using
a sledge-hammer to crack a nut by the draconian provisions of the 1989 Act. They say that if the Minister had laid the ground properly by making a reasonable approach for cooperation to the Plaintiffs then the objectives of the Act of preservation of the buildings and of the ambience of the island could have been achieved by negotiation and cooperation without compulsory acquisition. Counsel for the Plaintiffs mentioned several examples of such cooperation such as the French government's acquisition of Voltaire's House on the open market and the ownership of Castle Brodie by the National Trust in Scotland where the former owner continues to inhabit the castle.
65. The Defendants fifthly stressed the need to preserve "the prized relics of the past" and relied on ***O'Callaghan -v- Commissioners of Public Works in Ireland and the Attorney General*** [1985] I.L.R.M. 364 in which O'Higgins C.J. affirmed that the common good required the preservation of national monuments. It is clear that the Plaintiffs accept this principle. They have never contested the orders made under the National Monuments Acts in respect of some of their premises on the Great Blasket. Indeed, the Plaintiffs themselves have expended their own funds in trying to preserve the heritage buildings on the island. The ***O'Callaghan*** case was not a challenge to the validity of the National Monuments Acts nor is it authority for the proposition that preservation has to be achieved by expropriation rather than by the use of existing legislation and negotiation and cooperation with a landowner. Nor does ***O'Callaghan*** condone unfair procedures or discrimination. ***O'Callaghan's*** case concerned a challenge to a preservation order under the National Monuments Acts. The plaintiff had bought land at Lough Shinny on the coast of County Dublin which included a 38½ acre site occupied by a prehistoric promontory fort. The plaintiff knew that the lands contained an ancient monument. Nevertheless, he employed contractors to plough part of the area occupied by the fort. He failed to notify the
66. Commissioners of his intention to undertake this work. He could not then be found by the Commissioners with a warning notice to desist. It is hardly surprising that the Court held that the preservation order made under section 8 of the National Monuments Act, 1930 delimited not the right of private ownership but the user to which land, in the interests of the common good, may be put and that the preservation of national monuments should be regarded as the common duty of all citizens.
67. It is important to realise that in ***O'Callaghan*** , ***Ryan***, ***MacMathúna*** and ***Madigan*** the Courts were dealing with laws of general application which applied across the land and were not restricted to a tiny group of people or a small area such as one island singled out from an archipelago off the coast of Kerry.
68. Counsel for the Defendants were invited to find a comparable Act since 1922 which gives powers of compulsory acquisition in a specific geographical area rather than in a general measure of widespread effect. Counsel referred me to the Shannon Navigation Act, 1990 which gives powers to the Commissioners of Public Works in relation to the Navigation of the River Shannon and to provide for the restoration and taking into care of the Ballinamore and Ballyconnell Navigation. The Act is a comprehensive measure designed to rectify deficiencies in older enactments and to enable the Commissioners to undertake the care, management, control and improvement of the Shannon navigation including the Ballinamore and Ballyconnell canal and the section of the River Erne navigation within the State. Any powers of compulsory purchase are merely incidental to the Commissioners' duties. I was also referred to the Temple Bar Area Renewal and Development Act, 1991 which provides for the development of the Temple Bar area. The provisions in the third schedule relating to compulsory acquisition were only incidental to enabling Temple Bar Renewal Limited to decide on and implement measures for development of the area. Acts
containing powers of compulsory acquisition are almost invariably general measures. The Railway and Canal Acts involving compulsory purchase were usually private Acts and enacted after the full protective procedures involved in the enactment of private Acts were invoked. Neither the Shannon Navigation nor the Temple Bar Area Acts

refute the general principle that expropriatory legislation should be of general application and not aimed at a specific or individual target.

Onus of Proof and Onus of Persuasion

69. Counsel for the Defendants says that the Oireachtas by passing the 1989 Act had regard to the special part in our heritage of the Great Blasket and has recognised it as a prized relic of the past. The Defendants maintain that the 1989 Act is valid against the touchstone of the Constitution and refute the suggestion that there are circumstances in which the onus of proof in respect of invalidity can switch to the Defendants. They referred to the passage at p.398 in ***The State (Woods) -v- Attorney General*** [1969] I.R. 385 in which Henchy J., sitting in the High Court, set out the presumptions and rules in respect of the onus of proof affecting the High Court in adjudicating on the validity of legislation:-

"Every judge of the High Court (like all other judges appointed under the Constitution), upon his appointment and before entering on his duties as judge, makes and subscribes a declaration in which he solemnly and sincerely declares that he will uphold the Constitution and the laws: Article 34 section 5 subsection (1) of the Constitution. The duality of this obligation postulates a concordance between the Constitution and the laws. But, inevitably, there will be occasions when a judge cannot uphold both the Constitution and a particular law, because of an inescapable incompatibility between the Constitution and the law. In such cases, the duty of the judge is clear: he must fearlessly strike down the law as being repugnant to the Constitution which is the paramount law of the State. But the Courts will not lightly or casually declare an enactment of the Oireachtas to be unconstitutional. The Constitution declares that the sole and exclusive power of making laws for the State is vested in the Oireachtas, and no other legislative authority has power to make laws for the State: Article 15, section 2 subsection (1). In deference to the investiture of the law making functions exclusively in the Oireachtas, and in recognition of the comity that ought to exist between the great organs of State, the Courts have repeatedly laid down that, save in the case of laws expressly prohibited by the Constitution, there is a presumption in favour of the constitutionality of Acts of the Oireachtas and that the onus is on the person challenging the Act to rebut that presumption and to establish clearly any repugnancy: ***In Re Art. 26 of the Constitution and the Offences Against the State (Amendment) Bill, 1940*** *;* ***In Re Art. 26 of the Constitution and the School Attendance Bill, 1942*** *;* ***Buckley & Others (Sinn Féin) -v- Attorney General & Ors.*** *;* ***O'Donovan -v- Attorney General*** *;* ***Ryan -v- Attorney General*** *. This self-imposed limitation of the power of judicial review is also applied in the American Supreme Court:* ***U.S. -v- Steffens*** *. Our Supreme Court has refined the doctrine of presumption of constitutionality by ruling that where two or more constructions of a statute are reasonably open, one being constitutional and the other or others unconstitutional, the Court will presume that the Oireachtas intended only the constitutional construction and uphold that construction; it is only when there is no construction reasonably open which is not repugnant to the Constitution that the provisions should be held to be repugnant:* ***McDonald -v- Bord na gCon*** *. This rule also accords with the practice of the*

American Supreme Court: ***U.S. -v- Delaware & Hudson Company*** *;* ***U.S. -v- Witkovich*** *.*

The necessity for the Courts to exercise self-restraint in the exercise of their constitutional jurisdiction to review legislation is due in part to the inherent limitations of the judicial process. When a Court is presented with the question of the constitutionality of a legislative enactment, it can do only one of two things; it can find it to be constitutional, or it can strike it down as unconstitutional. If it finds it to be constitutional, it merely gives to an already valid law a judicial imprimatur. If it declares it to be unconstitutional, it holds it to be a nullity; it leaves a void where what purported to be a statutory provision was; but it cannot fill that void. It unmakes what was put forth as the law by the legislature but, unlike the legislature, it cannot enact a law in its place."

In ***Hand -v- Dublin Corporation*** [1991] 1 I.R. 409, Griffin J. at page 416 reiterated the presumption of constitutionality saying:-

"It is well settled that when this Court or the High Court has to consider the constitutionality of any law enacted by the Oireachtas, the impugned Act and each provision thereof is presumed to be constitutional unless and until the contrary is clearly established."

70. Counsel also referred to ***In Re Article 26 and The Matrimonial Home Bill, 1993*** [1994] 1 I.R. 305 in which, on a reference to the Supreme Court, Counsel nominated to argue against the constitutionality of the Bill submitted that the Court should depart from its previous
decisions on the presumption of constitutionality in respect of references pursuant to Article 26 of the Constitution. He contended that the purpose of the reference procedure was protective, and hence that the presumption of constitutionality was not justified and inhibited the Court in its function. The onus, it was submitted, should be on the Attorney General to prove constitutionality. The Supreme Court rejected this submission and applied the principles in respect of the presumption of constitutionality as follows (at p.317):-

"1. That it must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by the Bill are intended to be conducted in accordance with the principles of constitutional justice, and

2. that as between two or more reasonable constructions of the terms of the Bill the construction that is in accordance with the provisions of the Constitution would prevail over any construction that is not in accordance with such provisions."

71. Incidentally, Article 26 references would also differ in the respect that they would not have involved the calling of evidence but rather the postulation of material situations.
72. The Plaintiffs accept that the overall burden of persuasion lies on them. However, they submit that if they, despite the presumption of constitutionality against them, manage to make out a strong prima facie case as to the invalidity of a provision this may nevertheless perhaps be refuted by a constitutionally permissible justification. Then in such circumstances the Plaintiffs suggest that the onus is on the State to produce this justification. By way of example, the Plaintiffs submit that if the Court in considering section 4(2) of the 1989 Act against the provisions of Article 40.1 comes to the conclusion that, prima facie, the discrimination between two different types of landowner on the basis of lineal relationship to a former resident seems unfair and constitutionally suspect then this could warrant the need for adducing of justification. A second example might be that compulsory acquisition in the light of the guarantees in Article 4.3.2 and Article 43 requires justification on the grounds that it is necessitated by the exigencies of the common good. Counsel adopted passages from Peter Hogg, ***Constitutional Law of Canada*** (Third Edition, 1992) as being in point with regard to the distinction between the burden of proof and the presumption of constitutionality. In Canada, "charter litigation" involves constitutional rights. On page 857, under the heading "Burden of Proof", P. Hogg writes:-

"Who bears the burden of proof of factual issues in Charter litigation? At the first stage of Charter review, the court must decide whether a Charter right has been infringed. This issue is subject to the normal rules as to burden of proof, which means that the burden of proving all elements of the breach of a charter right rests on the person asserting the breach. In the case of those rights that are qualified by their own terms, for example, by requirements of unreasonableness or arbitrariness, the burden of proving unreasonableness or arbitrariness, or whatever else is part of the definition of the right, rests on the person asserting the breach.

The second stage of Charter review, which is reached only if a Charter right has been infringed, is the inquiry into justification under S.1. At this stage, the burden of persuasion shifts to the government (or other party) seeking to

support the challenged law. It is for the government to persuade the Court that the challenged law is a 'reasonable limit', and that it 'can be demonstrably justified in a free and
democratic society'. This was established by the judgment of Dickson C.J. for the unanimous Court in ***R. -v- Oakes*** *[1986] (1 S.C.R. 103 at pages 136 and 137). The standard of proof, the Court held, was 'the civil standard, namely, proof by a preponderance of probability'. The criminal standard of proof beyond a reasonable doubt would be too onerous, given the vagueness of the controlling concepts of reasonableness, justifiability and free and democratic society, but 'the preponderance of probability test must be applied rigorously'.*

In order to satisfy the burden of proving justification under Section 1, Dickson C.J. said that evidence would 'generally' be required, although he added that 'there may be cases where certain elements of the S.1 analysis are obvious or self-evident'. It is risky for a government not to adduce evidence of justification in defence of a Charter challenge, but in several cases the Supreme Court has been prepared to make justificatory findings of a factual nature without evidence, or with very little evidence, relying on the 'obvious' or 'self-evident' character of the findings."

73. This analysis assists. I conclude that the 1989 Act enjoys the presumption of constitutionality and that the overall burden of persuasion to the contrary as to invalidity rests on the Plaintiffs; however, if the Plaintiffs have established prima facie repugnancy then the onus may switch to the State to adduce evidence if appropriate or to produce justificatory arguments for what appears otherwise to be repugnant. Thus, while the rule applies that "he who asserts must prove" in the sense of adducing the evidence or making a submission, nevertheless an overall burden of persuasion rests on the Plaintiffs.
74. In its scrutiny of legislation which is alleged to be repugnant, the Court tends to be cautious in respect of intervention where a statute is for the purpose of regulating
business. Where the legislation affects and impinges on a basic right to liberty or to private property, then the Court will be vigilant to prevent, for example, wrongful deprivation of liberty or discrimination based on racist or **ethnic** grounds in the absence of reasoned justification.

Synopsis of Salient Evidence
75. A considerable number of witnesses were called and much evidence was adduced relevant to the large number of points of challenge being made by the Plaintiffs. A short summary of the relevant features of the evidence assists an understanding of the background to the 1989 Act, its objectives, and the challenges to the Act. Much of the evidence was common case but in some instances there was a conflict and it should become clear by implication or by indication which account I prefer where there is conflict.
76. Sarah Najemy (née Brooks), daughter of the fourth Plaintiff Kay Brooks, gave evidence of visiting the Great Blasket with her father Phillips Brooks, an American diplomat, in late 1971 and June 1972. Their family home was near Springfield, Massachussetts, and her mother was of Irish ancestry and both her parents were interested in Irish culture. This enthusiasm was increased by discussions with a professor of Irish studies at Buffalo University, a family friend, Professor Frasier Drew, who used to lecture on the literature of the Blasket islands. In 1972, Phillips Brooks bought a half share in the interest accumulated by Taylor Collings of land on the Great Blasket. By this stage, Taylor Collings had bought about 17/25ths of the property on the Great Blasket from former islanders with the second Plaintiff, Peter Callery, acting as his solicitor. Sarah Najemy made it clear that her father never intended to develop the island commercially but rather had an idealistic wish to conserve the heritage and to restore the buildings. On 10th January, 1975, Phillips Brooks
died in London. His widow Kay Brooks returned with her two younger children to the United States but kept in touch with matters concerning the island through Peter Callery. It was agreed by the parties that a statement of the evidence of Kay Brooks might be handed in to Court due to her indisposition. Taylor Collings had in the meantime sold the other half of his interest in the Great Blasket to Peter and James Callery. Eventually, an advertisement for the sale of the island was placed by Michael Collins, a realtor in California, U.S.A. Local people then approached Peter Callery and asked for any sale to be deferred as there was the prospect of a local group buying the island. She

said, despite this, that no offer was made before her mother read in the National Geographic magazine that her land was going to be taken. The Brooks' family attitude was that they had bought on the open market and they resented compulsory acquisition. They had been prepared to cooperate to conserve the island heritage and wished to retain some property on the island. Kay Brooks lives near Springfield, Massachussetts, where some of the former Blasket islanders and their descendants live. She objects to the discrimination in the 1989 Act which exempts persons on grounds of pedigree from acquisition. Her complaints are that the 1989 Act unfairly targets the Plaintiffs and exempts other landowners on grounds of pedigree; she also objects to the Great Blasket alone of all the islands in the archipelago being the subject of acquisition and she challenges the imposed procedures and provisions in respect of compensation. The Brooks family were irked by the fact that no offer was made in respect of purchase before the threat of compulsory acquisition was put in place and then that the sum offered was shortly thereafter almost trebled. This clearly made them sceptical as to the fairness of the approach being adopted to a valuation of their interest.

77. Peter Barker is a distinguished architect and town planner and an Honorary Fellow of the Royal College of Art. He has held visiting professorships at U.C.L.A. and the

78. Royal Academy of Amsterdam. While his research was in the field of disability, his major publications have been in respect of the design of cities and towns. He has practised as an architect for 27 years and has been an associate partner with O'Sullivan Campbell, Architects and Planning Consultants, for the last three years. He has an office in Dingle. For the last nine years, he has visited Kerry regularly and has been living there for the last three years and has visited the Great Blasket on many occasions. He carried out a photographic survey in October 1995. His photographs give a good visual image of the village, the structure of the houses and the Trá Bán. The Congested District Board built houses nos. 45, 44, 43, 42, 41, 3 and 8 on his map. No. 42 was inhabited by Peig Sayers. From his survey, the Congested District Board houses were in need of restoration as being in a poor state but, by comparison with the other buildings, they are in better repair as only five of the other buildings are in reasonable repair. His colour photographs give an indication of the approach to the slipway. He confirmed that landing on the island is hazardous. On his visit in 1992, a guesthouse and cafe were open. He could see repair work which he understood had been done by Taylor Collings on many of the houses, including the Congested District Board houses, in the early 1970s. He was intrigued by the literature and by the built structures and felt that there had been a special community on the Great Blasket for about 200 years. He said that the village was unique and should be preserved as otherwise it would be a heap of stones in 15 years times. In architectural terms, the village on the Great Blasket was an entity in its own right. From his experience in town planning and in setting up new towns such as Milton Keynes, he regarded it as unfair and invidious to place a C.P.O. on sections of a village and not on the whole area. He regarded the Blaskets as an archipelago with all the islands being worthy of conservation. He described the remnants of several houses and said that since 1983 the area had been protected by a prime special amenity order.

79. Peter Callery has been practising as a solicitor in Dingle since 1963. He is the principal of Murtagh E. Burke & Co. The first four Plaintiffs, mainly through the first Plaintiff, own about 17/25ths of the Great Blasket including an undivided 17/25th share in freehold of the largest commonage being of 1,060 acres. The total area of the island is 1,132 acres. In effect, the first four Plaintiffs own 70% of the island including about two thirds of the wholly owned lands. It became clear that Mr. Callery and his brother had both become interested in the history of the Blaskets and that while working on title matters for Taylor Collings, Peter Callery had acquired an expertise with regard to the land holdings on the Great Blasket. He described how Taylor Collings and his wife had made strenuous efforts to clean up the accumulation of rubbish on the island and, in the early 1970s, had started and done huge work in restoring four of the Congested District Board houses. Taylor Collings had put in a lavatory; there was a complaint and he had to get retention permission. He employed five or six men on restoration work, the foreman of whom was Sean Kearney, an islander. Mr. Kearney was a useful intermediary with prospective vendors and was helpful in respect of the title to holdings. The plan showing the property of An Blascaod Mór Teoranta, which was called at the hearing "the patchwork quilt map" is helpful in showing the land holdings behind the Trá Bán. The registered properties of the first Plaintiff are shown coloured pink; the property which it claims beneficially are coloured blue, and interspersed between both these types of properties are the white coloured holdings of other landowners. Two

of these registered holdings belong to Muirís Cleary and the Jauch family and one registered holding belongs to the Office of Public Works. Since 1973 Peter Callery dealt with the administration of the Callery/Collings/Brooks interest and with the registration of title for Muirís Cleary and the Jauch family. In 1973, Jane Barnes and Gerry Fox ran the guesthouse and restaurant on the island and since then the Plaintiffs have ploughed their own money in and kept the guesthouse going albeit in a run down state as a facility for visitors. Peter Callery visited the island very regularly. He explained how eventually Taylor Collings sold two one quarter shares in the shareholdings of the first Plaintiff to himself and to his brother James Callery. Taylor Collings had an unpaid vendor's lien for a time but it is accepted that Kay Brooks owns 50% of the shares in the first Plaintiff and Peter Callery and James Callery each own 25%. He described how over the years the Plaintiffs had expended considerable sums in repairs, painting and renovations.

80. Peter Callery received a letter dated 13th April, 1984 from the Office of Public Works stating that " *the Commissioners of Public Works intend to acquire all the lands on the island and develop them in the national interest so that they will be available for all to enjoy* ". By letter dated 28th June, 1984, Mr. Callery suggested a meeting for preliminary discussions. This was a sequel to a meeting between Mr. Callery and an official of the Office of Public Works back in 1973 when Peter Callery had inquired if a cooperation plan could be worked out with the Office of Public Works. However he received no response or encouragement in this respect. Peter Callery said, and I accept this, that before May 1989 the State had made no offer to purchase the Plaintiffs' interest. While he had been told of the draft of a Bill by Michael Begley, T.D., some months before, it was not until he turned on his television set and saw the Minister for the Gaeltacht, the then Taoiseach, speaking on the Bill in the Seanad that he became aware of the actual Bill.

81. Peter Callery made it clear that in the years before 1989 the first four Plaintiffs would have been prepared to sell their commonage and some of the village "fine lands" for a fair market price; however, no offer was made to them before the Act was passed. It was known since 1985 that the persons whose interest he represented were tentatively exploring for a buyer. Both Peter and James Callery and Mrs. Najemy expressed a wish to keep some permanent presence on the island. Peter Callery was careful to say that he could only surmise with regard to the reason for the exclusion of the other islands in the archipelago including Innisvickillane. He also said it was his belief that the exemption of the "1953 pedigree folk" was because the Act would otherwise have been unacceptable to the former islanders and their lineal descendants. This was not challenged. Mr. Callery was cross-examined with regard to his denial of ownership in or around 1986. He explained this on the basis of a confidentiality clause involving clients but, in any event, I have no doubt that since 1973 or thereabouts the State authorities were well aware that Peter Callery represented the interests which came to be held by the first Plaintiff.

82. On 7th June, 1989, the Act was enacted. About three months later, Dr. P.J. Moriarty, the Chairman of the ESB, telephoned Peter Callery and subsequently a valuer from the Office of Public Works called to his office. Unfortunately, the late Dr. Moriarty, the Chairman of the Foundation, was unwell during the hearing. One of the witnesses from the Foundation had given the impression that Dr. Moriarty would be able to deal with some aspects but unfortunately this was not to be due to his untimely death. I should add that the Defendants' Counsel never did indicate that he would be called as a witness. It was common case that negotiations under the threat of C.P.O. took place in 1990. In March 1991, C.P.O. notices were served and on 7th May, 1991 a plenary summons was issued on behalf of the first four Plaintiffs. Peter Callery having agreed to the request in about 1986 to hold the Plaintiffs' property off the market then found an Act was brought in giving powers of compulsory acquisition. He accepted the eminent importance of the Great Blasket but regarded the treatment of the Plaintiffs as unjust. Since February 1987, there had been preservation orders in respect of the three houses, namely of Ó Criothain, Muirís Ó Sullivan and Peig Sayers. As the Great Blasket was four miles long, if it was the once inhabited village which was of importance then he did not accept that the rest of the island needed to be or should be compulsorily acquired. He acknowledged that the literature was the prime source of information on the island community and that the books and recordings had a permanent form which he contrasted with the unrecorded recall of the living islanders who were a small and dwindling source of information since they had left on or before 17th November, 1953. He disagreed with certain people being given pre-eminence and rights by blood lineage. It was suggested in cross-examination that the C.P.O. was not targeted on the Plaintiffs because other persons were

included such as Ray Stagles, Margaret Bakewell and Vivienne Richie and one Guiheen. Peter Callery responded that there was no evidence of their titles at all as they were squatters on the commonage and the areas involved would be smaller than a little courtroom.
83. The only lands being acquired compulsorily from the "pedigree folk" are their shares in the great commonage of which the Plaintiffs own 19/25ths anyway. Thus, the "pedigree folk" are left with their fine lands and such shares as they hold in the three lesser commonages but not the great commonage.
84. A suggestion was made that the land holdings in the village represented a good example of the Rundale system. However, there was evidence that the acquisition of the lands from Lord Cork and the division of them thereafter by the Congested District Board among 25 land holders would have lessened the importance of this system. In any event, there are better examples of the system elsewhere on the western seaboard and on the Dingle Peninsula.
85. Muirís Cleary said that he bought five acres and two roods of fine land jointly with Arne Jauch. These holdings were made up of separated sites with the old post office ruin on unregistered land and with a recently built beehive hut. From about 1971, he had
fished from the island with Arne Jauch and they had bought a holding for shelter. They had responded to a letter from the Office of Public Works in March 1974 indicating that they would cooperate if the government was intent on a total buyout. He came of a fishing and seafaring family, currach people, and he abhorred the idea of dispossession. He was familiar with the Great Blasket since 1958 and in the 1960s he had spent three weeks at times there with Arne Jauch. He had received the letter dated 28th February, 1991 from the Heritage Service which gave the impression that only their commonage land was being acquired.
86. Dr. Matthias Jauch, a German and EC national, said that he had been brought up as a neighbour of Muirís Cleary. His family lands came from his brother Arne. He was under the impression that members of the Foundation had arranged for Muirís Cleary and himself to be exempt from the C.P.O. in respect of the buildings and fine lands. This tied in with the letter from the Heritage Service dated 28th February, 1991. This case had started on Wednesday 7th May, 1997 and only a few days before he had received C.P.O. notices dated 28th April, 1997 with regard to the rest of their lands besides the 2/25ths share of the great commonage which was the subject of previous notices. He had been amazed by the receipt of the recent notice as it seemed contrary to the tenor of the correspondence received.
87. Derek Daly, the chief planning officer of Kerry County Council, gave evidence that the Blasket archipelago had been zoned in the Kerry County Development Plan in 1968 as an area of prime special amenity and this was repeated in the Plans adopted in 1983, 1989 and 1996. There had been a consultation with the Office of Public Works in respect of the proposed construction of a slipway at the north-west end of the Great Blasket pursuant to the provisions of section 83 of the Planning Acts. In the County Development Plan of 24th October, 1983, it was stated that the "development of the Blasket islands as a national park must be envisaged". He is an experienced planning officer and was not aware
of any precedent for the 1989 Act. He added, for example, that there was no compulsory purchase involved in any part of the Bourne Vincent Memorial Park as the State had purchased other lands there at auction augmenting the gift from the Vincent family. The 1989 County Development Plan dealt with the conservation of ruins, some of which were on the Blasket group of islands.
88. Paddy O'Leary, an archaeologist, was called and described the archaeological sites on the Blasket islands. He was attracted to the idea of a national park for the whole Blasket archipelago. He and Lee Snodgrass had produced a report in May 1990 which was commissioned by the Foundation. It was part of a larger report in the compilation of which Criostoir MacCarthaigh had played a pivotal role. From an archaeological point of view solely (as opposed to folklore or literature), the Great Blasket was the least important of the islands. He would like to see the islands with archaeological remains included in a park to prevent sites being destroyed. As far as he was concerned, the literary heritage was safer as nobody could destroy it as the writings are in print and in the archives.
89. Michael Begley served as a county councillor for 30 years until 1990 and for 20 years as a T.D. He is a patron of the Foundation along with many other leaders of Church and State. In 1987/1988, he understood Peter Callery represented major interests in the Great Blasket. He learnt of the impending legislation from Dr. Patrick Moriarty; he was invited to a lunch at the ESB given on behalf of the Foundation on 20th January, 1989 where the assembly

included all the T.D.'s and Senators from Kerry and they were addressed by Dr. Moriarty and a barrister. A draft Great Blasket Island Act, 1988 was circulated at the meeting and a copy of this containing a summary and draft Bill was adduced in evidence without objection.

90. At this point, I should say that there is nothing improper about pressure groups lobbying public representatives for the laudable objective of preserving Irish heritage and culture. The significance of Mr. Begley's evidence, which I accept, is twofold. First, I believe his evidence that Peter Callery's interest in the Great Blasket was well known in 1987 and thereafter at a time when one would expect the State to have re-opened communication with the owners of most of the Great Blasket through their solicitor. Secondly, a number of witnesses involved in the Foundation stated that they were not aware of the Foundation having any role in lobbying for expropriatory legislation or acquisition of lands on the island for the Foundation. Mr. Begley knew that the draft Act was produced by the Foundation. I have no doubt that Mr. Begley was a reliable witness. The reality is that many people in West Kerry with an appreciation of the culture of the Blasket islands were apprehensive about the purchase of land holdings thereon from the 1970s. This is borne out by Michael Ó Cinnéide's approach to Peter Callery to postpone any proposed sale after the advertisement appeared in 1986. Two letters from an agreed book of correspondence were adduced and shed light on the aims and activities of the Foundation. The first letter is from Dr. P.J. Moriarty, the chairman of the Blasket Island Foundation, to the Secretary of the Department of the Taoiseach dated 9th December, 1988 and reads:-

"Dear Secretary,
The Blasket Island Foundation exists for the purpose of

- preserving the Great Blasket Island from commercial development;

- restoring with all their contemporary furnishings and household articles the dwellings of the three famous authors who lived there and contributed so much to world literature;

- establishing a centre of study of the culture, literature, fauna and flora of the island and of the rich marine life in the seas around it;

- having safe access to the island by the construction of proper piers and embarkation facilities on the island and mainland.

The Foundation has promises from the Government and from all the political parties on the passing of appropriate legislation to underpin the Foundation's objectives with, perhaps, the OPW in a major supervisory role.

The full implementation of the Foundation's plans are necessarily long term. £5/6 millions is a conservative estimate of funds which would be needed over a 5/6 year period. The project is justifiable in its own right in terms of the preservation of the riches of heritage but it is also justifiable in terms of creating a proper infrastructure for tourism in a Peninsula and Gaeltacht area not particularly well developed in this way.

The Foundation believes that the Blasket Island Foundation should be included as a development project in the application for Structural Fund allocations to the Office of Public Works.

I will furnish any further information which is required."

91. The reply dated January 1989 came from the Chairman of the Commissioners of Public Works and reads as follows and is indicative of the thinking after a meeting on 6th January, 1989:-

"Dear Mr. Moriarty,
I refer to our meeting of 6th January, 1989 following your letter to Padraig O'hUiginn regarding a proposal by the Blasket Island Foundation that the Great Blasket Island be included as a development project in this Office's application for E.C. Structural Funds.

You will recall that I outlined to you the nature of the Office of Public Works' involvement over the past number of years and that our present position was to look to the Foundation to acquire the Island, provide access and an Interpretative Centre - with the Office of Public Works giving protection to the Peg houses under the National Monuments Acts and possibly designating the Island as a National Historic Park as soon as new Parks legislation would permit.

You outlined the Foundation's short-term plans and indicated the extent of the funds raised to date. You were adamant that the inclusion of the Great Blasket Island in our proposal for Structural Funds would be the key to the Foundation raising the £1m as targeted. You were also satisfied that purchase of the Island should not be pursued at this point in time.

Following a discussion in the matter with the Minister of State, the project, details of which are attached, was included in our submission for E.C. Structural Funds. This proposal has been put forward on the basis of the understanding reached at our meeting that

(a) the Foundation would be responsible for the provision of the Interpretative Centre out of the monies they would raise,

(b) the landing facilities would be sponsored by the Foundation and the Office of Public Works and that Roinn na Gaeltachta would also be approached for a grant,

(c) individual holdings on the Island would be acquired by the Office of Public Works (using Structural Funds) if they came on the market inside the next five (5) years,

(d) the acquisition of the remainder of the Island would be a matter for the Foundation who would remain, from the Office of Public Works point of view, as the principals behind the project to create a National Historic Park on the Island.

I will write to you again about the question of providing an Architect on a repayment basis to advise on the Interpretative Centre etc."

92. It is interesting to note that it would seem there was agreement in January 1989 not to proceed with purchase of the island at that time and that acquisition of the island by the Foundation was obviously in contemplation and was being discussed.
93. Susan Callery, daughter of Peter Callery, gave evidence of her early memory of having checked with her father Peter the flags flown by an American lady living on the island and then in 1974 having made a trip around the islands with her uncle James Callery. From summer 1975, she had often stayed on the Great Blasket.
94. James Callery confirmed his brother Peter's evidence that they had bought an interest in the Great Blasket in 1972 and that his wish now was for a little house and a piece of land on the island. No approach had been made to him before the 1989 Act was passed. He found it offensive that the Act created a privileged class distinguished by

blood lineage. He said that it was well known that Peter Callery was a shareholder in the Plaintiff company and that the return to the Companies Office dated 9th March, 1988 showed Peter and James Callery as directors and this was filed on 3rd May, 1988.
95. John Moore, auctioneer of Dingle, gave evidence that he owned the Blasket islands other than the Great Blasket and Innisvickillane. His grandfather had acquired the islands and he regarded them as a unit geographically and economically. He owned no land on the Great Blasket and was the lessor of Innisvickillane.
96. Lesley Harmbrook said that she had worked and lived as a scientist on the Great Blasket from 1977 to 1980 during the summer months. She had lived in one of the Plaintiffs' Congested District Board houses and ran a guesthouse in the other. She had written a chapter on the flora for inclusion in Ray Stagles' book on the island.
97. Robert Pierse, solicitor, gave evidence that on 18th September, 1991 he met Kay Brooks, the fourth named Plaintiff. She had strong misgivings about the 1919 Act. Her
points were, first, that the arbitrator would be imposed and not agreed; the arbitrator is not a judge; and that the arbitrator gives no reasons and only makes an award from which there is no appeal.
98. Peter Callery was recalled and it was suggested to him that C.P.O. notices had been served on persons other than the Plaintiffs in respect of the lesser commonages. However, Peter Callery's response was that the exempting provisions would then come into play in respect of the "1953 pedigree folk". Peter Callery also said that offers had been made in 1990 in the course of a meeting with Commissioner Scully at which he, Peter Callery, had made the suggestion of international arbitration. Subsequently, he received a phone call from the Commissioner from which Mr. Callery had got the impression that the suggestion of a valuer from abroad was not acceptable.
99. Professor Padraig Ó Riagáin had earlier been called by the Defendants. Since 1980, he has been working as a research professor at the Linguistics Institute of Ireland and has expertise as a sociologist and in regional planning. Having been referred to section 2(2) of the 1989 Act about the historic heritage, culture, traditions and values of the island, Professor Ó Riagáin said that culture as a term used by sociologists would include literature, music, paintings and also the entire way of life of a community, including the linguistic system, the system of family and marriage relationships, the system for controlling property and religious or liturgical behaviour as well as those activities that go under the general heading of pastimes such as dances, music and songs, and also the material artefacts of a community. As for preservation and demonstration, he said that in the particular context of the Blasket islands, we are dealing with a community that is not historically remote and that is not geographically distant. He continued by saying that it would not be for him to say in exactly what practical and material form a culture could be preserved. There are many
obvious opportunities for preservation in the form of the physical remains of the fields, the property system and the houses on the island. There are the literary records. There is the recorded and extensive library of music and probably, from the sociological point of view, the interviews with people who did live on the island or their close descendants. All of these suggest a very wide range of possibilities whereby the culture, the heritage, the traditions and the values could be preserved. He later added that he would make the general remark that establishing the boundaries of cultural areas is always difficult. He referred to core cultural areas and more marginal or fringe areas and went on to say:-

"In the case of the Blasket, I would have thought that if an area had to be added to the Heritage Park, it would be in terms of the sociological and cultural linkages, ... the Dun Chaoin parish, which was the area on the mainland with which the Blasket islanders dealt in terms of trade and with which they had large numbers of family and other relationships. The other islands seem to me, from the records, to have been intermittently and rather sparsely populated and I don't think that any sociologist or anthropologist would regard them as comprising the core cultural area of the Blaskets. But where exactly a State draws the boundary always seems to me, to be a question of the practicalities of what is feasible and what will maximise what are usually very scarce resources."

100. He subsequently said that village life in the Blaskets was in one respect not dissimilar from the village life of most Gaeltacht communities at that time, that particular period towards the end of the 19th century and the beginning of the 20th century. It was a village life that was fractured by the effects of emigration. Most gaeltacht

villages, and the Blaskets were no exception, were effectively transnational communities. Members of the community lived on
both the island and elsewhere in the world. In this period, it was quite clear that what was once a very local, very restricted and relatively unchanging culture was coming within the influence of a global economic and social system and that therefore when we are talking about the Blasket culture we are talking about a culture that derived from a community that was transnational over a long period of time. It was to some extent a culture of emigration. One can see that in the writings; the different authors took up different positions with regard to emigration but none of them were unaware of it. The professor was subsequently asked with regard to the exemption from acquisition contained in section 4(2). He responded that this particular exemption or provision is consistent with the objective of preserving or demonstrating the culture of the island to the extent that is currently possible. A system of property relations in a community is part of its culture and this particular exemption would seem to be no more than an attempt to preserve and demonstrate that particular connection. Anybody who has grown up or is a lineal descendant of people who lived in an island community will preserve in their manner of living some elements of the particular cultural experience. It may be that they preserve the language. It may be that they preserve the religion. It may be they preserve some elements of the values or the norms of that island community. A culture is a dynamic thing. It is not fixed in time at any one point. It is constantly changing and this is one of the ways in which it changes. When asked to what extent elements of a culture are preserved in second or third generation persons who grow up in another country, the Professor replied that he could only give a personal view on this but he was deeply impressed with the way emigration had become part of the culture of the gaeltacht communities in the west of Ireland and he would find it offensive to have a heritage park in a Blasket island which, so to speak, eliminated from the culture that it presented the pain, torment and destructiveness of emigration, which was the sociocultural process that
brought that community to an end. Having a set of holdings on an island, some of which are declared to be owned by descendants of former residents who had to leave the island 50, 60 or 70 years earlier is a tangible, practical way of demonstrating that cultural experience of emigration. The Professor was subjected to a wide-ranging cross-examination in the course of which it became clear that he had a thorough knowledge of the position with regard to the Irish language in the Corca Dhuibhne gaeltacht and also of the literature written about the Blasket islands. The Professor was asked about the exemption provision and said:-

"I think that there is a certain consistency in the Act in trying to preserve and demonstrate a culture that came to an end in 1953 by maintaining such links as can be maintained between the original islanders and their descendants. Quite obviously, if you carried that to its extreme you do come up with a grotesque situation. But we are not talking about the extreme. We are talking about the time at the moment, and for as far ahead as I, as a limited human being, can reasonably envisage. I think that is consistent and that is all that I wish to say on it."

101. His evidence was strongly challenged.
102. The Professor was asked about the prospect of a park with patches of private property which are likely to become derelict and replied that this would be fitting in the sense that it would tell a story about the way in which an island had died.
103. I should say at this point that I have considerable scepticism about the effect of the exemption in favour of the former inhabitants and their relatives particularly where it involves the likely further deterioration of buildings in the village owned by the exempted classes. In fairness, Professor Ó Riogáin himself said that the situation in time would become grotesque. Section 2(2) of the Act talks of " *a park in which the historic heritage, culture, traditions and values of the island and its inhabitants will be preserved and demonstrated* ". This seems to me to refer to the heritage and culture of the community inhabiting the island prior to the evacuation in 1953. Under section 2(3), the Commissioners, in performing their functions under section 2(2), are among other things to conserve or restore and maintain such of the traditional dwellings and other buildings on the island as they consider appropriate. There are obvious difficulties in putting into effect a scheme of conservation of traditional dwellings if some of them are in

the Park and others are interspersed among them and still in private hands, being in the possession of the exempted class of former inhabitants and their relatives. In reality, over 40 years on since the evacuation of the very last of the inhabitants, these interspersed properties may well have passed into the hands of lineal descendants of the former inhabitants and many of these owners are probably living in diverse parts of the world and have been brought up in very different cultures from that of the former island community. I have set out Professor Ó Riagáin's evidence at length as it represents the apogee of the Defendants' justification for the discrimination in favour of the former inhabitants and their lineal descendants and against the Plaintiffs in respect of land holdings. It is ironic that some of those relatives of former inhabitants (who may have left long before 1953) could at this time already be very remote descendants who had never set foot on the Blaskets and are living in New York or Zanzibar. On the other hand, the Act envisages the compulsory acquisition of the property of the Plaintiffs who have taken an interest in the cultural heritage of the Blaskets and have taken active steps to preserve the buildings and have used their own resources to restore properties and ensure that there was access and somewhere to stay for visitors on the island.

104. Brendan Feiritéar said that he was a teacher and former head of Radio na Gaeltachta for nine years. He was born near Dun Chaoin and was knowledgeable about the area having been involved in research and programmes and film making about the Blaskets. In his view, the distinguishing feature of the Great Blasket was the literary accounts of the houses. He said that the last chapter of the story of the Great Blasket was the first chapter in the story of the emigrants from the Blaskets to the U.S.A. He produced a list of the patrons of the Foundation and explained that the aims of the Foundation were to preserve the Blaskets for the nation. The object was to preserve the Great Blasket unspoiled so that people could see the places mentioned by the authors. It was never the intention to acquire the island for the Foundation. He mentioned that everybody knew that Peter Callery acted for Taylor Collings. He also said that the members of the Foundation had discussed the need for special legislation from the beginning and that a bill was discussed although he could not recall when this was. In February 1989, he had been in Dublin at the launch of the Foundation and, on that occasion, he recalled Dr. Moriarty spoke of the aims of the Foundation and mentioned the draft Bill. It will be recalled that this included expropriatory provisions. Brendan Feiritéar said that the acquisition of property from the Plaintiffs and Muirís Cleary could be justified if it was necessary to preserve the village; the end could justify the means. He agreed that at some stage he was told that a specific Act had to be got together but he was vague on this aspect and I inferred that the witness had left the obtaining of special legislation to others.
105. Dr. Alan Craig became chief park superintendent in 1987 and from 1987 to 1991 was involved with the Blaskets. He explained that initially national parks were concerned with nature but that in the 1960s Derrynane came into State hands and became known as a National Historic Park but without any statutory basis for this. For a national
park by international standards, there should be at least 1,000 hectares. From the early 1970s, there was an upsurge of interest in the cultural heritage on the Great Blasket but there was no talk at that time of setting up a park. About 1974, the Office of Public Works purchased a holding on the Great Blasket in order to prevent undesirable development taking place. Over the years, clearer guidelines emerged with regard to national parks but not in respect of national historic parks. The Great Blasket posed a problem of a delicate balancing act between the intrinsic conservation and preservation objectives and public access and appreciation. Having the Interpretative Centre on the mainland was an effort to keep the balance. He agreed that it was quite possible for private owners to achieve this balance; indeed, heritage gardens were often best left in private ownership. He explained that it would be difficult to provide public access to the other Blasket islands and that the Great Blasket was relatively more accessible. He said that on the Great Blasket the focus is on the village and the surrounding fields which are made by man and more robust and he contrasted this with the fragile bird life on Tiaracht. He suggested that with regard to numbers of visitors, more than 10,000 persons per annum visiting would cause damage and dilute the experience of solitude. He said that there were tentative plans to restore the houses of Tomás Ó Criomhthain, Muirís Ó Sullivan and Peig Sayers as well as the house known as the Dáil and there was a need to make others safe. There was a strong consensus against complete restoration. Dr. Craig believed that there were circumstances in which

private individuals could conserve property and show them to the public. There was a difficulty in respect of implementing a national objective if one was having to rely on the goodwill of a private landowner as the goodwill might last until he wished to exercise the right of free sale. Dr. Craig made it clear that he was not involved in the acquisition procedure but had attended meetings in 1990 and 1991 on the Dingle Peninsula dealing with the practical planning of the
106. Visitor Centre on the mainland. He was not aware of other writers' houses elsewhere being preserved, although he was aware that St. Enda's was being looked after by the Heritage service of the Department. He stressed that the responsibility of the Office of Public Works was to implement the provisions of the 1989 Act. Dr. Craig confirmed that all of the Blaskets are included in the 1,000 to 2,000 proposed Natural Heritage Areas and that Tiaracht is a bird habitat of international rating; the geology of the islands was an extension of the mainland and as a botanist, in his view, there was no exceptionally peculiar flora on the Blaskets.
107. Edna Ul Cinnéide gave evidence that she came from Mayo, had lived in Dublin and in 1952 married the son of an islander. Her husband, Michael Ó Cinnéide, a County Councillor active in local and cultural matters, died in 1985. She was an active member of the Foundation and obviously is a competent person and an effective fund-raiser. She made it clear that she had no authority to, and did not, broker any deal in favour of Dr. Jauch and Muirís Cleary with the agencies of the State. I accept her evidence on this. In the light of her friendly disposition towards Dr. Jauch and Muirís Cleary, it is quite understandable that, when they received the letters dated 28th February, 1991 from the Heritage Service, they would feel that they were being treated in the same way as the "pedigree folk" and differently from the first four Plaintiffs. However, she had not in fact intervened as an uninvited benefactor. She confirmed that the Foundation started about 1986 when news came of the "island for sale advertisement" in America. She went with Brendan Feiritéar and two islanders to Peter Callery. It was a friendly meeting in which they were trying to establish facts about the sale. She said that the purpose of the Foundation was to have the State purchase the island and also to seek funding for the centre at Dun Chaoin. Funds collected were not to buy the island but to create an awareness of the island heritage. She accepted that there might have been a misunderstanding that the Foundation had designs
on buying the island. Funds raised were used as to £60,000 on research by Atlantic European Research on a wide study of the island, £45,000 was a donation in respect of the Visitor Centre, £25,000 was spent on a film made in respect of 17 surviving islanders then alive, £17,000 was spent on the publication of a magazine and money was expended on the lottery draws.
108. I am sure that she is telling the truth as she believes it. Accordingly, I conclude that she was unaware that persons in the top echelons of the Foundation were lobbying for legislation for compulsory acquisition. Sections 5, 6, 7 and 8 of the draft "The Great Blasket Island Act, 1988" circulated in January 1988 at the meeting held by Dr. Moriarty are incontrovertible proof that the Foundation wanted compulsory acquisition of all land on the Great Blasket other than "' *excepted land - owned by present owner since 17th November, 1953 (date of evacuation) or owned by present holder as a result of acquiring it from an ancestor resident on the island prior to 17th November, 1953* ". A further quotation from this draft emanating from the Foundation is:- *"'Excepted land' may be purchased by agreement and consent only"* . This is relevant to the challenges to the parts of the Act dealing with the role of the Foundation (see especially point (c) Constitutional Justice, and also (e) Delegation of Functions and Powers and (f) Section 5(4) of the Act - Power to Adapt - which are in the summary of grounds of constitutional challenge above). No doubt this is why no objection was taken to Mr. Begley's evidence and the putting in to evidence of the draft "The Great Blasket Island Act, 1988". It may be as well to add that the attitude of and lobbying by the Foundation for expropriation is not material to the Court's consideration of the validity of Section 4 of the Act in the light of the provisions of the Constitution as the Court must focus on the wording of Section 4. The Court has not, in the circumstances of this case, deemed it appropriate to delve into the legislative history of the 1989 Act, or to admit the record of the debates in the Oireachtas, other than so as to ascertain the general historical, geographical and cultural background.
109. Criostoir MacCarthaigh has an M.A. in Irish folklore. He contributed a chapter and was the moving spirit in the compilation of the book on the Blaskets produced by Atlantic European Resources. In August/September 1991, he did a field survey with Barry O'Reilly of the vernacular architecture of the village. They located 65 buildings

and sites. Their work was complicated by the houses having been enlarged and built on over the years so that there was a tapestry of buildings. They had added to the map and sites identified by the Office of Public Works; often they found remains of half walls and then traced for walls and gables. He said that only ten or eleven of the buildings now have roofs. He believed that the village had a late medieval origin. The five or six Congested District Board houses were very different in style and orientation from the vernacular houses. He felt it was important that the buildings and field system should be conserved apart from the literature. Several folklorists over the years had made recordings about the island. There were also several written volumes which included details of the structure and economy of the village. He was anxious that the buildings, structures and field systems of the village should be preserved. He deplored any mechanism that would damage the integral unity of the village.

110. Muirís MacConghail, former controller of programmes in RTE for ten years, author and film maker, was an impressive witness who has written and lectured on the culture of the Blaskets. His documentary film on the Blasket Islands, Oileán Eile - Another Island (1985) has won awards. He gave evidence of an oral medieval culture and the development of an island literature which is unique. He handed in a lengthy list of the authors of the Great Blasket. He explained how Carl Marstrander, Robin Flower and George Thomson had encouraged the islanders to write in their own living language. He explained that the
literature was written from within and for an island community; while the texts can stand on their own, and several have been translated into many languages, it is better to have and to preserve the literature in its surroundings, as people come to see the scene and to wonder how these great books came from such houses. He said that all the authors lived in the village on the Great Blasket and they lived in the world of the seven islands. He quoted Tomás Ó Criomhthain's words:- " *I wrote this account of my life for the likes of us will never be again* ". He said that Innisvickillane played a pivotal role in the Blasket culture and was an extension of the main island. His impression was that the village was water-logged and was being eroded. Work should be done to prevent the top and bottom village from going back into the hill as the water was not draining off. He was anxious that the houses of the authors should be preserved, that a field system should be identified so that the ownership of the fields would be known and that a jetty would be built so that boats could be brought in safely. He expressed the view that "when an island is dead, it is dead". When asked about blood descendants, he said that they would add an ingredient though he did not know how one could reinhabit an island. He said that the island represented "the forge of the literature" and that he did not know whether the children or grandchildren of the 1953 people returning could make a contribution. He said that there were three generations of authors who were distinct and quite different in the literary output from the Blaskets and it was important to know the environment in which that miracle had occurred. The surrounds and the whole island from which this literature came needed to be preserved together with the values of that culture. He regarded the island and its literary product as a national treasure.

111. Martin Connolly is the head of the valuation section in the Department of Engineering Services of the Office of Public Works and has 20 years experience there. He said that in the 1970s instructions were received from the Department of Finance to acquire
holdings on the Great Blasket as Taylor Collings had acquired a substantial number of holdings. In or about 1976, the Office of Public Works acquired one holding being 3¾ acres of fine land at a number of locations, with the ruin of a house, and a 1/25th undivided share of the 1,060 acres of large commonage. The holding had belonged to "Kearney the Yank"; the roof of the house had gone. Some walls were there but the Office of Public Works had done no restoration work on that house. He said that the first indication he had that Taylor Collings was not the owner of 17 holdings was on 1st June, 1989. A search in August 1989 showed the first Plaintiff as registered owner of the holdings. I note in passing that I do not think that his misapprehension as to the ownership of the 17 holdings is germane as it was quite clear and well known that Peter Callery was anyway the solicitor representing the interests of Taylor Collings and his successors, the Plaintiff landowners. In August 1989, Mr. Connolly visited the Great Blasket with Michael O'Mahony, the then senior valuer. They were assisted by having an architect's survey by Ciaran O'Connor for the purpose of their valuation. In November 1989, he met Peter Callery to sound him out. By April 1990, the valuations were done and Mr. Callery referred him to the Plaintiffs' valuer, Mr. Morley of Hamilton Osborne King. In June and July of 1990, meetings took place and Commissioner Scully had taken the matter up. In August 1990, he met Muirís Cleary and Dr. Jauch but in November 1990, on being told of Mrs.

Cleary's death, it was decided to postpone service of the C.P.O. notice on them. He explained that there were two groups of "1953 people", those whose names were known and also the owners of three holdings which were unregistered and in respect of which he was unable to ascertain names of the owners. There was a house on the great commonage which had been built for Eoghan Dunleavy and this was bought by Ms. Richie and Ms. Bakewell in the early 1960s. A similar house on the commonage built for Maurice Keane was bought by Ray Stagles in the 1950s. Ó Guithíns also had a house on the
great commonage. I note in passing that these three houses were all very small and were probably held on a possessory title. He said that in March 1991 C.P.O. notices were served and on 7th May, 1991 the Plaintiffs' plenary summons issued challenging both the jurisdiction of the Minister to make the forms and the constitutionality of the Act. No further notices were served on Muirís Cleary and Dr. Jauch until after Mr. Justice Kelly's decision of December 1996. Mr. Connolly had carried out research on the title to the three unregistered holdings, the schoolmaster Thomas Savage's house, the Roman Catholic national school and the burial ground. As for Dr. Jauch and Muirís Cleary, C.P.O. notices dated 29th April, 1997 had now been served in respect of their lands. He had moved on the matter of these C.P.O. notices once the Minister's decision in the matter of serving them had been conveyed to him after Mr. Justice Kelly's judgment. He was asked if the Office of Public Works had had co-operative relationships with local groups before and he explained that there was a successful cooperation with Professor Caulfield and locals in respect of the Céide Fields in County Mayo; the local group had acquired the fields there before there was any involvement by the Office of Public Works. He confirmed that the Office of Public Works can be flexible with regard to landowners and in respect of the restoration of houses. He also stated that the file in the acquisition section was opened when Taylor Collings started to buy up holdings on the Great Blasket. He confirmed that at no time was a synopsis of the reasons for the acquisition ever sent to the Plaintiffs.
112. Padraig Feiritéar is the principal of a secondary school in Dingle and a member of the Foundation since it began in 1985 under the chairmanship of Dr. Moriarty. He explained that the Foundation had two objectives, a National Historic Park on the Great Blasket and an explanatory Centre on the mainland. It published information and collected books on the Blaskets. He stressed that it was never the intention of the Foundation to
acquire the Great Blasket for themselves. The Foundation had never sought exemption for Dr. Jauch or Muirís Cleary. The Foundation did have an advisory role with regard to the Visitor Centre and he was the present chairman of the advisory committee. He said that the first lottery draw had brought in a nett £100,000 and the second draw had brought in a nett £80,000. The Visitor Centre had cost £3.8 million. He also identified the memo and articles of the Foundation as one of the signatories thereof. To his memory, it was never the intention of the Foundation to gain possession of land on the island. He refuted the suggestion that the Foundation had any role or made representations with regard to the contents of the Bill. It is difficult to reconcile this evidence with Michael Begley's account of the meeting organised by the Foundation at the ESB where the heads of a draft Bill (entitled "The Great Blasket Island Act, 1988") inspired by the Foundation were under discussion. Section 11 of this draft envisages management and control of the island being vested in the Office of Public Works and that the Office of Public Works, at the direction of the Minister, shall delegate nearly all its powers, duties and functions to the Foundation. Perhaps this was never mentioned at the next meeting of the Foundation or that Padraig Feiritéar was not present at any of the discussions which must have taken place with regard to the contents of or representations about the Bill. His concentration may well have been on the admirable work of inspiring and running the Visitor Centre.
113. Dave Fadden of the Office of Public Works gave evidence that he had attended a meeting on 5th June, 1990 with Commissioner Scully in Peter Callery's office in Dingle. The object was to try to agree the purchase of the first Plaintiff's holdings on the island. On 9th June, 1990, he made a memo of this interview. At a subsequent meeting on 25th July, 1990, he had attended in Commissioner Scully's room at St. Stephen's Green when the Commissioner had discussions with Peter and James Callery. The Callerys had suggested a valuer from abroad. Mr. Fadden said of the letter dated 28th February, 1991 sent to Dr. Jauch and Muirís Cleary, that this was a standard letter but that he realised how they could take the meaning from the letter that they were exempted from acquisition. He confirmed that no letter had been sent to the Plaintiff landowners setting out the reasons for and

objectives of the proposed acquisition. His office was caught up with the minutiae of getting the C.P.O. notices right.
114. I interject that the view could be taken that since the agents of the State had frequently explained the plans at meeting after meeting to the members of the Foundation, it should have been easy for the Department to set out the broad lines of the reasons for compulsory acquisition in a letter to the Plaintiffs responding to their offer of cooperation before taking the drastic step of sanctioning the service of the notices. It would seem that no letter setting out the reasons for the acquisition on grounds of the need to preserve the literary, folklore or built culture was ever sent and certainly no suggestion was made that continued ownership of plots of land by descendants of emigrants would demonstrate the culture of the former island community.
115. Professor Bo Almquist is the recently retired professor of folklore at University College Dublin. He has been aware of the unique position of the folklore of the Blasket islands since his student days at Uppsala University in 1952. In 1957, he met Michael, son of Peig Sayers, and worked with him until Michael died in 1972. He has been editing Peig Sayers' work in 14 volumes of about 300 pages each. He said that out of an island community of about 180 people came a dozen people of unique talents who have produced material covering every aspect of folk literature and in respect of which there is no comparable material elsewhere in the world. He said that there was still one or perhaps two surviving Blasket islanders and that it was very doubtful if the children of the departed islanders would have heard the stories and would pass them on. He said that Innisvickillane was a geographical part of the Blaskets but was of marginal importance in the folklore of the Blaskets. The professor's expertise was challenged. I accept his eminence as an expert not only in the folklore of the Blasket islands but also in comparative folklore from Newfoundland to Polynesia.
116. Michael de Mordha was born in Dún Chaoin and was formerly a programme manager with Raidió na Gaeltachta. He has been the manager of the Visitor Centre since July 1993. Last year, there were 40,000 visitors to the Centre. He produced in evidence a draft management plan drawn up in 1996 which covered access, buildings and organisation for the Great Blasket. There was a plan to improve the piers and to deal with the buildings which were in ruins and subsiding into the hillside. There was also a need to improve the water supply and to put in sanitary facilities. It was not envisaged or planned that people would reinhabit the Great Blasket.
117. Commissioner Brendan Scully has been a commissioner since 1982. He attended the meeting on 25th July, 1990 and was prepared to agree to an arbitration but not to an international arbitration. He had considered the suggestion of a valuer from abroad as it was put forward seriously. He thought Peter Callery was correct that he, the Commissioner, responded to the suggestion with a refusal on the telephone. In respect of suggested cooperation, he said that it would have been difficult to work out a modus operandi in respect of a national park with the Plaintiffs but it was a possibility.
118. Ciaran O'Connor is the senior architect with the Office of Public Works. His evidence was impressive not just for his expertise, which one would expect from an F.R.I.A.I. with the Office of Public Works, but also for his deep knowledge of the Great Blasket and the conservation of the island. He had first visited the Great Blasket as a student in 1973 having
read books by Muirís Ó Sullivan and Robin Flower. He was able to describe the deterioration of the buildings between 1973 and 1989. In 1989, he carried out a major survey with photographs and plans. The village was a clachan development but was unusual for being described in the literature. He pointed out on the plans where the five Congested District Board houses were set away from the upper and lower villages and built at a different orientation. He used the 1957 survey made by the Air Corps and Edith Flower's drawings made in 1911 and also the photographs taken in 1964 by a Cambridge University team. He also had the Griffith valuation and rent maps as well as the Congested District Board maps. He engaged Criostoir MacCarthaigh and Barry O'Reilly whose expertise in vernacular architecture helped to validate the plans on the ground. He expressed the view that the village was significant in its own right with the added interest of there being a good pictorial and literary record of it. There were photographs taken by Jeremiah O'Donovan in the 1890's and subsequently by Carl Marstrander, (c. 1907 and 1910), Robin Flower, J.M. Synge in 1915, and by George Chambers in the 1920s. The validity of the literary account can be checked on the ground and he felt that the village as an entity was worthy of preservation. The literature would help in the architectural restoration and preservation necessary as the buildings have continued

to deteriorate. He did not know of another village in Ireland as significant as that on the Great Blasket. For example, there was no literary record as to how the huts on Skellig Michael were built. The village gave an unparalleled chance to show the way of life of a community through the literature and the houses. In his first report he outlined the Office of Public Works plan dealing with the need for a jetty, the restoration of some of the buildings including the old national school, the Dáil and the dwellings of Ó Criomthain, Ó Sullivan and Peig as showing the different house types. As for water supply and drainage, the old Congested District Board drains had done very well although the slab
stones had moved and some of the drains had become eroded and silted up. These box-type drains were nearly a hundred years old and the Office of Public Works had the records about them from the Clerk of the Congested District Board. An effluent treatment system would be necessary to deal with sewerage and water storage. He expressed the view that cooperation in respect of restoration with the Plaintiffs was not really feasible; first of all, restoration work would require a health and safety programme which would cause difficulty if there was a division of responsibility. As to funding, there would be difficulty in respect of EC grants which would not be available unless there was State ownership and the Office of Public Works was carrying out the work. There was a need to control access to the island and in this respect the Office of Public Works would need to be in control for safety reasons. Pressure of visitor numbers would pose further difficulties for a scheme of cooperation. The 43 consultations with the members of the Foundation in respect of the Visitor Centre between 1989 and 1994 had been useful although it was the Office of Public Works who had to make the ultimate decisions. He had known of Peter Callery's interest in the island since 1973 and he was aware that all the locals knew of the Callery interest. The report of April 1989 had identified three aspects, the Visitor Centre, the access to the island and the Park. He said that the "traditional landowners" were awaiting the outcome of this case to see what payments would arise and they did not make any bones about this. Access to the island and the island structures would be subject to the existence of the exempted owners' plots. His job was to execute the policy in the Act.

119. I note in passing that there was admirable liaison with local people with regard to the Visitor Centre at Dún Chaoin. This is in contrast to the Department's lack of laying of the ground in respect of compulsory acquisition on the Great Blasket, at least as far as communication with the Plaintiffs was concerned.

120. Difficulty of access to date has protected the fragile environment of the island from the effects of overcrowding. Problems could be posed by an exempted landowner wanting to develop his part of the village or objecting to limited access rules. Thus, the exemption provisions would appear to create a practical problem in respect of control of access and planning because of the partial ownership of the island envisaged.

121. Before turning to the constitutional challenges, some other contentions should be examined.

Further Ultra Vires Challenges

(a) Discrimination in respect of the administration of the C.P.O.s

122. The Plaintiffs allege unfair discrimination against them as compared with Muirís Cleary and Matthias Jauch in respect of the administration of C.P.O. notices. Paragraph 32 and the declaratory claim in the amended statement of claim contends that there is unfair discrimination against the first to fourth named Plaintiffs in that their entire property on the Great Blasket is the subject of C.P.O. notices. This is by way of contrast to the C.P.O. notices dated 4th March, 1991 served on Muirís Cleary, being notices nos. 12 and 13, which purport only to apply to his interest in the great commonage on the island and do not cover the buildings, including the beehive hut and old post office, or fine lands in his two registered holdings and his unregistered holding, all of which he bought jointly with Arne Jauch. The Plaintiffs submit that if this issue has been rendered moot by the C.P.O. notices dated 28th April, 1997 served on Muirís Cleary and Dr. Jauch, then costs on this aspect should be awarded against the Defendants on grounds comparable to the order for costs made by Johnson J. in ***Dudley -v- An Taoiseach*** [1994] I.L.R.M. 321. In ***Dudley***, the moving by the Government to call a by-election obviated the need for the proceedings about to be heard in

123. Court. However, I accept the evidence of Mr. Fadden that the Office of Public Works was advised that Mr. Cleary's wife had died in an accident and, accordingly, he held off with sensitivity from serving the notices for the time being. The first four Plaintiffs in the meantime issued a plenary summons and challenged the power of the

Minister for the Gaeltacht to make the statutory instruments prescribing the forms for the C.P.O. This aspect was fully argued before Mr. Justice Kelly who heard and considered carefully various submissions before finally coming to the conclusion that the Minister did have the requisite power. It was prudent of the Commissioners not to proceed until this point had been resolved by the High Court. The deferral of service of the C.P.O. notices until April 1997 may well have lulled Mr. Cleary and Dr. Jauch into a false sense of security and have convinced the Plaintiffs of further unfairness and discriminatory behaviour. Nevertheless the initial holding off of the service of the C.P.O. notices was on compassionate grounds and the subsequent delay was justified by the prudence of awaiting the outcome of the challenges dealt with in the judgment of Mr. Justice Kelly.

(b) A second ultra vires challenge concerned a proposed amendment to the statement of claim contained in paragraphs 32(B) and 32(C) of the amended statement of claim delivered on 23rd June, 1997. These amendments were refused on 24th and 25th June, 1997 respectively as being too late, although only arising out of evidence elicited from witnesses called by the Defendants. However, it was made very clear by me, when not allowing these amendments, that the entire conduct of the parties, including preliminary steps, or the lack of them, taken prior to compulsory acquisition procedures would be taken into account. Both parties had dealt at length already with this history and the complaint that none of the major landowners on the Great Blasket were furnished with the general outline of
what were the Department's plans or even the rationale for the establishment of a National Historic Park. Both parties were alive to the criticisms that no response was made to the Plaintiff's offer of co-operation and no suggestions were made or even considered with regard to terms on which the Plaintiffs might be invited to cooperate as an alternative to compulsory acquisition. Section 4(1) of the Act clearly envisages acquisition by agreement with compulsion as an alternative. Both parties certainly explored the suggestion of arbitration by an international valuer, which proposition was considered by Commissioner Scully, but this was long after the enactment of the 1989 Act. In view of the limited number of landowners on the Great Blasket, it does seem surprising that there was no correspondence from the Department, no invitation to open negotiations and no reasonable opportunity given to the Plaintiffs to make objections or representations before the enactment.

(c) <u>Unfair Legislative Procedure</u>

124. The Plaintiffs submit that for all practical purposes the 1989 Act was a private Act of the Oireachtas in that it was sponsored by a private company, the Foundation, and it almost exclusively targeted the Plaintiffs' property. It is clear that the Foundation was active in lobbying for and sponsoring the legislation and the Act contains provisions giving the Foundation an advisory role and certain delegated functions. The Plaintiffs suggested that fair procedures required that the Plaintiffs be given some advance notice of the proposed Bill and an adequate opportunity to comment on it. The Plaintiffs drew comparisons with the protective procedures adopted in respect of private Acts when the persons likely to be affected by the provisions are put on notice thereof and given an opportunity to make objections and representations. However, the 1989 Act has been passed as a public general Act. The Court has no function at this stage to consider whether the 1989 Act ought to have
been a private Act or whether the procedures adopted in the enactment of a private Act should have been followed. Special groups are entitled to lobby for a particular piece of legislation. However, where a compulsory acquisition measure has such a narrow focus involving only the Plaintiffs' lands with a few other tiny additions then one would have expected some advance notice, or invitation to negotiations, or opportunity to make representations to be given to the very few affected parties. However, the failure to give such notice or to afford such opportunity does not of itself invalidate the 1989 Act.

(d) <u>Rushed Measure</u>

125. The Plaintiffs have criticised the speed of passage of the 1989 Act through the Houses of the Oireachtas. The Court is not concerned with the speed of passage of the Act but concentrates on its constitutionality.

(e) <u>Mistargeting / Underinclusive</u>

126. The Plaintiffs contend that the Blasket islands as an archipelago are an integral unit and that it is unreasonable to single out the Great Blasket. However, there was ample evidence that the Great Blasket island held the community which produced the literature and contained the homes of the authors. I accept the evidence of Professor Almquist with regard to the importance of the Great Blasket in the folklore tradition. There was convincing evidence of a number of the witnesses particularly Muirís MacConghail in respect of the merit of the wonderful literary output of the islanders. I was also impressed by the evidence of Professor Barker and Ciaran O'Connor with regard to the "built heritage" in the village having intrinsic value worthy of preservation. The Court should be slow to interfere with allocation of resources by the Oireachtas.

(f) Ireland / US Treaty

127. The contents of the Treaty of Friendship, Commerce and Navigation between Ireland and the USA dated the 21st January, 1950 is not enforceable by individual citizens of the United States or of Ireland against either of the States; being a treaty, it does not take precedence over an Act of the Oireachtas. It is not part of our national law, and does not give rise to a cause of action by an individual.

EC / Bloomer Point: Indirect discrimination contrary to Article 6 of the EC Treaty

128. The fifth named Plaintiff is a German national and challenges the 1989 Act, particularly section 4, as being contrary to Article 6 of the EC Treaty. The relevant part of Article 6, which was formerly Article 7, as now amended reads:-

"Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

129. This Article prohibits discrimination on the basis of nationality, including indirect discrimination or discrimination by impact. When one considers section 4(2) of the 1989 Act one realises that land which is owned by a person who has owned or occupied it since 17th November, 1953 and was ordinarily resident on the island before that date, or a relative of such person, is almost certainly land owned by an Irish national. Since all of those exempted by section 4(2) from being subject to compulsory acquisition were likely to be Irish nationals,

section 4(2) allows for discrimination by impact against a German or EC national who subsequently has purchased a holding on the island. The Plaintiffs argue that ownership of land falls within the scope of the application of Article 6 of the EC Treaty and submit this on the analogy of Article 7 applying to intellectual property in the ***Phil Collins -v- Imtrat Handelsgesellschaft MBH*** , case C92/92 [1993] E.C.R. I 5145. The Plaintiffs further argue that the criterion of residence in a State in reality amounts to a test based on nationality. The Plaintiffs rely on ***Bloomer -v- Incorporated Law Society of Ireland*** [1995] 3 I.R. 14 in respect of discrimination by impact. In ***Bloomer***, it was held that in determining whether a provision contained indirect discrimination on grounds of nationality, contrary to Article 6 of the Treaty of Rome, 1957, the Court should answer the following questions one after the other:-

(a) Had the plaintiffs established that the provision operated mainly to the detriment of nationals of other Member States?

(b) If so, had the plaintiffs established that the difference in treatment between law graduates of named universities and those of other universities was not objectively justified by, or was disproportionate to, their different situations?

(c) Had the defendants established an objective justification for the discrimination unrelated to nationality?

130. It was held that the plaintiffs had established that the provision operated mainly to the detriment of nationals of other Member States, in that the majority of law graduates of the named universities were nationals of Ireland whereas the vast majority of law graduates of Queen's University Belfast were nationals of other Member States.
131. The basis of Laffoy J.'s decision in ***Bloomer*** is that the particular piece of legislation had the primary effect of discriminating against a national of some other EC country. By contrast, the exemption in section 4(2) discriminates in favour of a particular class against other Irish citizens and EC nationals who have property interests on the island. While the fifth Plaintiff, Dr. Jauch, is a German national and has a very real interest in these proceedings, nevertheless such interest as he has in the lands comes to him from his brother Arne who was an Irish citizen. While I am satisfied that Dr. Jauch has an adequate interest in the matters in issue in this case to have locus standi, nevertheless his actual interest in the lands comes via his brother Arne's estate which is an Irish and not a German estate. Thus, the effect of the legislation is the same on Muirís Cleary's holding as it is on the other moiety which belonged to Arne Jauch and, accordingly, I do not think that the submission about indirect discrimination by impact against a German national is in point in the actual situation here.

Construction of "relative" and "lineal descendant" in Section 4

132. A conflict arose between the parties as to the meaning of "lineal descendant" in section 4(4). It was first contended on behalf of the Defendants that "relative" in section 4(4) is confined to a person who is actually alive at the date of the passing of the Act. Subsequently, this submission was amended and it was contended that the "relative" in section 4(2)(a)(ii) is to be ascertained at the date of service of the C.P.O. notices, some being served in March 1991. This is not the plain meaning of the words. If the Oireachtas intended to limit "relative" and in particular "lineal descendant" to a specific point in time, then the words " *at the date of the passing of this Act* " or " *at the date of the C.P.O. notice* " could have been included. I have reached this conclusion by reading the words as enacted. I ruled against the admission of the record of debates in the Oireachtas on the Bill. I acceded to an application to allow the production in evidence of the Bill as initiated. It is interesting to note that the phrases "upon the passing of this Act" and "upon such passing" were respectively included in sections 4(2)(a)(i) and (ii) in the Bill. I am not prepared to speculate as to why these words were either initially included or subsequently deleted. The straightforward construction of the words in section 4(2)(a)(ii) does not put a time constraint on either "relative" or "lineal descendant". Thus the "lineal descendant" could be from a far future generation, the distant issue of a post-1953 owner or occupier who ceased to be resident long before 1953.

PRIVATE PROPERTY

133. In the part of the Constitution dealing with Fundamental Rights, under the heading Personal Rights, the relevant part of Article 40 reads:-

"40.1. All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

"3.1º The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2º The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

134. Under the heading Private Property, Article 43 reads:-

"1.1º The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2º The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2.1º The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2º The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."

135. The construction and application of these two Articles and their interrelated effect on each other has evolved over the years.
136. There is a similar guarantee in Article 1 of the first protocol to the European Convention on Human Rights and Fundamental Freedoms (see D.G. Harris et al. ***Law of European Convention of Human Rights*** , 1990, chapter 18).
137. The Plaintiffs assert that the 1989 Act, especially section 4, is an unjust and constitutionally impermissible attack on their property rights. In order to avoid the perils of subjective notions, I propose to sift previous cases for established criteria as to what is an unjust attack which is also repugnant to the Constitution.
In ***Pigs Marketing Board -v- Donnelly (Dublin) Limited*** [1939] I.R. 413, Hanna J. was considering the price controlling mechanism contained in the Pigs and Bacon Acts, 1935 and 1937 on foot of a challenge that the Acts were inconsistent with Article 43. He expressed scepticism about the concept of social justice as he could not conceive social justice as being a constant quality. He said at p.422:-

"The days of laissez faire are at an end, and this is recognised in paragraph 2 of clause 2, which enacts that the State can 'as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good'. I am of opinion that the Oireachtas must be the judge of whatever limitation is to be enacted. This law does not abolish private ownership in pigs or bacon, it only delimits the exercise of these rights by the persons in whom they are vested, and if the law is contrary to the common good, whatever that may mean, it must be clearly proved."

138. He regarded the necessities of the common good as a nebulous concept.
In ***Fisher -v- Irish Land Commission*** [1948] I.R. 3, Gavan-Duffy J. said at p.14:-

"... the expropriatory measure has been deliberately ascribed by the Legislature to the politico-economic sphere. The Constitution in Article 43 par. 2 subjects private
ownership to the claims of social justice, but it does not assign policy specially to the judiciary. Therefore the power here conferred, not being peculiarly and distinctively judicial, is a power which the Oireachtas is competent to vest wherever it thinks proper."

139. On appeal to the Supreme Court, Maguire C.J. said at p.23:-

"It is not contested that the Legislature has the power to expropriate owners so as to make land available for public purposes."

However, in ***Buckley & Others (Sinn Féin) -v- Attorney General*** [1950] I.R. 67, Gavan-Duffy P. refused to make an order under an Act which was passed to end litigation about the remnants of a fund and to divert the money to a Board which was to administer it in a charitable manner. He refused because this was an encroachment by the

Legislature on the judicial sphere as the Court had seisin of the case. On appeal to the Supreme Court, O'Byrne J. gave the judgment of the Court which not only affirmed the order preventing the invasion of the judicial sphere but also held that the Act breached constitutional property rights. O'Byrne J. said at p.82:-

"We do not feel called upon to enter upon an inquiry as to the foundation of natural rights or as to their nature and extent. They have been the subject matter of philosophical discussion for many centuries. It is sufficient for us to say that this State, by its Constitution, acknowledges that the right to private property is such a right and that this right is antecedent to all positive law. This, in our opinion, means that man by virtue, and as an attribute, of his human personality is so entitled to such
a right that no positive law is competent to deprive him of it and we are of opinion that the entire Article is informed by, and should be construed in the light of, this fundamental conception. Consistently with, and as an adjunct to, this recognition, the Constitution proclaims (1) that in a civil society, such as ours, the exercise of such rights should be regulated by principles of social justice, and (2) that, for this purpose, the State may pass laws delimiting the exercise of such rights so as to reconcile their exercise with the requirements of the common good.

It was contended by counsel for the Attorney General that the intendment and effect of Article 43.1.2º was merely to prevent the total abolition of private property in the State and that, consistently with that clause, it is quite competent for the Oireachtas to take away the property rights of any individual citizen or citizens. We are unable to accept that proposition. It seems to us that the Article was intended to enshrine and protect the property rights of the individual citizen of the State and that the rights of the individual are thereby protected, subject to the rights of the State, as declared in clause 2, to regulate the exercise of such rights in accordance with the principles of social justice and to delimit the exercise of such rights so as to reconcile their exercise with the exigencies of the common good... .

In particular cases this may give rise to great difficulties. It is claimed that the question of the exigencies of the common good is peculiarly a matter for the Legislature and that the decision of the Legislature on such a question is absolute and not subject to, or capable of, being reviewed by the Courts. We are unable to give our assent to this far-reaching proposition. If it were intended to remove this matter entirely from the cognisance of the Courts, we are of opinion that it would have been done in express terms as it was done in Art. 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas, and are expressly removed from the cognisance of the Courts."

140. Subsequently, he said at p.83:-

"In the opinion of this Court, the Sinn Féin Funds Act, 1947, is repugnant to the solemn declarations as to the rights to private property contained in Article 43 ... and, accordingly, we are of opinion that it was not within the powers of the Oireachtas to pass such an Act."

141. This strong pronouncement was somewhat toned down by O'Byrne J. in ***Foley -v- Irish Land Commission*** [1952] I.R. 118 as the social purpose of the Land Acts was enough to justify the fairly radical mechanism they contained because this served the exigencies of the common good although at the individual's expense. However, both cases are in harmony and in contrast to Hanna J.'s view to the extent that the Supreme Court refused to concede sole discretion to the Oireachtas in the matter of property. The ***Sinn Féin Funds Act*** case has similarity to the present case in that both Acts have a narrow focus on a restricted target in contrast to being measures of general application.
In ***Attorney General -v- Southern Industrial Trust*** [1960] 94 I.L.T.R. 161, Davitt P. tackled the analysis of the link between Article 40.3 and Article 43 against the background of a customs offence. Davitt P. said at p.168:-

"There is a clear distinction to be drawn between (1) the general and natural right of man to own property; (2) the right of the individual to the property which he does
own; and (3) his right to make what use he likes of that property; and I think this distinction is to be observed in these articles. Article 40.3 seems to me to be the only provision in the Constitution which protects the individual's rights to the property which he does own. By it the State guarantees to respect this right and by its laws, as far as practicable, to defend it and as best it may to protect it from unjust attack, and where injustice has been done to vindicate it. This is no absolute guarantee but is qualified in more than one respect. It impliedly guarantees that the State itself will not by its laws unjustly attack the right; and I think that the justice or otherwise of any legislative interference with the right has to be considered in relation, inter alia, to the proclaimed objects with which the Constitution was enacted, including the promotion of the common good."

In ***Central Dublin Development Association -v- Attorney General*** [1975] 109 I.L.T.R. 69, Kenny J. approved Davitt P.'s analysis of the relationship between Article 40.3 and Article 43. The Plaintiffs were attacking the powers given to planning authorities as infringing the two Articles Kenny J. held that the making of a development plan is necessary for the common good and set out his conclusions at p.86:-

"(1) The right of private property is a personal right;

(2) In virtue of his rational being, man has a natural right to individual or private ownership of worldly wealth;

(3) This constitutional right consists of a bundle of rights, most of which are founded in contract;

(4) The State cannot pass any law which abolishes all the bundle of rights which we call ownership or the general right to transfer, bequeath and inherit property;

(5) The exercise of these rights ought to be regulated by the principles of social justice and the State accordingly may by law restrict their exercise with a view to reconciling this with the demands of the common good;

(6) The Courts have jurisdiction to inquire whether the restriction is in accordance with the principles of social justice and whether the legislation is necessary to reconcile this exercise with the demands of the common good;

(7) If any of the rights which together constitute our conception of ownership are abolished or restricted (as distinct from the abolition of all the rights), the absence of compensation for this restriction or abolition will make the Act which does this invalid if it is an unjust attack on the property rights."

In Re Article 26 and The Employment Equality Bill, 1996 , the Supreme Court recently considered these Articles. At page 70 of the unreported judgment, having set out Article 43, the Supreme Court said:-

"It has been clear since the decision of this court in ***Blake -v- Attorney General*** *[1982] I.R. 117 that this Article prohibits the abolition of private property as an institution but at the same time permits, in particular circumstances, the regulation*

of the exercise of that right. It does not deal with the citizen's right to a particular item of property: those items are, however, protected from unjust attack by the provisions of Article 40.3.1 ... In reading Article 43 of the Constitution, it is important to stress the significance of the word 'accordingly' which appears in Article 43 s2 ss 2. It is because the rights of private property 'ought' in civil society to be regulated by 'the principles of social justice' that the State may, as occasion requires, delimit their exercise with a view to reconciling it with the 'exigencies of the common good'. It is because such a delimitation, to be valid, must be not only reconcilable with the exigencies

*of the common good but also with the principles of social justice that it cannot be an unjust attack on a citizen's private property pursuant to the provisions of Article 40 s3 of the Constitution (see judgment of Walsh J. in **Dreher -v- Irish Land Commission** [1984] I.L.R.M.).*

*Needless to say, what is or is not required by the principles of social justice or by the exigencies of the common good is primarily a matter for the Oireachtas and this Court would be slow to interfere with the decision of the Oireachtas in this area. But it is not exclusively a matter for the Oireachtas. Otherwise, as was pointed out in the **Sinn Féin** funds case, Article 43 would appear, with Article 45, in the section of the Constitution devoted to the directive principles of social policy the application of which by the Oireachtas in the making of laws is withdrawn from the consideration of the Courts (see **Buckley & Others -v- Attorney General & Others** [1950] I.R. 67 at p. 83)."*

Blake -v- Attorney General [1982] I.R. 117 involved a challenge to the Rent Restrictions Acts which controlled rents in some categories of dwellings and turned controlled premises into a very uneconomic asset for their owners. Housing at low rents was
achieved by the State at the expense of a class of house owners without any compensation for this loss. The High Court (McWilliam J.) and the Supreme Court on appeal held that the Rent Restrictions legislation was an unjust attack on the plaintiff's property rights as protected in Article 40.3.2. The effective reduction of the value of the landlord's interest was achieved arbitrarily and many rented premises were outside the controls. The provisions of Part II of the Rent Restrictions Act, 1960 (which related to rent restrictions) constituted an unjust attack on the property rights of the Plaintiffs contrary to Article 40.3.2. These provisions restricted the exercise of property rights of one group of citizens for the benefit of another group without providing compensation for the first group and interfered in a manner which disregarded the financial capacity and needs of the groups and failed to limit the period of such restriction or to provide a method by which a landlord could have a rent reviewed. It was also held that the provisions of Part IV of the 1960 Act (which related to recovery of possession), being an integral part of the unjust attack contained in Part II, could not be preserved by severance from Part II since the legislature never contemplated the separate existence of the provisions of Part IV of the 1960 Act. The Supreme Court said at p.135:-

"There exists, therefore, a double protection for the property rights of a citizen. As far as he is concerned, the State cannot abolish or attempt to abolish the right of private ownership as an institution or the general right to transfer, bequeath and inherit property. In addition, he has the further protection under Article 40 as to the exercise by him of his own property rights in particular items of property."

142. There is a duty placed on the Court to try to protect both an individual's right to private property and to take cognisance of social justice. Once the High Court is put on notice of an injustice in fact being done to an individual, then it could be failing in its constitutional duty if it refuses to interfere so as to vindicate the rights of the oppressed party.
143. The Plaintiffs particularly rely on two cases. Firstly, they cite the ***Sinn Féin*** Funds Case and draw attention to the passage at p. 70 in the judgment of Gavan-Duffy P. in the High Court:-

"Justice involves due process of law, and that law, to recall the monumental declaration of Daniel Webster, is the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, and property and immunities under the protection of the general rules which govern society; arbitrary executions of power under the forms of legislation are thus excluded and no organ of the State can deny to the citizens the equal protection of the law."

144. This is relevant to the claim that the 1989 Act specifically targets the Plaintiffs and is akin to a "bill of attainder" and is dealt with below under that heading.
145. Secondly, the Plaintiffs rely on ***O'Brien -v- Bord na Móna*** [1983] I.R. 255. The plaintiff O'Brien had objected to the defendant Bord's acquisition of his lands with his main contention being that it was not necessary for the purposes of the Turf Development Act, 1946 that his parcel of land should be vested in the defendant Bord permanently and that such parcel should revert to him whenever the Bord had completed the extraction of turf from it. In the course of his judgment, Keane J. said at p.267:-

"Certain principles of law are clearly applicable to the matters in issue in this case. First, the Act of 1946 is an Act of the Oireachtas and, accordingly, enjoys a presumption of constitutionality. The Court, in considering any provision of the Act which is impugned as being repugnant to the Constitution, will first of all look for a meaning or a way of doing what is provided for which accords with constitutionality: see page 238 of the report of ***Loftus -v- Attorney General*** *.*

Secondly, a statutory provision which has been enacted by the parliament established under the Constitution will, unless it plainly shows on its face a repugnancy to the Constitution, be entitled not only to a presumption of constitutionality but also to a presumption that what is required, or allowed to be done, for the purpose of its implementation will take place without breaching any of the requirements, express or implied, of the Constitution: ibid. In particular, it is to be presumed that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice: see p. 341 of the report of ***East Donegal Co-operative -v- Attorney General*** *.*

Thirdly, the guarantee by the State in Article 40, s3, of the Constitution to respect, and, as far as practicable, to defend and vindicate the personal rights of the citizen (including his property rights) is a guarantee to the citizen of basic fairness of procedures: see p. 264 of the report of ***In Re Haughey*** *."*

146. Subsequently, at p. 274 he said:-

"The provisions are also challenged as being invalid having regard to Article 43 of the Constitution relating to private property. There has, of course, been considerable debate as to the extent to which this Court is entitled to substitute its own view for the view taken by the Oireachtas in any particular case where the exigencies of the common good require the delimitation by law of the exercise of the rights mentioned in that Article. In the context of the present case, however, it is sufficient to say that, where an enactment violates the constitutional guarantee of fair procedure in respect of private property rights given by Article 40, the enactment in question cannot be saved by a plea that the enactment in question was necessitated by the exigencies of the common good and by a plea that the decision of the Oireachtas that it was so necessitated is not capable of review by this Court. To hold otherwise would be to render useless, in the case of private property rights, the guarantee given by Article 40 s3, of the Constitution. It follows that the provisions in question are also invalid having regard to the provisions of Article 43. It is unnecessary, accordingly, to express any opinion on the submission advanced by Mr. Blayney that the onus rested on the State to satisfy the Court that, in any particular case, the exigencies of the common good required the delimitation of property rights, other than to say that it appears to be at least doubtful having regard to the presumption of constitutionality and the observations of Mr. Justice Kenny in ***Central Dublin Development Association -v- The Attorney General*** *at p.146 of the report."*

147. It is implicit in the Supreme Court decision in ***O'Brien -v- Bord na Móna*** that the Court was looking at the provisions of Article 43 when holding that the legislation did not infringe the constitutional guarantee of private property because it promoted the common good.
148. However, the Plaintiff won on his main contention because the precise objection of the plaintiff was never brought to the notice of the members of the board of Bord Na Móna before they made their decision to acquire the lands. His point was that his land should be acquired for such period only as was necessary for the extraction of the peat from his lands and that, thereafter, his lands should revert to him or his successors. Section 29 of the Turf Development Act, 1946 provided that Bord Na Móna for the purpose of exercising or performing any of its functions may do all or any of a number of things including the acquiring of any land either permanently or temporarily. The failure by the deciding authority to hear the objections and representations of the owner of the land before deciding to acquire it, meant that the requirement of fair procedures and natural justice in the process of compulsory acquisition of property was not complied with and it was too fundamental and important a requirement to be fulfilled by proof that objections would have been rejected if they had been entertained, even though there was evidence that there was an unchanged and apparently unchanging policy at Bord na Móna to acquire the fee simple of bog lands.
149. The 1989 Act is clearly an encroachment on and extreme case of the delimitation of the exercise of the Plaintiffs' property rights. The following inferences can be drawn in respect of the principles of law from the cases. In order to ascertain the constitutionality of the 1989 Act, the Court must ask

(1) whether this delimitation, the restriction on the rights of enjoyment of private property, is in accordance with the principles of social justice, and

(2) whether the delimitation, in this case involving expropriation with compensation, is necessary in order to reconcile the exercise of the Plaintiffs' property rights with the exigencies of the common good.

150. Furthermore, these questions must be examined against the background of the presumption of constitutionality and the margin of tolerance allowed to the Oireachtas in making the assessment of what is required to fulfil the exigencies of the common good. In this regard, the word "exigencies" has a connotation of more than "useful", "reasonable" or "desirable"; it means "necessary" and implies the existence of a pressing social need. The notion of necessity is linked to that of a "democratic society". A measure cannot be regarded as necessary in a democratic society, based on tolerance and broadmindedness, unless it is proportionate to the legitimate aim being pursued. Furthermore, when the exigencies of the common good are called in aid to justify restrictions on the exercise of the rights of private property, being fundamental rights spelt out in the Constitution, it should be remembered that the protection of the fundamental right, is one of the objects which needs to be secured as part of the common good. Has a pressing social need been demonstrated which justifies the impugned legislation and its encroachment on the basic rights of private property? Is the amount of the encroachment proportionate to a legitimate aim being pursued and to the difference in the Plaintiffs' situation which requires the delimitation of their rights?
151. The Plaintiffs suggest a number of propositions can be drawn up. Firstly, they say that in cases concerning the outright expropriation of land (as contrasted with regulating the use of property or taxation measures), the relevant test is that contained in Article 43.2.1, that is such a delimitation of private ownership to be valid must be not only reconcilable with the exigencies of the common good but also with the principles of social justice. Secondly, they argue that there must be a sufficient and proper public purpose for the acquisition and that it must be shown that lesser measures are inadequate to achieve the objective. I accept these propositions with the provisos that the presumptions of constitutionality apply and also that there is a varying margin of tolerance to be given in favour of the views of the Oireachtas depending on the types of rights and legislation involved. Thirdly, the Plaintiffs suggest that the burden of persuasion is on the State. However, I reiterate that the overall task of convincing lies on the Plaintiffs; they have to get over the hurdle of the presumptions of constitutionality and it is only when the Plaintiffs

have shown a strong prima facie case against a need for acquisition that there would be then an onus on the Defendants to produce justificatory evidence and submissions as to the pressing needs for the acquisition.
In ***O'Callaghan -v- The Commissioners of Public Works in Ireland and The Attorney General*** [1985] I.L.R.M. 364, O'Higgins C.J., in delivering the judgment of the Court on the constitutional issue, set out Article 43 and said at p.368:-

"This Article ought to be read in conjunction with Article 40.3.1 and 2 when considering the question of unjust attack (including unjust attack by the State itself) on the property rights of every citizen, so as to give effect, insofar as possible, to both provisions. It cannot be doubted that the common good requires that national monuments which are the prized relics of the past should be preserved as part of the history of our people. Clearly, where damage to such monuments is the probable result of unrestricted interference by the owners or other persons, a conflict arises between the exigencies of the common good and the exercise of property rights."

152. That case concerned ploughing up and destruction of a promontory fort. It is noteworthy that the judgment pointed out that the legislation was not arbitrary or selective and that it applied to all national monuments wherever situated and whoever owns them. I respectfully agree that Articles 43 and 40.3 should be read in conjunction. What is social justice in a particular matter depends on the circumstances of the case. Any State action that is authorised by Article 43 and passes the tests laid down by Article 43 has to be necessary for the common good and cannot by definition be unjust for the purpose of Article 40.3.2. Conversely, a restriction on an individual's property rights which is manifestly unjust is unlikely to be regarded as consistent with social justice or as warranted by the requirements of the common good.
153. The Defendants contend that a number of cases are authority for the proposition that the Courts must accord the Oireachtas a very wide margin of tolerance in assessing the pressing social needs in any case. In this context, they rely particularly on ***MacMathúna -v- Ireland & The Attorney General*** [1995] 1 I.R. 484. The Supreme Court held that where an Act was passed through the Oireachtas as a money Bill, the Court's concern, on a challenge to its constitutional validity, was whether what had been done adversely affected constitutional rights, obligations or guarantees and that the Courts could not enter into the area of taxation policy or concern themselves with the effectiveness of the choices made by the Government and the Oireachtas. In this respect, the Supreme Court was following the decision in ***Madigan -v- The Attorney General*** [1986] I.L.R.M. 136 which was a case about taxation. In ***MacMathúna***, the Court was dealing with the allocation of social welfare allowances and held that the Courts could not adjudicate on the fairness or otherwise of the manner in which other organs of State had administered public resources. I have no doubt that the Defendants are correct that the Courts would be slow to intervene in cases
involving taxation or allocation of public resources. In this context, the Plaintiffs rely on ***Dandridge -v- Williams*** , 397 U.S. 471, where the United States Supreme Court held that a State has great latitude in dispensing its available funds. Given the State of Maryland's limited resources available for public welfare funds, the State was not prevented from sustaining as many families as it could and providing the largest families with somewhat less than their ascertained per capita standard of need. Mr. Justice Stewart delivered the opinion of the Supreme Court and at page 484 said:-

"If this were a case involving government action claimed to violate the first amendment guarantee of free speech, a finding of 'over-reaching' would be significant and might be crucial. For when otherwise valid governmental regulations sweep so broadly as to impinge upon activity protected by the first amendment, its very overbreadth may make it unconstitutional. But the concept of 'over-reaching' has no place in this case. For here we deal with State regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest A.F.D.C. families."

(AFDC stands for Aid to Families with Dependent Children).

154. The crucial distinction is the different approach in cases involving fundamental rights as opposed to cases involving allocation of welfare payments as in ***Dandridge*** and ***MacMathúna***. The margin of appreciation allowable to the Oireachtas is not as extensive in a case involving the fundamental right to private property as it is, by contrast, with regard to cases involving allocation of resources or taxation measures (such as MacMathúna and
155. Madigan). The present case is not regulatory or allocatory but expropriatory and affecting a fundamental right protected by Article 40 and Article 43. Furthermore, while the Act has been enacted as a public general Act, it is not a measure of general applicability but impinges on one area, the Great Blasket and affects one small named group of landowners, namely the Plaintiffs, and exempts other landowners, by this time almost certainly on the grounds of ancestral lineage.
156. The Plaintiffs also referred me to ***Clancy -v- Ireland*** [1988] I.R. 326. In that case, Barrington J. refused to make a declaration of invalidity in respect of section 2 of the Offences Against the State (Amendment) Act, 1985 as the machinery of the 1985 Act provided for a fair hearing and compensation in cases of error and thus constituted no more than a permissible delimitation of property rights in the interests of the common good and was not therefore an unjust attack upon private property contrary to Article 40 and Article 43 of the Constitution. One of the circumstances influencing Barrington J. in upholding the legislation providing for the confiscation of monies in bank accounts was the fact that the legislation provided for a fair hearing.
157. While the Court should be reticent about interfering with the assessment by the Oireachtas of what is necessary in the interests of the common good, the matter is not exclusively within the discretion of the Oireachtas. For the Court is bound to examine the situation from the aspect of the protection of the fundamental rights in Articles 40 and 43 including both the right of all citizens to be held equal before the law and the right to protections for private property.
158. The question of whether there has been an unjust attack on the Plaintiffs' property rights and the examination of whether there are pressing needs of the common good falls to be considered against the background of the presumption of the constitutionality of
the Act and a reading together of Article 40 and Article 43. Both the right of all citizens to be held equal before the law found in Article 40.1 and the right to protection of property rights and the right to private property, found in Article 40.3.2 and Article 43 in conjunction, are fundamental rights. The Plaintiffs say that it is against the background of the State having the obligation in particular by its laws to protect as best it may from unjust attack the property rights of every citizen that the Court should scrutinise "the interests of the common good", as set out in the long title to the 1989 Act, which are advanced as justification for the taking of the Plaintiffs' land.
159. The objectives of the Act are set out in the long title and in section 2 (see above). Neither the archaeological remains nor the flora and fauna of the Great Blasket are peculiarly distinctive. The Plaintiffs concede that the exigencies of the common good often justify expropriation for the construction of roads, hospitals or public housing but they suggest that there is no precedent for compulsory acquisition of an area which has an exclusively cultural significance. However, in ***Tormey -v- Commissioners of Public Works*** , McLoughlin J., in an unreported judgment delivered on 20th December, 1968, held that the Commissioners were entitled to acquire, under section 11(1) of the National Monuments Act, 1930, 57 acres "being an area of the Hill of Tara containing an extensive earthworks".
160. In the unanimous Supreme Court judgment delivered by Ó Dálaigh C.J. on 21st December, 1972 (unreported), the Chief Justice said at p.6:-

"... the acquisition provisions of the Act of 1930 are an interference with private rights and accordingly the Court will look strictly at the terms of the Act."

161. The appellant Mrs. Tormey had particularly contested the acquisition of a ten acre field but the Chief Justice held at p.15 that:-

"... the acquisition of the ten acre field to preserve the amenities of the Hill of Tara is in my opinion well warranted."

162. He repeated McLoughlin J.'s vivid phrase that

"to exclude the ten acre field would amount, I think, to cutting a cake-tier out of the Hill of Tara and that would be unrealistic."

163. Thus the Supreme Court gave "national monument" a wide connotation.
164. This case is helpful on four aspects. Firstly, it is an example of the State using compulsory purchase powers to acquire a national monument. Secondly, the area being acquired was extensive being much larger than the Great Blasket and with consideration being given to the preservation of the amenities. Thirdly, the Court stressed it would construe strictly the terms of an Act which interferes with the rights of private property. Fourthly, the Chief Justice in conclusion referred to the story of Cormac MacAirts' remark made to soothe Odran who was resentful at being expropriated from lands at Tara; I will return to what the Chief Justice said at the end of this judgment.
165. Cogent evidence has been given by Muirís MacConghail and Professor Almquist about the importance of the literary and folklore heritage of the Great Blasket and the need to preserve the environment of the writers. The Court must take cognisance of and pay respect to the view of the Oireachtas with regard to the importance of preserving the
historic heritage, culture, traditions and values of the island and its former inhabitants. There was considerable evidence from Professor Barker, Criostoir MacCarthaigh and Ciaran O'Connor in respect of the unusual nature of the village and the need to preserve it and, in particular, examples of the types of houses built in the village. Their evidence would appear to bring the remnants of the village into the category of the "prized relics of the past" and supports the reasonableness of the Oireachtas taking the view that buildings should be conserved to demonstrate the history of our people. Both the evidence of Professor Barker and of Mr. O'Connor would indicate that there is a degree of urgency in respect of preserving the buildings as soon they will have deteriorated so much that they will merge back into the hillside. The evidence of a number of the witnesses called by the State, particularly that of Dr. Alan Craig, and of Mr. O'Connor, the architect, pointed to the desirability of the State controlling the entire of the Great Blasket Island from the point of view of being able to regulate numbers so as to provide and manage access without damaging the environment. This is also relevant from the aspect of obtaining funding for the Park. The architect pointed out the difficulties of cooperation with the Plaintiffs from the point of view of health and safety plans. Similarly, there must be very real practical difficulties not just in respect of safety plans but also in relation to the repair and maintenance of pathways and drains on account of there being a patchwork quilt of ownership in the village and the fine land properties with descendants of former residents owning holdings and being entitled to unlimited access.
166. The Plaintiffs suggest that there were less drastic means open to the State to achieve substantially the same ends as are sought to be achieved by section 2 of the 1989 Act. They contend that existing legislation in 1989 such as the National Monuments Acts, 1930 to 1987, the Local Government (Planning & Development) Acts, 1963 to 1990 and the Wildlife
167. Act, 1976 would have between them sufficed to restrict development on the island and to preserve the ambience. The Great Blasket had been designated as an area of prime special amenity in each County Kerry Development Plan since 1968. The houses of the three leading writers were also protected under the National Monuments Acts. Furthermore, there was considerable unchallenged evidence that the Plaintiffs had expended their own time and money in trying to preserve the buildings and that the Plaintiff James Callery had an enviable reputation as a preserver and displayer of Irish heritage property at Strokestown House in County Roscommon. I accept that the Plaintiffs offered and are still willing to cooperate with the State in respect of heritage preservation.
168. The Plaintiffs say that the very wording in Article 43.2.2 bears out their argument that the State should have adopted less severe methods to achieve the objectives set out in section 2. Implicit in their arguments is the

requirement that the State observe the principle of proportionality in the reconciling of the rights of private property with the exigencies of the common good. If the objectives can be achieved without the need for complete acquisition, then the exigencies of the common good do not require such draconian measures as are contemplated and contained in the 1989 Act. In this context, the Plaintiffs rely on ***Hauer -v- Rhineland Pfalz*** case 44/79, ***Sporrong & Lonnroth -v- Sweden*** [1983] 5 E.H.R.R. 35 and ***Pine Valley Developments Limited -v- Ireland*** [1991] 14 E.H.R.R. 319.
In the case of ***Sporrong and Lonnroth -v- Sweden*** [1985] 5 EHRR 35 the applicants claimed that the period of time which their properties were subject to expropriation permits and prohibitions on construction, ranging from 23 and 8 years for the former and 25 and 12 years with regard to the latter, constituted an unlawful infringement on their right to peaceful enjoyment of their possessions pursuant to Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article I states:-
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

169. As the applicants were not actually deprived of their possessions, the issue to be decided was whether a fair balance had been struck between the demands of the general interest of the community, which imposed limits on the applicants' exercise of their rights, and the requirements of the protection of the individual's fundamental rights. Although it was found that the State had a wide margin of appreciation and toleration in this area the relevant laws were too inflexible and imposed such individual and excessive burden on the plaintiffs that they infringed the article.
Case 44/79 ***Hauer -v- Land Rheinland-Pfalz*** [979] 3 E.C.R. 3727 concerned Council Regulation No 1162/76 on measures designed to adjust wine-growing potential to Common Market requirements. In furtherance of this aim Article 2 of the Regulation imposed a prohibition on all new planting of vines for a period of three years. The applicant claimed that this was an infringement of her right to property and to her right to pursue a trade or profession, those rights being guaranteed by the Grundgesetz of the Federal Republic of Germany. These issues of fundamental rights were to be investigated by the Court in the

light of Article 1 of Protocol 1 of the European Convention and also the indications provided
by the constitutional rules and practices of the then nine Member States which, it was acknowledged, permitted control of property rights when necessitated by the general interest. The test was whether with regard to the general aim pursued the restrictions constituted a disproportionate and intolerable interference with the owner's rights impinging on the very substance of the right to property. Given the temporary nature of the restriction, the aim pursued and the effects on the applicant's property rights, which did not include outright deprivation of property, the measures were considered to be justified by the objectives of the general interest.
The case of **Pine Valley Developments -v- Ireland** [1992] 14 EHRR 319 concerned, inter alia, the interpretation of Article 1 of the Protocol. The applicants had bought property with outline planning permission which a subsequent Supreme Court decision declared invalid. The value of the property thus being reduced, the applicants claimed an infringement of their property rights in the absence of compensation or retrospective validation of the planning permission as provided for by S.6(1) of the Local Government (Planning and Development) Act, 1982 which did not apply to them. The European Court found that the applicant's property rights were subject to control, within the meaning of the Article, and that the legislation requiring control was in pursuance of a legitimate aim in accordance with the general interest. Furthermore in the circumstances of the case i.e. the undertaking of a commercial venture and the associated element of risk, annulment of the planning permission without remedial

action was not a disproportionate measure. The court did find however that there was a violation of Article 14 in conjunction with Article 1 of Protocol No 1 in that the applicants were treated differently in regard to their

property rights from others as they were excluded without justification from the retrospective validation of planning permission which was available to others in their situation.
170. The Plaintiffs stress that it is very rare in this or any other EC country for the State to take steps compulsorily to acquire a property for cultural reasons. They point out that the usual memorial for literary renown are an author's books. They suggest that the amenity of the island has been preserved by the Plaintiffs and that the Plaintiffs' endeavours to assist visitors' access by keeping a guesthouse going on the island and in preserving the buildings is in marked contrast to the State's attitude to the property acquired in about 1976 which has since been left derelict. If there was such a pressing need for preservation, why were no steps taken over the years by the State to purchase and preserve the homes of the writers and the other buildings in the village? They point to the advertisement in the Wall Street Journal as the catalyst for the activities of the Foundation and suggest that the 1989 Act was not an Act having general effect but had as its target a small specific group of land owners on the Great Blasket. They submit that if nationalisation of the island was the only reasonable and proportionate method of securing the objectives in section 2, then the exemption of the lands belonging to the pre-1953 residents and their descendants defeats the objective of protecting and preserving the entirety of the island.
171. Conclusions in respect of rights of property and equality and findings on proportionality and alternative less drastic measures are interrelated and will be set out after consideration of the discriminatory provisions in section 4.

Equality and Personal Rights
172. The situation has to be scrutinised against the provisions of Article 40.1 and Article 40.3. There is an equivalent guarantee in Article 14 of the European Convention on Human Rights. In ***Quinn's Supermarket -v- Attorney General*** [1972] I.R. 1, Walsh J. in the Supreme Court said of Article 40:-

*"This provision is not a guarantee of absolute equality for all citizens in all circumstances, but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon the assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their **ethnic** or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete ... ".* (Emphasis added)

173. The terms of the exemption in the regulations about trading hours which exempted kosher shops generally from an order which regulated weekday opening for everybody was made so as to permit Jews to buy kosher meat for an hour after 6.30 p.m. on Saturday. This was to avoid Jews offending either their religion or the law. However, the terms of the exemption were not confined to Saturday and so the discriminating exemption went further than was necessary for the protection of religious observance. Accordingly, the exemption was invalid. In short, it was excessive and not proportionate to the need. An examination of any delimitation on the exercise of a person's fundamental rights should include the requirement of proportionality. The Plaintiffs submit that the following general propositions pertain:-

1. The Oireachtas is entitled, in its enactments, to differentiate and make distinctions between persons, their affairs and activities.

2. Certain kinds of distinctions require considerable justification for them to be upheld, for example impositions on grounds of race, gender, religion or political opinion.

3. Certain forms of legislation carry a very strong presumption of constitutionality against any attack based on Article 40.1 because these are laws which regulate business (eg. ***Railway Express Agency Inc. -v- New York*** , 336 U.S. 106 [1949]).

4. Where an Act purports to expropriate or otherwise substantially invade private property rights, such distinctions as it makes must be carefully scrutinised by the Court so that there is no unfair discrimination between property owners.

174. A practical example of proposition 4 occurred in ***Brennan -v- Attorney General*** [1983] I.L.R.M. 449. Barrington J. reviewed the history of the rating system on agricultural land which was based on a valuation which had been done over a century before. A group of farmers complained about the anomalies which were by then involved. Barrington J. said at p.486:-

"If the Oireachtas were today to introduce legislation providing for the valuation of the lands of Ireland, such legislation, if enacted, would enjoy the
benefit of the presumption of constitutionality. But if such legislation were to provide that the lands of Ireland were to be valued by reference to crops grown, and the scale of agricultural prices obtained, in the years 1849 to 1852 (this had been the basis of the valuation still in force) such provision would be so eccentric and ludicrous that the Courts would have, I suggest, no difficulty in holding that it failed to respect the property rights of individual farmers ... These Acts ... are not consistent with the Constitution in that they do not respect the Plaintiffs' property rights or respect the Plaintiffs' right to equality before the law in relation to their property rights."

175. The Supreme Court upheld the basis of the decision insofar as it was of the view that if reasonable uniformity of treatment by valuation and assessment is lacking, the inevitable result will be that some rate-payer is required to pay more than his fair share ought to be. This necessarily involves an attack upon his property rights which by definition becomes unjust as the discrepancies increase as time passes.

Statutory Discrimination

176. Section 4 provides for acquisition of land on the Great Blasket by the Commissioners. Section 4(2) exempts from compulsory acquisition land that is owned or occupied by a person who has owned or occupied it since 17th November, 1953 and was ordinarily resident on the island before that date or land that is owned or occupied by a relative of a person, where that person owned or occupied it and was ordinarily resident on the island before that date. This has been referred to as "exempted land" and for ease of reference Counsel referred to the former residents and their relatives as "pedigree folk". In the last century, land on the island was owned by the Earl of Cork and let to tenants. Early in this century, the Congested District Board purchased nearly all the land and divided the property on the island into 25 individual folios with each folio having on it a dwelling-house and curtilage, and a number of small, segregated and scattered fields in the fine lands, being the arable area inland of the Trá Bán. Each of the 25 property owners was also entitled to a further undivided 1/25th of the greater commonage together with such other rights in common of grazing or turbary as they might have. There were also three smaller commonages held in undivided shares by some of these land owners. The fine lands are a patchwork quilt of ownership as shown on the plan thereof. Section 4 of the 1989 Act exempts the pedigree folk from the compulsory acquisition powers in respect of their houses and fine lands but excepts from the exemption the area of land in the greater commonage and lands subject to rights in common of grazing or turbary. The definition of relative in section 4(4) is wide and includes lineal descendant without any limitation on the number of remote generations involved. The Plaintiffs, who between them own at least 19/25ths of the island are subject to the full rigours of the compulsory acquisition powers and have been served with C.P.O. notices. Muirís Cleary, who owns a part share in at least two folios, has also been served with a C.P.O. Notice. A few others, namely Vivienne Richie, Margaret Bakewell and an Ó Guithin and a Dunleavy who own tiny plots probably with possessory title, have also

been served; their lands would not be exempt as being on the great commonage. The Plaintiffs contend that this legislation is unique and peculiar in that it grants compulsory purchase powers in order to preserve premises and fields once inhabited by writers but which for the most part have been deserted now for over 40 years unless conserved by the Plaintiffs.

177. Two categories of landowners are created by section 4(2) of the 1989 Act. The first category encompasses those owners who were ordinarily resident on the Great Blasket before 17th November, 1953 and their relatives, including lineal descendants for all time; the other category is any person who is not a native resident or relative of a native resident who has bought land on the island, for example the Plaintiffs. This introduces an unusual and dubious classification with **ethnic** and racial overtones.
In ***O'B. -v- S.*** [1984] I.R. 316, the Supreme Court held that discrimination in legislation might be justified under other provisions of the Constitution. The exclusion of illegitimate children from an intestate right of succession to their father under the Succession Act, 1965 was held to be justified by provisions protecting the position of the family. Walsh J., at p. 334, in delivering the judgment of the Supreme Court said:-

*"The judgment of Mr. Justice Walsh in **De Burca -v- The Attorney General** stated (at p.68) that Article 40, s1, does not 'require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids invidious or arbitrary discrimination'. In **King -v- Attorney General** , the provisions of s4 of the Vagrancy Act, 1824 were held to be inconsistent with several provisions of the Constitution and, in particular, with S.1 of Article 40. In the course of his judgment, Mr. Justice Henchy stated (p.257) that S.4 of the act of 1824 failed to be consistent with Article 40 S.1, because of 'its arbitrariness and its unjustifiable discrimination'. Thus, it may be seen from the decisions of this Court referred to above that the object and the nature of the legislation concerned must be taken in to account, and that the distinctions or discriminations which the legislation creates must not be unjust, unreasonable or arbitrary and must, of course, be relevant to the legislation in question. Legislation which differentiates citizens or which discriminates between*
*them does not need to be justified under the proviso if justification for it can be found in other provisions of the Constitution. Legislation which is unjust, unreasonable or arbitrary cannot be justified under any provision under the Constitution. Conversely, if legislation can be justified under one or more Articles of the Constitution, when read with all the others, it cannot be held to be unjust within the meaning of any Article: see the decision of this Court in **Dreher -v- The Irish Land Commission** and also **Quinn's Supermarket Limited -v- The Attorney General** at p.24 of the report."*

178. While the plaintiff O'B. lost in the Irish Courts, in the subsequent case of ***O'Brien -v- Ireland*** brought before the Court of Human Rights in Strasbourg on the grounds of the State's failure to comply with the provisions requiring equality of treatment in the Convention, the State compromised and settled the plaintiff's claim apparently on the basis of lack of justification for such discrimination.
179. The Plaintiffs submit that all property owners on the island should be similarly treated. The island was deserted as long ago as 1953 and only in recent times has there been any revival of interest in the island. They submit that the use of a blood connection or pedigree as indicative of cultural continuity or as a criterion for legislative differentiation in respect of expropriation requires much justification; and that this does not exist in this instance and to classify landowners in reality as culturally acceptable and unacceptable is objectionable in itself and is redolent of apartheid.
Justification Suggested for Discrimination
180. What do the Defendants say is the justification for the different treatment which renders the discrimination created by the Act compatible with the Constitution?
181. The starting point is that, given the literary and folklore connections and the peculiar status of the village buildings referred to by Professor Barker and Ciaran O'Connor, there is evidence that the village is distinctive and should be preserved. The Defendants say that the discrimination in respect of the land holdings of the "pedigree folk" is justified by the evidence of Professor Ó Riagáin. He said that the culture to be preserved was neither that of

an historically remote community or of a social group which was currently inhabiting the island - but which inhabited the island in the 19th and early 20th century until 1953; as the island was inhabited so recently and within living memory, the inhabitants and their descendants were sources of information. He added that he would personally find it offensive to have a heritage park developed in a Blasket island which, so to speak, eliminated from the culture that it presented the pain and the torment and the destructiveness of emigration, which was the sociocultural process that brought that community to an end. He also said that if the function of the Act was to preserve and demonstrate and to foster the study of the culture of the island then to retain relationships with second and third generation inhabitants, whether they be living in Ireland or abroad, was a tangible, practical way of demonstrating the experience of emigration which was the dynamic of the culture.

182. I do not think that even if one were to accept Professor Ó Riagáin's evidence in its entirety this could justify this most unusual discrimination based on **ethnic** grounds. It is stretching credulity and unrealistic to think that lineal descendants of the inhabitants are likely to return so as to help to demonstrate the culture of the pre-1953 community. Emigration was a factor in the life of the islanders but demonstration of this by allowing lineal descendants to keep their holdings conflicts with some of the objectives in section 2(2) and section 2(3); for instance, the conservation or restoration and maintenance of traditional dwellings and buildings on the island. Over one third of the fine lands in the village are owned by the exempted pedigree folk so that the map of the ownership of plots in the village is similar in appearance to a patchwork quilt. The excepting from exemption of the access areas is reasonable as the area by the jetty would need improvement. However, a Constitution should be colour and pedigree blind unless there is some cogent reason to the contrary. My understanding of the evidence of Dr. Craig and the architect Ciaran O'Connor was that the Office of Public Works would require to have ownership before carrying out restoration work in respect of the drains and houses; furthermore, there was evidence that there could be problems with regard to funding unless there was State ownership. While the Plaintiffs have in evidence indicated that they would be willing to cooperate, no such evidence has been heard from exempted landowners and it is difficult to envisage the attitudes which their lineal descendants from Massachussetts, Zanzibar or Australasia might take in the future. I note that the draft management plan for the Park is prefaced by the statement that " *it is recognised that a management plan cannot be operated until such time as the island is in State ownership* ". The patchwork quilt effect in respect of ownership would seem to be an unprecedented anomaly in a national park. The effect of the exemption is that the draconian effect of compulsory acquisition is confined to a limited target, namely the Plaintiffs. The letters from the Office of Public Works to the "exempted pedigree folk" indicate a desire to buy them out thus the pedigree folk would seem to have a willing buyer on the open market whereas the lands of the Plaintiffs are subject to compulsory purchase.

183. I am extremely sceptical of the proposition that deserted and decaying holdings continuing to belong to lineal descendants of the pedigree folk can demonstrate the historic heritage and culture of the Great Blasket. The Plaintiffs cogently submit that the books of authors are their memorial but one can envisage how perhaps the house of a writer acquired from the Plaintiffs could be restored so as to assist an understanding of the author's living conditions and milieu. My understanding of the Blasket community is that it was a cooperative community living in a harsh environment surviving by mutual help in winning food and fuel. In any event, the draft plan of the Office of Public Works for the island does not envisage human habitation of the island.

184. Emigration is a feature of much of the west of Ireland. The desire for security of tenure of land has also been a strong feature of that culture. The thrust of the 1989 Act is to acquire compulsorily the Plaintiffs' lands and leave other lands on the island in the ownership of the pedigree folk. The effect would be that the former islanders (of whom few if any now survive), and their relatives and descendants can sell their holdings on the open market whereas by contrast Kay Brooks is to have her lands compulsorily acquired. She is a widow whose ancestors came from Ireland, who lives in the same part of Massachussetts as many of the emigrant islanders and who has put her money and energy into preserving the buildings and environment of the Great Blasket.

185. In determining the constitutionality of the 1989 Act at present, the Court can take into account the present and prospective operation of the Act. If the present exemption were confined to a former inhabitant who had maintained an active association with the lands on the island then the objection would be weaker. However, the exemption is

far more extensive than this and is in favour of lineal descendants of the former inhabitants without limit in time or remoteness of relationship.
186. It has already been acknowledged that the Legislature has a considerable margin of tolerance and appreciation in respect of the notion of the exigencies of the common
good and that the judiciary should be slow to intervene. Perhaps there may be some justification for the limiting or deprivation of the rights of landowners on the Great Blasket by compulsory purchase in an attempt to reconcile their rights with the interests of the common good, and so as to achieve the preservation of the heritage and culture of the former inhabitants. However the discrimination which allows the pre-1953 residents and their relatives to retain their land while the Plaintiffs' land is to be compulsorily acquired is not necessary for the achievement of the common good as outlined in the long title. In the absence of justification elsewhere in the Constitution, it is necessary to consider the impugned provisions under Article 40 which precludes what has been described as "invidious discrimination". Implicit in this description is the requirement of proportionality. Where there is a difference of treatment this must be in a proportionate relationship to the quality of difference between the two categories of landowners in the situation which is sought to be regulated. This is consistent with the notion of the common good being defined by the fact that the common good requires the promotion of the dignity, freedom and rights of the individual including each of the Plaintiffs.

Invidious Discrimination
187. Both parties have referred me to ***Morey -v- Doud*** 354 U.S. 457. This was an appeal from the United States District Court for the Northern District of Illinois to the US Supreme Court. The Illinois Community Currency Exchanges Act regulated Currency Exchanges engaged in the business of issuing or selling money orders. It forbade them to do business on the premises of any other business; but it exempted from all of its provisions money orders sold or issued by the American Express Company, an old established worldwide enterprise. The Court held that the application of the Act to the appellees denied
them the equal protection of the laws guaranteed by the 14th Amendment. The equal protection clause does not require that every State regulatory statute applied to all in the same business but a statutory discrimination must be based on differences that are reasonably related to the purposes of the statute. The effect of the discrimination involved was to create a preferred class by singling out American Express money orders for exemption from the requirements of the Act. In delivering the opinion of the Court, Mr. Justice Burton said at p. 463:-

"In determining the constitutionality of the Act's application to appellees in the light of its exemption of American Express money orders, we start with the established proposition that the 'prohibition of the equal protection clause goes no further than the invidious discrimination'. ***Williamson -v- Lee Optical of Okla, Inc.*** *, 348 U.S. 483, 489. The rules for testing a discrimination have been summarized as follows:-*

"(1) The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

(2) A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

(3) When the classification is such that a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

(4) One who assails the classification of such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. ***Lyndsley -v- Natural Carbonic Gas Co.*** *, 220 U.S. 61, 78-79. To these rules we add the caution that 'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision'."*

188. At page 465, he went on:-

"That the equal protection clause does not require that every State regulatory statute be applied to all in the same business is a truism. For example, where size is an index to the evil at which the law is directed, discriminations between the large and the small are permissible. Moreover, we have repeatedly recognised that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'. ***Williamson -v- Lee Optical of Okla, Inc.*** *, 348 U.S. 483, 489. On the other hand, a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found."*

189. This reinforces the Defendants' point that the overall burden of proof is on the Plaintiffs but the Plaintiffs are also entitled to emphasise the Court's proviso that caution has to be exercised when the discrimination is of an unusual character. The exemption clause in this case is based on lineage which is highly unusual and it was urged that it was unprecedented in this country. Furthermore, the Court is scrutinising the situation against the background of two articles protecting fundamental rights. The long title to the Act uses the phrase "in the interests of the common good", but the word "exigencies" and indeed "riachtanach" seem to be much stronger and indicate a much more pressing need than merely "in the interests of the common good". The Constitution was enacted by the People on 1st July, 1937 against the historical background of the growth of fascism and totalitarian states. Article 43.1 affirms the State's acknowledgement that man in virtue of his rational being has the natural right, antecedent to positive law, to the private ownership of external goods. The phrase "antecedent to positive law" indicates a right which is previous to the notion of a feudal grant from a liege lord and also connotes a rejection of fascism and totalitarianism in the sense of recognising the right of the individual to own property rather than the State owning all assets.
190. What do the Defendants say is the pressing, demanding or driving need which necessitates that the Plaintiffs' lands rather than the lands of the exempted folk be taken in the interests of the common good?
191. The purpose of the 1989 Act is set out in the long title and in section 2 of the 1989 Act: the aim is to create a park to be maintained, managed, controlled, preserved, protected and developed by the Commissioners for the use and benefit of the public as a park in which the historic heritage, culture, traditions and values of the island and its inhabitants will be preserved and demonstrated and its flora, fauna and landscape will be protected (emphasis by my underlining). Since the last of the inhabitants were evacuated on 17th November, 1953, it is the heritage, culture, traditions and values of the pre-1953 inhabitants which are to be preserved and demonstrated. The Defendants say that it would be
self-defeating to acquire compulsorily the property of these former inhabitants and their relatives and accordingly that the legislation does not amount to invidious discrimination or preferment, but instead is a positive measure in favour of persons whose particular connection with the island should be preserved. It is suggested that the testimony touching on the common good of preserving a property connection with the exempted landowners justifies them being excepted from acquisition. This proposition deserves analysis and scrutiny.
192. The term "invidious discrimination" does not give rise to ready identification; however, in ***Murphy -v- Attorney General*** [1982] I.R. 241, Kenny J. in the Supreme Court said at p. 286:-

"Throughout the argument in the present case the phrase 'invidious discrimination' was used to indicate the type of inequality which is prohibited by Section 1 of Article 40.1. According to the 1979 edition of Collins English Dictionary 'invidious' means (1) incurring or tending to arouse resentment, unpopularity (2) (of comparisons or distinctions) unfairly or offensively, discriminatory."

193. The 1982 edition of the Concise Oxford Dictionary says of "invidious": "giving or likely to give offence, especially by real or seeming injustice." The 1989 Act has undoubtedly aroused bitter resentment and has been described by Counsel for the Plaintiffs as unfairly and offensively discriminatory.
In ***Brennan -v- Attorney General*** [1983] I.L.R.M. 449, Barrington J. said at p. 483:-

"It may be that all discrimination between citizens not relevant to a legitimate legislative purpose is invidious."

194. I conclude that there is discrimination against the Plaintiffs and that it is invidious, unfair and offensive as it is discriminatory treatment between two classes of citizens based substantially on pedigree. The Defendants contend that nevertheless the differentiation is justified by a legitimate legislative purpose. Walsh J. in ***O'B. -v- S.*** said that legislation which discriminates between citizens can be justified by other provisions of the Constitution. However, no such other provision seems in point and, in this case, the exigencies of the common good do not provide justification because the actual aims of the 1989 Act could be better achieved by dealing with the property as an entity without fragmentation of ownership on a criterion of lineage. Walsh J. further adds that legislation which is unreasonable, unjust or arbitrary cannot be justified under any provision of the Constitution.
195. In the absence of justification in the interest of the exigencies of the common good under Article 43, the legislation falls to be considered under the provision of Article 40. The difference between the two categories of landowners is insufficient to justify the nature of the differentiation made in the 1989 Act. In addition, Article 40.3.2 guarantees that the State shall by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the property rights of every citizen. The legislation is expropriatory affecting a fundamental right which should be protected by Article 40 and Article 43.
196. It is difficult to see what steps were taken by the State to vindicate the Plaintiffs' property rights. Evidence was given that officials of the State had no less than 43 meetings with members of the Foundation before June 1989 which rather contrasts with the
lack of meetings with the Plaintiffs, who owned more than 3/5ths of the Great Blasket; nor was any written explanation sent to the Plaintiffs' Solicitor setting out the rationale for compulsory purchase legislation nor was any initiative taken to seek co-operation to achieve the cultural objectives with which the Plaintiffs were clearly in sympathy. They had, out of their own resources, taken steps to preserve buildings in the village, they had kept open a guesthouse so as to assist visitors' access and they had cleared up the rubbish on the island.
197. I conclude therefore that, in the absence of any real legitimate legislative purpose requiring the difference in treatment of the Plaintiff landowners and the exempted folk, the discrimination in the 1989 Act cannot be justified as the interests of the common good do not necessitate such measures. Furthermore, as the difference of treatment between the two categories of landowners created by the Act bears no relation to the quality of the actual difference between the two categories of landowners the discrimination is disproportionate and invidious. The requirement of proportionality has not been respected. Finally, the treatment of the Plaintiffs by the State authorities with regard to the legislation and the manner in which the State attempted to enforce the regime constitutes a failure by the State to protect the property rights of the Plaintiffs from unjust attack, to vindicate those rights or to regulate them where injustice has been done in breach of Article 40.3.2, and to regulate them in accordance with the principles of social justice, and to delimit by law the exercise of the rights guaranteed and recognised by the Constitution in accordance with the exigencies of the common good contrary to Article 43.2.3 of the Constitution.

Individualised Targeting / "Bill of Attainder"
198. The Plaintiffs base another objection on the equality provision in Article 40. They submit that the 1989 Act cannot properly be regarded as a law of general application
since its scope is narrowed to a specific island and a tiny group of landowners. In ***Fletcher -v- Peck*** , 10 U.S. (6 Cranch.) 87, at 132 (1810), Chief Justice Marshall wrote for the Supreme Court that " *a bill of attainder may affect the life of an individual, or may confiscate his property, or may do both* ". The essence of the ban on Bills of attainder in the United States is that it proscribes legislative punishment of specified persons - as opposed to whichever persons might be judicially determined to fit within general proscriptions duly enacted in advance. It

will be recalled that in the ***Sinn Féin Funds Act*** case [1950] I.R. 67, Mr. Justice Gavan-Duffy adverted to the principle of the separation of powers under the Constitution and he then continued at p.70:-

"Justice involves due process of law, and that law, to recall the monumental declaration of Daniel Webster, is the general law, a law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which governs society; arbitrary executions of power under the forms of legislation are thus excluded and no organ of the State can deny to the citizens the equal protection of the law." (Underlining added).

199. The Plaintiffs say that the Oireachtas can pass an amended Heritage Act with powers of compulsory purchase in respect of islands generally if, for example, they are of historical, archaeological or cultural importance but that it is objectionable that one small specific group of landowners on one particular island should be targeted. By analogy, Counsel referred to Article 25.1 of the Constitution of South Africa which states:-

"No one may be deprived of property except in terms of a law of general application ...".

200. The U.S. Constitution forbids enactment of such laws directed against specific individuals; Article 1 section 9(3) states " *No Bill of Attainder ... shall be passed (by Congress)* ", and Article 1 section 10(i) states " *No State shall ... pass any Bill of Attainder ...* ".
201. One of the essential protections against arbitrary and unreasonable government is the requirement that laws should be of general application and not targeted against a specific **minority**. For example, in ***Railway Express Agency Inc. et al. -v- New York*** , 336 U.S. 105, a New York city traffic regulation forbade the operation of any advertising vehicle on the streets, but excepted vehicles which have upon them business notices or advertisements in respect of products of the owner not being used merely or mainly for advertising. In a concurring judgment, Mr. Justice Jackson said:-

"Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibitional regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a ***minority*** *must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."*

202. These are sage observations.
203. An example of undesirable "ad hominem legislation" and the strictures of Courts in respect thereof is to be found in ***Liyanage -v- The Queen*** [1967] 1 A.C. 259, an appeal to the Privy Council from the Supreme Court of Ceylon. There had been an abortive coup in Ceylon. Ex post facto legislation was brought in to change the law in respect of sedition from trial by jury and also imposed a minimum sentence of ten years together with the confiscation of the convict's property. Lord Pierse on the appeal regarded these alterations as constituting a grave and deliberate incursion into the judicial sphere. At p.291 he stated:-

"Blackstone in his Commentaries said:

'Therefore a particular act of the legislature to confiscate the goods of Titius , or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law.' (Underlining added).

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the
legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution."

204. When William Blackstone wrote about "municipal law" he was not referring to the particular laws and customs of a municipium or town but rather to any one state or nation which is governed by the same laws and customs. In this context the reference is to a rule of law or civil conduct which is not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal. In short, he is describing a general law of universal application in contrast to legislation which has a separate target individual or group.
205. While this Liyanage case involved a criminal trial and a usurpation by the legislature of judicial powers inconsistent with the written Constitution of Ceylon, nevertheless the same principles prevail in respect of separation of powers and discriminatory executions of power under the guise of forms of legislation in regard to expropriation of property of a specific target person or tiny group.
In ***The State (Divito) -v- Arklow Urban District Council and Byrne*** [1986] I.L.R.M. 123, the Supreme Court was dealing with the applicant Divito's appeal against his conditional order of certiorari being discharged in respect of the UDC's resolution to rescind the application of Part III of the Gaming and Lotteries Act 1956 to the area in which his amusement arcade was located. Henchy J. held that the passing of the Council's resolution was not an unconstitutional invasion of the judicial process. At page 126, he said:-

"Secondly, the questioned resolutions of the council are attacked for having been made in bad faith in that they were directed ad hominen and were unfairly discriminatory and therefore invalid.

I consider it to be the law that administrative decisions such as those called into question here, which do not disclose invalidity on their face, enjoy a presumption of having been made within jurisdiction. It is for the applicant to show that in passing those resolutions the council exceeded their jurisdiction. Jurisdiction would have been overstepped if it were shown that the council acted out of animus against the applicant personally rather than in the bona fide exercise of their powers under the Act."

206. The applicant failed to discharge the onus of showing that the UDC were moved by improper motives. While the facts did not support the applicant's contention nevertheless the Court recognised the impropriety of resolutions which were directed ad hominem and were unfairly discriminatory and accordingly invalid. It appears that the principle applies to legislation which is not general in effect but instead has a particular target and is aimed very narrowly ad homines at a tiny specific group of landowners with confiscatory intent.
207. In the Irish Constitution, unlike in the United States Constitution or the South African Constitution, there is no explicit ban on legislation which contains Acts of attainder against a tiny specifically designated group of people. However, such an Act which also at the same time specifically exempts another group who also own similar lands on the one
small island is in the present circumstances without adequate justification and is a violation of the equality provision in Article 40.1. The Oireachtas has the sole power to legislate under Article 15.2.1; if an Act is found to be in the nature of a bill of attainder aimed at an individual person or tiny group of people, as in the present case,

then the Act is not merely legislative in nature. Such a bill of attainder in the circumstances violates the equality provision in Article 40.1 of the Constitution.
208. I do not think the fact that in 1991 C.P.O. notices were served on Margaret Bakewell, Vivienne C. Richie, Ray Stagles and Ó Guithín and Taylor Collings is of any great significance as all these people had miniscule holdings and I think that in nearly every instance their lands in any event were on the great commonage.
209. Thus the 1989 Act is unfairly undiscriminatory in its application and fails to comply with the provisions of Article 40.1 of the Constitution of Ireland. The application of the power to acquire land compulsorily only to the Plaintiffs' lands, and not to the similar lands exempted by section 4(2) and belonging to former inhabitants and their relatives and descendants, amounts to an unjust and arbitrary expropriation. The narrow application of the 1989 Act amounts to a form of "bill of attainder" or the targeting in reality of only the Plaintiffs whereby the Plaintiffs' lands are subjected to the power of compulsory acquisition. The expropriatory powers in the 1989 Act, insofar as they purport to vest in the first named Defendant the power to acquire land compulsorily on the Great Blasket island, are invalid, having regard to the provisions of the Constitution of Ireland and, in particular, Article 40.3, Article 40.5 and Article 43 thereof on the grounds already set out, and on the further ground that the legislation is arbitrary and discriminatory and, in effect, applies a compulsory power to acquire certain lands owned only or predominantly by the Plaintiffs. In so doing, the Legislature fails to defend and vindicate the personal rights of the Plaintiffs in breach of
210. Article 40.3.1 and fails to protect from unjust attack the property rights of the Plaintiffs in breach of Article 40.3.2 and also fails to vindicate the property rights of the Plaintiffs in the case of injustice done in breach of Article 40.3.2.

Objection to the incorporation into the 1989 Act of the Acquisition of Land (Assessment of Compensation) Act, 1919 and challenge to the constitutionality of the 1919 Act.

211. A further challenge to the constitutionality of section 4 of the 1989 Act is based on the contention that the Act does not provide a constitutionally adequate or valid mechanism for assessing the quantum of compensation to be paid in the event of a compulsory purchase. It was clear from the evidence that the Plaintiffs had indicated a willingness to submit their differences with the State on this aspect to arbitration involving an international valuer, rather than the Irish property arbitrator, but their offer was not acceptable to the Defendants. The fourth named Plaintiff, Kay Brooks, the widow of Phillips Brooks, both of whom expended time, energy and their own resources latterly through her agent Peter Callery on trying to preserve property and amenities on the Great Blasket and to ensure access for visitors to the island, is particularly upset at the threat of compulsory acquisition. According to the evidence of her solicitor, she has consistently made the point that in the U.S.A. the acquisition of land compulsorily for public purposes can only be done on foot of a Court order. She has succinctly made the points that in Ireland the property arbitrator is an imposed and not an agreed arbitrator; the arbitrator is not a Judge; and under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919 (the "1919 Act"), the arbitrator need not and does not give reasons for the award either in respect of the factual or legal basis for the decision. There is simply an award and, while there is a provision in relation to the stating of a case on a question of law arising in the course of the proceedings, because the decision of the property arbitrator is final and binding on the parties, in the absence of a reasoned judgment there is no appeal nor is there the usual supervisory role of the High Court by way of certiorari, except in very limited circumstances such as the misconduct of the arbitrator. In view of the acknowledged expertise and integrity of those nominated to be the property arbitrators in this country, allegations of impropriety or misconduct are unlikely. The Plaintiffs contend that the State is failing to vindicate and protect their right to and rights of private property secured by Articles 40 and 43 of the Constitution unless the strategy to set aside their right to enjoy their property is sanctioned by a Court order made for explicit reasons of social justice and in the interest of the exigencies of the common good.
212. Section 4(3) of the 1989 Act states that:-

"(3) The provisions of the schedule to this Act shall have effect in relation to the acquisition of land compulsorily under this section."

213. Paragraph 5(2) of the Schedule states:-

"(2) The compensation to be paid under this paragraph in respect of any estate, right, easement, title or interest of any kind in, over or in respect of land shall, in default of agreement, be determined by arbitration under and in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919. "

214. The 1919 Act as amended provides for determinations by property arbitrators who are not Judges appointed under the Constitution and do not have the tenure of Judges. Section 6 of the 1919 Act renders the arbitrator's award final and binding on the parties subject to the stating of a special case for the opinion of the High Court on a point of law. The Plaintiffs have not sought a declaration that the Act of 1919 or any part of it is unconstitutional but say that the constitutionality of the 1919 Act is relevant to the question of whether the compulsory acquisition is fair bearing in mind the provisions of Article 40 and Article 43 of the Constitution. In this context, the Plaintiffs seek to rely on the type of order made by the Supreme Court in ***Brennan -v- Attorney General*** [1984] I.L.R.M. 355 in which the Court held that section 11 of the Local Government Act, 1946 was to be impugned in place of section 34 of the 1852 Act . Section 11 provided for the collection of County Rate on the basis of the 1852 system of valuation which Barrington J. had found to be "shot through with unnecessary anomalies and inconsistencies". The Plaintiffs' contention is that the incorporation of the 1919 Act procedures into the 1989 Act is invalid and constitutionally infirm because:-

1. The procedure involves the administration of justice by property arbitrators who are not judges contrary to Article 34.1 and Article 37.1 of the Constitution. Article 34.1 states:-

"Justice shall be administered in Courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

Article 37.1:-

"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such a person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

215. The Plaintiffs contend that the assessment of compensation was an administration of justice by persons who are not judges and that this contravened Article 64 of the 1922 Constitution and, accordingly, was never carried over into the law of the Irish Free State under Article 73 of that Constitution and, therefore, could not have been further carried over by Article 50.1 of the 1937 Constitution.

2. The property arbitrator exercises more than the limited functions and powers of a judicial nature which are envisaged in Article 37.1 as being exercised by any person duly authorised by law to exercise such functions and powers notwithstanding that such person is not a judge established under the Constitution.

3. The procedure is repugnant to the Constitution because of the lack of an appeal mechanism and the lack of provision either for judicial supervision or for review of the property arbitrator's decision.

4. The procedure is repugnant to the Constitution and to the requirement for fair procedures in that the arbitrator does not have to give reasons explaining and justifying the amount of the award.

216. The Plaintiffs submit that, if any of the arguments in respect of repugnancy are successful, then there is no prescribed constitutional method of assessing compensation under the 1989 Act and, accordingly, the powers of compulsory acquisition are repugnant since valuable rights of private property involving heritage land are being expropriated without a compensation mechanism.

5. The Plaintiffs say that the application of the 1919 Act system to the heritage property on the Great Blasket is unfair and constitutionally discriminatory when viewed in comparison with the procedure for compensation in respect of other heritage property.

217. Before making an analysis of the Plaintiffs' specific points, it is helpful to make a quick survey of the position in kindred jurisdictions. The Australian Constitution, Chapter II, Article 71 vests judicial power in the High Court and such other Federal Courts as are created; the Judge's tenure is constitutionally protected according to P.H. Lane, a Manual of ***Australian Constitutional Law*** (3rd Edition, 1984, pp. 219 to 241). Under the Lands
218. Acquisition Act, 1989, section 82, a party dissatisfied with the quantum of compensation being offered in a compulsory purchase is entitled to go to the Federal Court of Australia; similarly, under the Lands Acquisition (Just Terms Compensation) Act, 1991 of New South Wales and the Land Acquisition and Compensation Act, 1986 of Victoria, there is access to the Courts in respect of compensation.
219. In Canada, according to P. Hogg, ***Constitutional Law of Canada*** , 3rd Edition, 1992, pp. 184-196, under the Federal Expropriation Act, 1970, section 29, disputes about the quantum of compensation are decided by a Court.
220. Under the U.S. Constitution, Article III.(1) vests judicial power in the Supreme Court and such other inferior Courts as may be established; Judges of these Courts have constitutionally protected tenure. In ***Northern Pipeline Construction Company -v- Marathon Pipeline Company*** , 458 U.S. 50 [1982], the new system of bankruptcy Judges who did not have such protected tenure was struck down. In the U.S.A., compensation for compulsory purchase is determined by the Courts.
221. The South African Constitution of 1996, Chapter 8, Article 165(1), vests judicial authority in the Courts and Article 180(c) permits laws that allow " *the participation of people other than judicial officers in Court decisions* ". Under the Expropriation Act, 1975, section 14, disputes about the quantum of compensation in compulsory purchases are determined there by the Courts.
222. As for England and Wales, it is clear from Halsbury, Volume 8, (1) para. 202 et seq., dealing with compulsory acquisition that the property arbitrator system has been replaced long since by the Lands Tribunal Act, 1949 and that, as the tribunal is presided over by a Judge, it can properly be regarded as part of the administration of justice.

223. This instructive survey is the result of diligent research by Counsel; however the issue is to be determined particularly by reference to the Irish Constitution and case law.
224. Where land is acquired compulsorily, the measure of compensation to which the owner of an interest in that land is entitled depends on the provisions of the statute governing the compulsory acquisition. The Lands Clauses Consolidation Act, 1845 provided the basic framework for the modern compensation code. The 1845 Act provided a code governing acquisition procedures, and the assessment and payment of compensation. When land was compulsorily acquired as public authorities became more involved in the purchase of land for public purposes, concern arose that the compensation provisions of the 1845 Act were being interpreted too generously by the Courts. The Scott Committee recommended market value as between a willing seller and a willing buyer as the basis for compensation and this recommendation was incorporated into the Acquisition of Lands (Assessment of Compensation) Act, 1919 which laid down six basic rules of valuation. The 1919 Act did not confer any rights to compensation. It was concerned with establishing how compensation was to be measured and determined in default of agreement. The right to compensation, subject to any express provisions that may be in the enabling Act, will normally derive from the 1845 Act. The 1845 Act provided that its provisions should be incorporated in to all Acts

conferring powers of compulsory purchase unless expressly varied or excepted by any such Act. The 1919 Act provided that its provisions should apply where compensation is to be determined in a case of compulsory purchase by a government department or any local or public authority. The 1919 Act provisions are expressly incorporated in many post 1922 Irish Acts authorising the exercise of compulsory purchase powers. The Defendants question the Plaintiffs' entitlement to challenge the validity of the 1919 Act provisions incorporated into the 1989 Act. It is true that the Plaintiffs are not yet affected by any decision made by a
property arbitrator and that the burden of proof in establishing unconstitutionality rests on the Plaintiffs (see ***Cowen -v- Attorney General*** [1961] I.R. 415 infra). However, C.P.O. notices have been served and I think that the application of the provisions of both the 1989 Act and the 1919 Act to the Plaintiffs is imminent or already underway. I do not accept the Defendants' point that the Plaintiffs have not yet called any evidence in relation to damages suffered by virtue of the 1919 Act. I think it is enough that the 1919 Act establishes the mechanism by which compensation is to be assessed in the event of a conflict as to quantum between the parties which has to be resolved.
225. The Plaintiffs contend that the 1919 Act system involves an assessment of compensation which is an exclusively judicial function. If this contention is correct, then the Plaintiffs submit that this was contrary to Article 64 of the Irish Free State Constitution of 1922 and would not have been carried over in 1937. Article 64 states:-

"The judicial power of the Irish Free State shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in the manner hereinafter provided."

226. The Courts have taken a pragmatic approach to the continuation of the laws which were in being before 1922. In ***Geoghegan -v- Institute of Chartered Accountants in Ireland*** , Murphy J. said (as approved by the Supreme Court in 1995 I.R. 105): he could see no reason in principle why a law enacted in Great Britain in medieval times by the Monarch himself in pursuance of the legislative power which (as well as judicial and executive powers) vested in him not merely as a theoretical concept but as a practical reality could not have passed into the laws of the Irish Free State. The filtering process provided by Article 73 of
the 1922 Constitution (like the comparable provision of the 1937 Constitution) related to the contents of the law and not its source. In the divisional sitting of the High Court in ***The State (Kennedy) -v- Little*** [1931] I.R. 39, O'Byrne J. said at p. 58:-

"It seems to me to have been intended to set up the new State with the least possible change in the previously existing law, and that Art. 73 should be so construed as to effectuate this intention ... (pending any legislation that might amend what was carried over) *I am of opinion that the fullest possible effect should be given to Art. 73, and that the previously existing laws should be regarded as still subsisting unless they are clearly inconsistent with the Constitution."*

227. In the same case dealing with the Fugitive Offenders Act, 1881, Johnston J. said at p. 45 that he thought the Court:-

"should be very slow to do anything that would have the effect of depriving the Saorstát of the benefit of the vast body of useful statutory law which regulated hundreds and thousands of necessary matters in the body politic at the date of the coming into operation of the Constitution."

228. In the light of these pragmatic statements, it is understandable why the 1919 Act did not come under close scrutiny.
In ***State (Kennedy) -v- Little*** as adopted by Lavery J. in ***State (Hully) -v- Hynes*** [1966] 100 I.L.T.R. 145), O'Byrne J. went on to say at p. 59:-

"... any Statute of the British Parliament which was in force in this country on the 6th day of December, 1922, should be considered as being continued by Art. 73, unless it is, in principle , inconsistent with the Constitution. The fact that it may require adaptations or amendments in order to give it full force and effect in the changed circumstances of the new State is, in my opinion no proof of such inconsistency." (Underlining added).

229. In the Hully case the Court was concerned with a warrant over the hand of a Justice of the Peace for the City of Lancaster in England which depended for its legality on the relevant sections of the Petty Sessions Act, 1851. One of the grounds of appeal before the Supreme court was that in the circumstances created by the enactment of the Constitutions of the State in 1922 and 1937 the provisions of the Act relating to the backing and enforcement within the State of warrants issued by a foreign State had been rendered inoperable. It is in this context that Lavery J. adopted the dicta of O'Byrne J. in ***Kennedy***. Kingsmill-Moore J. noted at p. 165 that *"clearly a strong argument could be put forward that the provisions of SS. 29 and 31 of the Petty Sessions Act, framed for operation in a unitary state, were inconsistent with the Constitution".* However, he noted that this argument was rejected by the Supreme Court in the ***Dowling -v- Kingston*** cases (No 1) 1937 IR 483 and (No 2) 1937 IR 699. An indication of the standard applied to pre-1922 statutes and the definition of what constitutes inconsistency is to be found in Meredith J.'s judgment in the latter case where, in reference to the difference in the position as it was in 1851 and 1922, he said at p757:

"In my opinion this difference does exist, but I do not think that it constitutes a vital difference as regards essentials.... the Constitution leaves such arrangements and the terms and conditions on which they may be entered into or maintained in the unrestricted control of the Oireachtas, and that such control is in no way prejudiced by Sect. 29 being continued in force under Article 73, since it may at any time be repealed or amended by the Oireachtas"

230. Kingsmill-Moore J. also refers to the reasoning of Sullivan C.J. in that case on the lines that the legislature could have enacted SS. 29 and 31 of the Petty Sessions Act and the effect of the two Constitutions was that it came over into our law as if so enacted. At p.747, Fitzgibbon J. makes a pertinent point that:-

"If it would be, as I do not think can be disputed, within the competence of the Dáil to enact Sect. 29 today with the adaptations made in 1923, I can see no ground for holding that this could not be done by Dáil Eireann sitting as a Constituent Assembly, and if they could, I think they did it by Article 73."

Some conclusions can be drawn from this:

(1) Only legislation which is obviously *in principle* inconsistent with the 1922 Constitution did not pass into the law of the Saorstát Eireann.

(2) The need for some amendments or even a varied interpretation in order to be adapted to the circumstances of the new State does not automatically imply inconsistency. This is permissible because having accepted statute law into the State by virtue of Article 73 the Oireachtas then has the power to alter or amend it should the need arise. For some time, at least, after 1922, the view was held and expressed by the Courts that having regard to the interpretation of Article 50 of the 1922 Constitution a statute inconsistent with the Constitution and not expressed to be an amendment of it could still be deemed to be an amendment and therefore immune from constitutional challenge.

(3) In these circumstances as long as there are no *vital differences with regard to the essentials* the presumption of constitutionality can be said to apply and the legislation was carried over into Saorstát Eireann.

231. The provisions were not challenged or found to be repugnant over the years. They have been frequently referred to and adopted by the Legislature and in a reinvigorated existence have the further sanction given by Article 37.
232. This conclusion is inevitable given that the power in question is one implicitly validated by Article 37.1 of the 1937 Constitution as will now be discussed. The 1919 Act has been referred to in at least 78 Acts of the Oireachtas and 4 Statutory Instruments in the period 1925-1992, which is adequate confirmation of consistency and compatibility with both Constitutions. In ***Lynam -v- Butler No. 2*** [1933] I.R. 74, Kennedy C.J. made an attempt to define judicial power by way of description rather than by precise formula, and said at p.99:-

"In the first place, the judicial power of the State is, like the legislative power and the executive power, one of the attributes of sovereignty, and a function of government ... It is one of the activities of the government of a civilised state by which it fulfils its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over person and property. The controversies which fall to it for determination may be divided into two classes, criminal and civil ..."

233. Having dealt with the judicial power in criminal cases, he went on to say:-

"In relation to justiciable controversies of the civil class, the judicial power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens and the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in asserting or resisting claims alleged or denied.

It follows from its nature as I have described it that the exercise of the judicial power, which is coercive and must frequently act against the will of one of the parties to enforce its decision adverse to that party, requires of necessity that the judicial department of government have compulsive authority over persons as, for instance, it must have authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property."

234. Kennedy C.J. in that case went on to state his opinion that the land commissioners were primarily an administrative body with a great variety of ministerial duties to perform and that while the nature of some of these duties require that they be performed judicially with fairness and impartiality and in accordance with the canons of natural justice, this requirement did not convert a ministerial act into a judicial act in the sense of an act which must be performed by a judge in a Court of justice. Rather than examining further the situation under Article 64 of the 1922 Constitution, the question of carryover and the reasons for the reticence in bringing constitutional challenges before the 1950s, I intend to focus on the cases shedding light on Articles 34.1 and Articles 37.1.
In ***James Madden -v- Ireland and The Attorney General, The Land Commission, Thomas O'Sullivan and John Kelly*** , McMahon J. who delivered judgment on 22nd May, 1980, was dealing with a challenge to the powers of the Land Commission. At page 8 of the unreported judgment, he said:-

"I find it difficult to regard the function of the lay commissioner or on appeal the appeal tribunal in fixing the price of land compulsorily acquired as merely the exercise of an administrative power. Section 5 of the Land Act, 1950 gives the owner a statutory right to have a price fixed at an amount equal to the market value of the land. In this process, there is no scope for policy concepts and what is being decided is solely a question of legal right. In my

view, the jurisdiction so exercised by Lay commissioners and on appeal the appeal tribunal constitutes the administration of justice and the exercise of judicial power.

I am satisfied that it is an exercise of judicial power which is sanctioned by Article 37 of the Constitution. It is not the power to dispossess the owner which is in
question here but the power to ascertain the fair market value of the land expropriated and on that basis to fix the price to be paid to the owner. In my view, that is a power which is of a limited nature. Any action may have unforeseeable consequences but Article 37 contemplates powers and functions which can be regarded as limited. I accept that the test is the effect of the powers when exercised (***In Re The Solicitors Act, 1954*** *[1960] I.R. 239 per Kingsmill-Moore J. at p. 264) and in my view that necessarily means the foreseeable effects. Experience has shown that modern government cannot be carried on without many regulatory bodies and those bodies cannot function effectively under a rigid separation of powers. Article 37 had no counterpart in the Constitution of Saorstat Eireann and in my view introduction of it to the Constitution is to be attributed to a realisation of the needs of modern government. The ascertainment of the market value of the holding of lands by an administrative body with special experience appears to me to be the kind of judicial power contemplated by Article 37."*

235. Assessing the amount of the market value of lands would appear to be a question of an adjudication on a conflict between the parties and to be an exercise of judicial power rather than simply an administrative matter. I will return to the point that the power to fix the price to be paid to the owner is said to be only of a limited nature. ***In Re Solicitors Act, 1954*** [1960] I.R. 239, the Supreme Court regarded professional disbarment as being confined to the judicial function as it has such a serious effect on the right to earn a livelihood. In that case, Kingsmill-Moore J. gave his view about the nature of judicial power at p. 271 as follows:-

"From none of the pronouncements as to the nature of judicial power which have been quoted can a definition at once exhaustive and precise be extracted, and probably no such definition can be framed. The varieties and combinations of powers with which the legislature may equip a tribunal are infinite, and in each case the particular powers must be considered in their totality and separately to see if a tribunal so endowed is invested with powers of such nature and extent that their exercise is in effect administering that justice which appertains to the judicial organ, and which the Constitution indicates is entrusted only to Judges."

In *The State (Shanahan) -v- Attorney General* [1964] I.R. 239, Davitt P. said at p. 247:-

"I have certainly no intention of rushing in where so many eminent jurists have feared to tread, and attempting a definition of judicial power; but it does seem to me that there can be gleaned from the authorities certain essential elements of that power. It would appear that they include

(1) the right to decide as between parties, disputed issues of law or fact, either of a civil or criminal nature or both; (2) the right by such decision to determine what are the legal rights of the parties as to the matters in dispute; (3) the right, by calling in aid the executive power of the State, to compel the attendance of the necessary parties and witnesses; (4) the right to give effect to and enforce such decision, again by calling in aid the executive power of the State. Any tribunal which has and exercises such rights and powers seems to me to be exercising the judicial power of the State."

In *Goodman International -v- Hamilton* [1992] I.R. 542, at page 489, Finlay C.J., under the heading "Article 34" said:-

"The meaning of the constitutional concept of the administration of justice involved in this Article was identified in the test set out in the judgment of Kenny J. in the High Court in McDonald -v- Bord na gCon

[1965] I.R. 217 in a passage which was later accepted by the decision of the Supreme Court in the judgment of Walsh J. I, like Costello J. in the course of his judgment in this case, would adopt them as being appropriate tests. The passage is as follows:-

'It seems to me that the administration of justice has these characteristic features:

(1) a dispute or controversy as to the existence of legal rights or a violation of the law;

(2) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

(3) the final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties;

(4) the enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the exclusive power of the State, which is called in by the Court to enforce its judgment;

(5) the making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.'

I am satisfied that with the possible exception of the first clause in this statement of the characteristics of the administration of justice, where it speaks of a controversy as to the existence of a violation of the law, the activities of this tribunal of inquiry fulfils none of the other fundamental conditions or characteristics of the administration of justice as laid down in this case."

236. How do these criteria relate to the functions of the property arbitrator under the 1919 Act?

(1) The property arbitrator has jurisdiction over any question of disputed compensation and so has power to determine disputes about entitlement to compensation as well as the amount to be awarded. His jurisdiction is not confined to the question of quantum.

(2) The property arbitrator decides whether the landowner is entitled to compensation and the award imposes a liability on the acquiring authority to pay the award.

(3) The property arbitrator's award is final and binding on the parties under section 6 and indeed there is no appeal from his award.

(4) An award may be enforced in the same manner as a judgment or order by leave of a Court without the Court considering the merits of the dispute leading to the award.

(5) The making of an order which as a matter of history is an order characteristic of the Courts.

Under the Lands Clauses Consolidation Act, 1845, the assessment was carried out by Courts. While this reflected the Victorian view as to the value and importance of landed property, nevertheless it is interesting that in the U.S.A., Australia, Canada, South Africa, and even in the United Kingdom since 1949 in the form of the Lands Tribunal, the matter of compensation is dealt with by a judge or at least with a judicial presence on the Tribunal.
In *O'Cleirigh -v- Minister for Agriculture, Food & Forestry, The Minister for Finance, Ireland and The Attorney General* [1996] 2 I.L.R.M. 12, Barron J. held that the determination of the amount of ex gratia compensation due to the lay commissioner of the Land Commission for early loss of office was judicial in

nature. The Minister, being the person making the payment under section 9(1) of the Irish Land Commission (Disillusion) Act, 1992 could not at the same time determine the amount of such payment.
237. As for the finality of the arbitrator's award, in *Dublin Corporation -v- The Building and Allied Trade Union* [1996] 1 I.R. 468, the Supreme Court held that the doctrine of res judicata applies with even greater force to an award under the Acquisition of Land (Assessment of Compensation) Act, 1919.

Under section 5 of the 1919 Act, the property arbitrator has considerable discretion in relation to the award of costs which include any fees, charges and expenses of the arbitration or award.
In *Keady -v- Garda Commissioner* [1992] 2 I.R. 297, the plaintiff challenged the statutory powers given to the Garda Commissioner to dismiss members of the Gárda Síochána as amounting to an unconstitutional administration of justice and made arguments on the lines of those advanced in the *Solicitors Act* case. It was argued in the High Court that the effect of the tribunal's

decision constituted more than the mere exercise of limited functions and powers of a judicial nature permitted by Article 37 of the Constitution. Costello J. dismissed the plaintiff's claim. On appeal, the Supreme Court held that Articles 37 and 38 of the Constitution did not operate to prohibit the making of allegations which might also found a criminal prosecution before any statutory or other domestic tribunal or inquiry; that having regard to long and settled authority the Garda tribunal of inquiry, although obliged to act judicially, did not exercise a judicial function, in that its determination was not upon a contest between parties before it, but was an inquiry only; and moreover matters of police discipline historically had never been reserved to the jurisdiction of the Courts in the administration of justice. In the course of his judgment, McCarthy J. said that, to qualify as being the administration of justice, each of the five *McDonald -v- Bord na gCon* tests must be satisfied and he went on to say at p. 204:-

"It was scarcely intended by Kenny J. or by this Court to exclude from the qualifying criteria such matters as were identified by Kennedy C.J. in Lynam -v- Butler (No. 2) 1933 I.R. 74 - authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property."

238. O'Flaherty J. said that the main question that must be confronted was: did the operation of the inquiry constitute an administration of justice? He then set out the characteristic features of the administration of justice identified by Kenny J. in McDonald -v- Bord na gCon and said:-

'In turn, it is possible to isolate two essential ingredients from these characteristics and they are that there has to be a contest between parties together with the infliction of some form of liability or penalty on one of the parties. Here, while undoubtedly there was the infliction of a penalty - and a severe one - the other essential ingredient is not present. This was not a contest between parties; it was, as its name says, an inquiry."

239. Counsel for the Defendants referred to *Deighan -v- Hearne* [1986] I.R. 603 H.C. and [1991] I.R. 499 S.C. in which the High Court and Supreme Court determined that there was no unconstitutional administration of justice by inspectors of taxes in assessing an amount of tax due by an individual as they were simply providing an expert assessment which in certain circumstances might have statutory consequences. A similar approach was taken by the High Court in *State (Calcul International Limited) and Solatrex (International) Limited -v- Appeal Commissioners* (unrep. High Court 18 December 1996, Barron J.). Barron J. held that the powers of the appeal commissioners were confined to deciding whether the assessment raised by the tax inspector should be reduced or increased.

240. He held that the commissioners are not exercising powers of a judicial nature; the test depended on the orders which they were entitled to make. He said:-

"Such orders obviously imposed liabilities upon the tax payer concerned, but they do not deprive him of anything nor impose penalties nor limit his freedom of action. They declare his liability for tax upon the basis of the facts as found by them. Having declared this liability, they have no power to enforce their decision."

241. Barron J. went on to say:-

"The payment of customs due to your value added tax is related proportionately to the relevant taxable income. Such payments cannot have far reaching effects on the fortune of the tax payer ... since in each case the liability is relative, being proportionate either to his income or to his turnover, as the case may be."

242. However, it may well be that the revenue cases may best be regarded as a special category as far as the question of administration of justice is concerned.
In *Cowen -v- Attorney General* [1961] I.R. 411, Haugh J. was dealing with a challenge to an election court where an election petition was brought on the grounds that the plaintiff was disqualified by law from seeking election. In the course of his judgment, Haugh J. said at p. 423:-

"In my view, an election court when hearing a petition in the case of a municipal election is doing the same class of work as the High Court did prior to 1882, and still does when hearing a parliamentary election petition - that is, it acts judicially. An
election court, when commencing the hearing of an election petition, may know what it is about to try, but if and when, in any petition, the court should, of its own volition, order the attendance of a new witness or witnesses, entirely new issues may arise that may involve findings by the court that could well affect, in the most profound and far reaching way, the lives, liberties, fortunes or reputations of those against whom they are exercised; and I am of opinion that the court, availing of all the powers and duties conferred upon it in its ordinary day to day exercise of its powers and functions, is in fact not exercising the limited functions and powers allowable by Article 37, and is therefore unconstitutional."

243. I conclude on the basis of the *Madden* and *McDonald* decisions that the property arbitrator, under the 1919 Act, is in fact exercising a judicial function.
In *Madden*, it was decided that the Land Commissioners were exercising a limited function and power of a judicial nature. It is clear from a number of the cases that the historical background is taken into account and certainly in respect of the Land Commission system the Courts have been sympathetic to the policy considerations and have stressed the administrative role of the Land Commission.
244. The provisions of the 1919 Act have been referred to and incorporated into many Acts both before and after 1937. Many of these Acts provide for the acquisition of land and for the fixing of compensation under the provisions of the 1919 Act. Furthermore, the Property Values (Arbitration Appeals) Act, 1960 substituted the property arbitrator for the previous official arbitrator under the 1919 Act and effectively readopted the whole Act. Similarly, the Local Government (Planning & Development) Act, 1990 provided that section 2 of the 1919 Act (as amended by section 69 of the Local Government (Planning &
245. Development) Act, 1963) should, notwithstanding the repeal of section 69 of the principal Act by this Act, apply to every case other than a case under this Act where compensation is to be assessed by a planning authority or other local planning authority. The inclusion of references to the 1919 Act in many statutes since 1937 and the reference in the 1989 Act itself seems to me to involve the assumption that the Oireachtas has looked again at the provisions of the 1919 Act and, accordingly, the presumption of constitutionality should apply.

Lack of Appeal Procedure and Inadequate Review Mechanism

246. The Plaintiffs say that even if the 1919 Act system does not involve the administration of justice or was carried over in 1937 and involves only limited judicial powers and functions, it is nevertheless constitutionally defective because there is no adequate appeal or judicial review mechanism available to correct an error in an award. Counsel cited *Doyle -v- Kildare County Council* [1995] 2 I.R. 424 as authority for the narrow scope of the mechanism for judicial review of the decision of the property arbitrator. In *Doyle*, the plaintiff's evidence was that their loss amounted to £1,377,010. The county council figure for the loss was £125,000. The arbitrator made an award of £106,000. No reason was offered to explain how the award was compiled. Neither party had complained of irregularity during the arbitration or requested that a case be stated to the High Court. It was held by the Supreme Court that the trial Judge was correct in holding that the decision of the arbitrator was neither irrational nor perverse; accordingly, the trial Judge had no statutory jurisdiction to set aside the award of the property arbitrator under the Arbitration Act, 1954 in the absence of a finding that he had misconducted himself or the arbitration as envisaged by section 38(1) of the Act; also, that the trial judge did not have proper grounds for invoking the jurisdiction at common law which permits the setting aside of an arbitrator's award where a fundamental error of law appeared on the face of the award. Thus, the Supreme Court made it clear that it was desirable as a matter of policy that the Court should respect the finality of arbitration awards subject to recognised exceptions such as misconduct or impropriety.

247. Counsel for the plaintiff stressed that Henchy J. in *Tormey -v- Ireland* [1985] I.R. 289 said that, where exclusive jurisdiction to hear a matter had been devolved on a tribunal under cover of Article 37, while the High Court would not hear and determine the matter or question, nevertheless "its full jurisdiction is there to be invoked - in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action - so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter may be excluded from the range of the original jurisdiction of the High Court". Counsel makes the point that while the land commission system was subject to judicial review, nevertheless, the system under the 1919 Act, with its lack of a requirement to give reasons, made judicial review difficult in practice. The Plaintiffs contend that, in a case involving interference with constitutional rights, a fundamental principle of the administration of justice is that there should be a right of appeal or at least the right to a review of the decision of a single adjudicator. No Irish case has been cited to this effect and I do not think that the right to a fair trial protected by Article 6 of the European Convention on Human Rights goes so far as to guarantee a right of appeal in a civil action. I accept there is a right of appeal to the Courts from the decisions of many tribunals and it is clear that in many other comparable jurisdictions it has been thought desirable that there should be a judicial involvement in this sphere as in the lands tribunal in England. Compensation is assessed by the Courts in many jurisdictions. However, in this country, the Property Values (Arbitration

248. Appeals) Act, 1960 substituted the property arbitrator for the official arbitrator under the 1919 Act and the legislature effectively adopted the 1919 Act. In the recent case of *Manning -v- Shackleton and Cork County Council* [1997] 2 I.L.R.M. 26, a land owner challenged an arbitrator's refusal to give reasons for his award or a breakdown of the sum awarded. While the Supreme Court did make an order of mandamus directing the property arbitrator to specify the amounts awarded under specific heads, nevertheless it was made clear that the requirement that justice should appear to be done may not require that an arbitrator's award should incorporate anything in the nature of a reasoned judgment. The clear policy of the Acquisition of Land (Assessment of Compensation) Act, 1919 was to afford to the parties a machinery for determining the value of compulsorily acquired land which would avoid the need for litigation and would be final and binding. If arbitrators under the 1919 Act were required to give reasoned judgments, there would be a multiplicity of cases which, although couched in the language of judicial review, would be attempts to appeal awards. This would not be consistent with the policy underlying the arbitration procedure. Thus, an arbitrator under the 1919 Act may be required to specify the amount awarded in respect of any particular matter. Keane J., in giving the judgment of the Supreme Court with which O'Flaherty and Blayney JJ. concurred, said at p. 34:-

"The purpose of the arbitration procedure prescribed by that Act is to enable an independent and suitably qualified person to determine what is appropriate compensation for lands compulsorily acquired where the owner and the acquiring authority cannot agree on the amount. In arriving at his determination, the arbitrator hears evidence and submissions from both parties. He then determines by his award the appropriate sum and, with certain qualifications which I will mention in a moment, the parties will be in a position to deduce, in broad terms, the approach the arbitrator has adopted. He may have preferred the evidence of one valuer to another or he may have taken an intermediate position between the two valuations. Whatever the amount he decides on may be, neither the claimant nor the acquiring authority will be in the same position as the probationary officer in Daly who was given no reasons as to why his appointment had been terminated or the Applicants for licences in International Fishing Vessels Limited who were told in bald terms that their applications were refused. Nor can their position be equated to that of the Applicant for compensation in Creedon who was tersely informed by the tribunal that it was not satisfied that her husband's death arose because of, or in the course of, his attempting to save human life.

There may, of course, be arbitrations of this nature, in which more than the value of the land in the conventional sense may fall to be determined by the arbitrator. He may be called on to include in his award other headings of compensatable loss sustained by the claimant, such as compensation for disturbance, severance and injurious affection. Section 3(3) of the 1919 Act as amended provides, however, that: the property arbitrator shall, on the application of either party, specify the amount awarded in respect of any particular matter the subject of the award.

The claimant and the acquiring authority are thus in a position to ensure that they are aware of what precise sum has been awarded by the arbitrator in respect of each of the headings under which the claimant has presented his claim.

It is, of course, to be anticipated that questions of law may arise during the course of the hearing before the arbitrator and hence s.6, as amended, provides that ...
the property arbitrator may, and shall, if the High Court so directs, state at any stage of the proceedings, in the form of a special case for the opinion of the High Court, any question of law arising in the course of the proceedings, and may state his award as to the whole or part thereof in the form of a special case for the opinion of the High Court.

Thus, if a legal issue arises upon which either party requires a reasoned legal adjudication, they may apply to the arbitrator for a Case Stated and, if he refuses the application, the High Court may direct him to state a case.

Subject to these valuable protections for both claimant and acquiring authority, s.6(1) as amended provides:
the decision of a property arbitrator upon any question of fact, shall be final and binding on the parties, and the persons claiming under them respectively ... .

In addition, certain relevant provisions of the 1954 Act are applicable to arbitrations under the 1919 Act. The High Court may remit the matters referred or any of them to the reconsideration of the arbitrator (s.36); may remove the arbitrator where he has 'misconducted himself or the proceedings' (s.37); and may, again where the arbitrator has 'misconducted himself or the proceedings', set his award aside (s.38).

I agree with the conclusion of the High Court Judge in this case that these features of the procedure under the 1919 Act render inapplicable the authorities which would otherwise suggest that the Respondent was under an

obligation to give reasons for his award. In particular, neither of the factors on which Finlay C.J. laid emphasis are present. The fact that the arbitrator does no more than determine the amount of the compensation and, if required, segregate it under different headings does not in any way inhibit the specific supervisory jurisdiction conferred on the High Court in respect of such arbitrations by the 1919 Act and the 1954 Act nor the more general jurisdiction which may be invoked in an appropriate case by means of the judicial review procedure. Nor does the requirement that justice should appear to be done require that an arbitrator's award, having regard to its special features which I have already outlined, should incorporate anything in the nature of a reasoned judgment.

Apart from these considerations, it must also be remembered that the clear policy of this legislation was to afford to the parties a machinery for determining the value of the compulsorily acquired land which would avoid the necessity for litigation and be final and binding. In these respects, it does not differ from other forms of arbitration of which McCarthy J. said in Keenan -v- Shield Insurance Company Limited [1988] I.R. 89 (at p.96):

'It ill becomes the Court to show any readiness to interfere in such a process; if policy considerations are appropriate as I believe they are in a matter of this kind, then every such consideration points to the desirability of making an arbitration award final in every sense of the term.'

It is obvious that, if arbitrators appointed under the 1919 Act were to be required to give a reasoned judgment in every case, the inevitable result would be a multiplicity of applications by dissatisfied claimants or acquiring authorities which, although doubtless couched in the language of judicial review, would be in effect attempts to appeal from the award. Such a consequence would be inconsistent with the policy underlining the arbitration procedure explained by McCarthy J. in that passage.

Different considerations, however, apply to an application by one of the parties to the arbitrator, after he has published his award, to specify the amount awarded in respect of any particular matter the subject of the award."

249. It seems to me that the Supreme Court in *Manning* did consider whether there was a lack of constitutional fairness in the procedures to be followed by the property arbitrator under the 1919 Act and that it was implicit in the judgment of the Supreme Court that the policy of the Act could preclude the giving of reasons thus limiting the scope for judicial review. However, the judgment specifically stated that the fact that the arbitrator does no more than determine the amount of the compensation and, if required, segregate it under different headings does not inhibit the supervisory jurisdiction conferred on the High Court nor the more general jurisdiction which may be invoked by means of judicial review procedure.
250. Counsel for the Defendant is also correct in stressing that the arbitrator is assessing a value and is not performing the function of measuring damages which requires the determination of rights necessary for the assessment of compensation in respect of personal injury awards.
251. Finally, the Plaintiffs make the point that their buildings and fine lands in the village are fairly described as heritage property. When comparable heritage property is being acquired under the National Cultural Institutions Act, 1997, applications for compensation can be made to the High Court with an appeal to the Supreme Court under section 59 of the 1997 Act. By contrast, section 4 and the schedule of the 1919 Act force the Plaintiffs to abide by the arbitration system under the 1919 Act. The Plaintiffs also point to the Minerals

252. Development Act, 1979 which grants a right of appeal to the High Court on the question of the amount of compensation. However, while experience abroad may indicate that there is much to be said for having an involvement of the Courts in the assessment of compensation where expropriation measures are used,

nevertheless the fact that compensation in respect of loss of mineral rights, or property rights in heritage chattels, may be measured by the High Court in this jurisdiction does not necessarily render the 1919 Act invalid. The Oireachtas is entitled, subject to the validity of the measure against the touchstone of the Constitution, to determine the appropriate method of assessing the compensation to be provided in the event of a compulsory acquisition.

253. Accordingly, the Plaintiffs have not discharged the onus of persuasion that the 1919 Act is repugnant to the Constitution. While it is clear that in many comparable jurisdictions the view has been taken that there should be a judicial role or intervention in the assessment of compensation and this would seem sensible and desirable, nevertheless in this State there is authority for the proposition that the assessment of compensation is a limited function and that this role can be carried out by experts acting in a judicious manner. The Supreme Court in recent cases has sanctioned the procedure and has implicitly allowed the system whereby the property arbitrator does not give a reasoned judgment, although requiring him to specify the amounts awarded under specific heads.

Challenges based on the Constitution to the validity of section 5 of the 1989 Act in respect of the delegation of functions and powers to the Foundation.

254. Section 5 in full reads:-

"5(1) The functions of the Commissioners under this Act shall be performed by them subject to the general superintendence and control of the Minister.

(2) The functions or specified functions of the Commissioners under this Act (other than sections 3 and 4 and the Schedule to this Act) or under bye-laws under section 3 may be delegated by the Minister by order to the Foundation.

(3) The following provisions shall have effect in relation to the delegation of a function under subsection (2):

(a) the function shall be performed by the Foundation in its own name but subject to the general superintendence and control of the Commissioners;

(b) the Minister may amend or revoke an order made under this section;

(c) the delegation shall operate, while it is in force, to confer the function on and vest it in the Foundation;

(d) the function shall, notwithstanding the delegation, continue to be vested in the Commissioners but shall be so vested concurrently with the Foundation and so as to be capable of being performed by the Commissioners or the Foundation;

(e) the delegation shall not remove or derogate from the responsibility of the Minister to Dáil Éireann or as a member of the Government for the performance of the function by the Commissioners.

(4) An order under this section may contain such ancillary or subsidiary provisions as the Minister considers necessary or expedient including provisions adapting provisions of this Act.

(5) An order under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to anything previously done thereunder."

255. The Foundation is a private body being a company limited by guarantee whose members and directors are private citizens. Against the background of the powers in the Act to acquire compulsorily the property of the Plaintiffs who own more than 3/5ths of the land on the island, it is surprising to find the powers in section 5 which permit the delegation of public functions to such a private body. The Act professes to provide in the interests of the common good for the establishment and maintenance of a park to be developed by the Commissioners for the use and benefit of the public. Counsel have said that they are not aware of any legislation where a private company has been the recipient of such privileges in respect of public administration. This Act
would appear to be highly unusual in providing for the establishment of a cultural public park on much of an island and in then providing for the transfer of functions of the Commissioners to a private Foundation. Under section 3, consultation is envisaged between the Commissioners and the Foundation before any bye-laws are made in any case where the Commissioners consider such consultation appropriate. Under section 5, the Minister may delegate by order certain functions of the Commissioners to the Foundation. Under section 8(5), the Commissioners may appoint a person to be an authorised person in respect of powers given the Garda Siochana and "authorised persons". The Plaintiffs submit that these provisions authorising the delegation of public functions to the Foundation are an excessive and invalid delegation of public authority. While no order under sections 5(2) or 5(3)(b) has as yet been made, nevertheless I think that the Court has sufficient facts about the Foundation and the circumstances, so that this aspect is sufficiently ripe for the Court to make an adjudication. The Oireachtas would hardly have included such provisions unless their implementation was in contemplation. The Plaintiffs contend that in a democratic State public authority should be exercised by public agencies and should not be delegated to private bodies which do not have public accountability. Counsel points to American authorities for the proposition that the handing over of governmental or quasi-governmental power to private groups continues to be disfavoured. He adopts the statement of Laurence Tribe in *American Constitutional Law* , 2nd Edition at p.369:-

"The judicial hostility to private law making - even more apparent, perhaps in the context of State delegations - thus represents a persistent theme in American constitutional law".

256. Section 5(2) expressly excludes from the ambit of delegations the functions of the Commissioners in respect of the making of bye-laws in section 3 and in regard to acquisition of land in section 4 and in the schedule. Accordingly, it would seem that all other functions of the Commissioners are capable of delegation and this would include the power of the Commissioners under section 8(5) to appoint in writing a person to be an authorised person for the purposes of section 8 which gives powers to members of the Garda Siochana and authorised persons to police the park. If this power under section 8(5) of the Commissioners was to be excluded from the provisions authorising delegation in section 5(2) then one would expect mention of this exclusion as there is of sections 3 and 4 and the schedule to the Act. While it seems highly unusual that park-ranger type persons might be appointed by the Foundation after delegation of authority from the Commissioners, nevertheless no Irish case has been cited on the point that this giving of policing powers to a private body with no obvious public accountability would be repugnant to the Constitution. Furthermore, section 5(5) makes provision for an order delegating functions by the Minister to the Foundation to be laid before each House of the Oireachtas as soon as may be after it is made. The Oireachtas may pass within 21 days a resolution annulling the order and thus retains some supervisory role in respect of this delegation of power. I accept the Plaintiffs'
points that delegation of policing and park-ranger powers to a private body seems dubious and places the Commissioners in the role of a conduit pipe for these powers and functions. Nevertheless in the absence of an Irish case or other strong authority indicating that this is repugnant to the Constitution, and being conscious of the presumptions in favour of constitutionality, I am not persuaded that the provisions enabling such delegation, subject to the supervisory powers contained in section 5(5), are invalid.

Suggested excessive delegation to executive by Section 5(4) - "Henry VIII clause".

257. The Plaintiffs contend that section 5(4) of the 1989 Act authorises the Minister to amend the Act and submits that the only restraining criterion on that amending power is what the Minister considers expedient or necessary. The Plaintiffs say that these wide powers of amending legislation are such that they are repugnant to the provisions of Article 15.2.1 of the Constitution:-

"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

258. While no order has been made under section 5(4), nevertheless once an enactment has been passed into law, the Court is entitled to determine its validity having regard to the provisions of the Constitution (see *O'Cleirigh -v- Minister for Agriculture, Food & Forestry* [1996] 2 I.L.R.M. 12). The Court has considerable evidence as to the background circumstances as well as being able to look at the actual provisions of the Act. Section 5(4) has to be read in the context of section 5 as a whole. An order under section 5 refers to an order under section 5(2) by which the functions of the Commissioners under the Act may be delegated by the Minister by order to the Foundation. The order may contain such ancillary or subsidiary provisions as the Minister considers necessary or expedient including provisions adapting provisions of the Act. The Plaintiffs say that this is tantamount to a power to amend of very wide scope. The Defendants, on the other hand, say that the phrase can reasonably be interpreted to mean that any such provision is necessary or expedient in the sense of being merely facilitatory and emollient rather than radical and law-making.

In *Cityview Press Limited -v- An Chomhairle Oiliúna* [1980] I.R. 381, the plaintiffs challenged, as an unconstitutional delegation of legislative power, the provisions of the Industrial Training Act, 1967 empowering the Defendants to make a levy order for the collection of a tax from each enterprise in a particular industry to be used for the training of recruits to that industry. In the course of rejecting the challenge, the Supreme Court said at p. 399:-

"Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution."

259. Chief Justice O'Higgins said:-

"In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to of principles and policies which are contained in the statute itself. If it be, then it is not authorised for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power".

Section 5(2) authorises delegation of functions of the Commissioners by the Minister and this is the underlying principle and policy of section 5 and section 5(4) can be construed as giving the Minister power to ease the way to achieving this policy. The intention to involve the Foundation not only in consultation but also in performance of functions is clear from the framework of the Act. In *Harvey -v- Minister for Social Welfare* [1990] I.R. 232, Chief Justice Finlay said at p. 241:-

"The wide scope and unfettered discretion contained in the section can clearly be exercised by a Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not

constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution."

260. By analogy, while section 5(4) could be interpreted as appearing to contain wide powers of amendment, nevertheless, on a closer reading of section 5(2), preference can be given to a narrower constitutionally valid construction. By reading section 5(4) in the context of section 5(2), and bearing in mind the presumption that statutes will not be administered or applied in a way that will infringe constitutional rights, the Minister can be said to be confined to modifying provisions insofar only as to carry out the delegation allowed in section 5(2) so as to put into effect the policy and principles of the Act. There is also the safeguard that under section 5(5) an order under Section 5 has to be laid before each House of the Oireachtas.

Unfair lack of preliminaries and overtures

261. I refused the application to amend the statement of claim made on 24th June, 1997 as coming too late in the case for an amendment of pleadings. The Plaintiffs were seeking this so as to be able to mount ultra vires challenges on the grounds that the Defendants had failed before the serving of the compulsory purchase notices to warn the Plaintiffs of the intended legislation and acquisition or to respond to the Plaintiffs' offer of a co-operative plan rendering compulsory purchase unnecessary. However, I did make the point that the aspects preliminary to the legislation had been well addressed by the parties in evidence, submissions and case law and that it was mainly from the testimony of witnesses called by the Defendants that the importance of this aspect had emerged. I made it clear in
my Ruling that I would bear this in mind in the overall view of the case. It seems extraordinary that agents of the State attended no less than 43 meetings of the Foundation but no letter giving information or making overtures about common objectives was sent from the responsible Department to the small group of Plaintiffs who were represented by the solicitors' office of the second Plaintiff, a well known firm of solicitors in Dingle. It could well be, as was said by one of the Plaintiffs, that a letter setting out the justifications for this Act, which were eventually suggested in evidence, and seeking co-operation from the Plaintiffs could have produced a compromise which would have obviated the need for legislation involving compulsory acquisition. Surprisingly, none of the Plaintiff landowners were furnished with a general outline of what the Department intended by way of an historic park for the Great Blasket and the rationale in respect thereof, nor were the Plaintiff landowners offered the opportunity of co-operating with the State before legislation was enacted enabling the compulsory taking of their property. In *O'Brien -v- Bord na Mona* [1983] I.R. 255, the Court decided that the plaintiff was entitled to a reasonable opportunity to make objections or representations. While there was provision in that case for the acquisition to be temporary or permanent and so, theoretically, the plaintiff's representation might bear fruit, this opportunity to make a representation was against the background of the settled policy of Bord na Mona only to acquire on a permanent basis. This failure in the case of the Great Blasket to give notice to the Plaintiffs beforehand of the justificatory reasons for acquisition seems to be indicative of the State's failure to vindicate the property rights of the Plaintiffs. I do not speculate on or make any comment on the motives of the individual members of the Oireachtas in passing this Act. However, from a study of the Act itself, as is appropriate, it is clear that it is a highly unusual and peculiar piece of legislation. While it is a public Act, it singles out one specific island and one tiny group of landowners and also
provides for exemption for other specified types of landowners. This is based on land having been owned by previous inhabitants of the island and their relatives to the extent of infinite lineal descendants. Manifestly any discrimination based on pedigree reeks of racial discrimination and calls for justification. Evidence has been given in this case with regard to the role of the Foundation. The history of the evacuation of the island

in 1953 and the subsequent interest of Taylor Collings in purchasing property on the island gives the background to the concern of local people about the island culture. Indubitably the advertisement for sale in the Wall Street Journal acted as a catalyst. It was clear from the evidence and demeanour of a number of witnesses who are members of the Foundation that some had reasons smacking of chauvinism as well as idealistic aims of preserving the traditions and culture of the island. I have previously expressed reservations about the practical reality of the concept that the culture of the Blaskets could continue to be demonstrated usefully by the continued ownership of plots of land by lineal descendants from a widespread diaspora throughout the world and at several generations remove from the islander inhabitants of whom the last left the island in 1953. Looking at section 2(2) of the Act, the park is to be reserved and developed as a park in which the historic heritage, culture, traditions and values of the island and its inhabitants will be preserved and demonstrated. I conclude that the intent was to demonstrate the culture of the pre-1953 inhabitants and in particular the renowned authors. It is unreal to contemplate the demonstration of this culture by the continued ownership of land holdings by either persons brought up in a modern mobile transatlantic culture or of lineal descendants of islanders returning after several generations from Africa or Australia. Any journeyman barrister who has practised in the Irish Courts is aware of the strong desire for secure land tenure felt by those who live on the land particularly along the western and southern seaboards. Section 4 of the Act exempts the
former inhabitants and their descendants from compulsory acquisition in respect of the village and holdings of the fine land. This exemption is at the core of this legislation and ties in with the inspiration for the activities of the Foundation. I hasten to add that the members of the Foundation were actuated with a perfectly laudable desire to preserve the cultural heritage of the Great Blasket and they are quite entitled to lobby public representatives to bring in legislation. In my view, the procedures adopted did fail to vindicate the Plaintiffs' property rights, including the failure to make preliminary overtures to the Plaintiffs explaining the justificatory reasons for the acquisition. The provisions in respect of acquisition and the exemptions therefrom may appear to be neutral on the face of the Act but, in reality, disadvantage one specific group, namely the Plaintiffs, who own more than 3/5ths of the land on the Great Blasket. Because of the view which I take with regard to the failures on the part of the State in respect of the treatment of the Plaintiffs and their rights, and bearing in mind the strictures of Kelly J. with regard to the drafting of this legislation, I take the view that even if the Plaintiffs had lost on each and every challenge to the constitutionality of this Act, nevertheless there would be a very strong case for the State bearing the costs of these proceedings. The provisions of this Act are so obviously unusual, unorthodox, unfair and discriminatory as to invite challenge on constitutional grounds.

Severability

262. Counsel for the Defendants submitted that if any provision of the Act is found to be unconstitutional, then it does not follow that the entire Act is repugnant and he invited separation and severance. My conclusion is that section 4(2)(a) read in conjunction with section 4(4) is invalid. This subsection contains the exemption in favour of land owned by the former inhabitants and their relatives and descendants. The discrimination inherent in this provision is improper bearing in mind the provisions with regard to equality and the protection of private property and the impropriety of *'ad hominem'* legislation.
263. Counsel for the plaintiffs say that if the plaintiffs win on any of the arguments concerning equality, property, the 1919 Act, EEC discrimination or delegations to the Foundation, severance is inappropriate especially as the entire Act is equivalent to private legislation. The defendants respond that if the court were to find a particular section or subsection unconstitutional, then only that infirm section should be struck down unless "what remains is an entirely unworkable edifice". Counsel gives examples of this situation if certain parts of the Act were found unconstitutional by suggesting severability of the provision about the involvement of the Foundation or that relating to the delegation or adaptation of functions.
264. Article 15.4 limits the invalidity of any provision to the extent of its repugnancy to the Consitution. This however can only be done when the remaining legislation upholds the presumed legislative intent. The

authoritative case on principles of severability is *Maher -v-Attorney General* 1973 I.R. 140. In that case Fitzgerald C.J. said that "the question is one of interpretation of the legislative intent". He went on to say:-

".. therefore there is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety. This presumption, however, may be rebutted if it can be shown that, after a part has been held unconstitutional, the remainder may be held to stand independently and legally operable as representing the will of the legislature. But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity."

265. Professor Casey in his book "Constitutional Law in Ireland" (2nd Ed.) interprets Maher and sets out clearly the circumstances where severance may take place at p.293:-
"... the invalid portion may be severed only if: (a) the rest can survive independently and be capable of being operated independently; (b) that in its truncated form the provision is compatible with the legislative intent and policy."

266. In this regard Casey also notes that the United States Supreme Court applies similar tests and refers to *Alaska Airlines, Inc. -v- Brock* [1987] 480 US 678. The reasoning behind these tests stems from the doctrine of the separation of powers; the Court must ensure that any decision which declares a portion of a statute unconstitutional does not result in the Court encroaching on the legislative domain by allowing the remaining enactment stand with a different import and effect to that originally intended by the Legislature. This area of the law was recently restated in *Mallon -v- The Minister for Agriculture, Food and Forestry & Ors* in which Chief Justice Hamilton quoted Finlay C.J. in *Desmond -v- Glackin* (No.2). Essentially the criteria remain the same as set out in Maher.
267. With regard to ascertaining the intention of the Legislature, the most useful method is to be found by looking at the legislation from the perspective of the legislator who will have a number of different levels at which reasons can be given for enacting a provision. There may be a general aim behind the enactment which bears a relation to a broad political
objective; in the present case this would presumably be the preservation of the national heritage and culture. There may then be an objective of removing or preventing a certain ill; with regard to this legislation, that might be to prevent the further deterioration of the Great Blasket, especially the village and the houses of the authors. However this might not be the only ill in sight as the plaintiffs have pointed out that the catalyst for the legislation was the Wall Street Journal advertisement for the sale of property. The State could have acted far sooner in attempts to preserve the island and indeed could have taken up the offer of some of the plaintiffs to give co-operation. It is certainly one of the aims that the Island be largely in State ownership. Another specific aim in S.4 is not to subject the property of the pre-November 1953 residents and their lineal descendants to compulsory purchase.
268. The 1989 Act would probably not have been passed without the exemption. While the objectives in the main of the Act are entirely laudable in respect of preserving and demonstrating the historic heritage, culture, traditions and values of the Great Blasket and its inhabitants, nevertheless the method chosen to achieve this has failed to take account of the rights of the Plaintiffs. Section 4(2) is very much at the core of the Act and so section 4 permeates and is not independent of and severable from the rest of the Act. The remainder after deleting Section 4 could not be held to stand independently and be legally operable as representing the will of the legislature. The provisions held to be invalid are an integral part of the Act and the remnant would not represent the legislative intent and, accordingly, the remaining part should not be severed and given constitutional validity. In short, if the Court was to sever section 4 as being repugnant and seek to give validity to the remnant, this would produce an effect which would be at variance with the legislative policy of the Oireachtas. The Court should not invade the domain exclusive to the legislature.
269. I will hear Counsel as to the terms of the declaration to be made.

270. As for the question of damages claimed by the Plaintiffs, I made it clear that this aspect should be deferred. It may be that this matter may not arise as it was clear from the evidence given by the Plaintiffs that their cooperation would be forthcoming in achieving many of the objectives of the Act. Indeed, it may be that their suggestion of using a valuer from abroad might be considered in the context of the unique cultural heritage of the Blaskets. Since it is unique and of international importance perhaps there is less peril of setting a precedent. However I am conscious that I trespass on the preserve of the parties in making such a suggestion as a way of avoiding further expensive litigation and anxiety.

Conclusion

271. I hope that the parties will not mind if I quote from the judgment of Chief Justice Ó Dálaigh in the *Tormey* case at page 17 of his unreported judgment about King Cormac MacAirt's remark made to soothe Odrán who was angry at being dispossessed of his land.

"IV. It will not, I hope, be out of place to call attention to the fact that this is not the first time a land owner was disturbed at Tara. One of the archaeological sites at Tara is traditionally known as Cormac's House; it lies within Rath na Riogh. The building of the great vallum which surrounds Rath na Riogh is, by tradition, ascribed to Cormac the renowed MacAirt. The tradition is that he built it on land belonging to one Odrán, who protested loudly when Cormac began to stake out his work. When the day came for the King to take possession of the house Odrán set his back against the door to prevent the King from entering. The King turned Odrán's wrath away with the softest answer conceivable: he promised to compensate him by paying him his own weight in silver, daily rations for a household of nine persons for so long as the King should live and land of equivalent value elsewhere. Today Cormac's successors, the Commissioners of Public Works, must pay compensation for extending themselves at Tara (rightly, as I hold) just as Cormac did. All I would add is this. The Commissioners, when they come to negotiate terms of compensation with the dispossessed owner whose lands today abut on Rath na Riogh, might bear in mind that, while they do not command royal wealth or unlimited discretion, a niggardly spirit is foreign to the genius and tradition of Cormac MacAirt, Tara's greatest King, whom historians (according to McAllister) loved to compare to Solomon".

272. At the outset of this case I was alerted to the many grounds of challenge to the 1989 Act, to likely issues in respect of admissibility and to the large number of witnesses who were envisaged. I expressed concern about the length and expense of such a case. Counsel for the Plaintiffs made it clear from the start that his clients were supportive of the preservation and demonstration of the culture of the Great Blasket and the former islanders. With the ingenuity of Counsel, one might have hoped that recourse to coercive expropriation and litigation might have been avoided. Perhaps the peculiarity of the Great Blasket is such that no damaging precedent would be set if heed is given, even at this late stage, to the wise words of Chief Justice Ó Dálaigh, who was himself renowned as a linguist and was learned in the culture of the Blasket Islands.

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276. Cahill -v- Sutton [1980 I.R. 269
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