Neutral Citation Number: [2007] IEHC 331

THE HIGH COURT

[1990 No. 1510 P]

BETWEEN

EMERALD MEATS LIMITED

PLAINTIFF

AND

MINISTER FOR AGRICULTURE IRELAND AND THE ATTORNEY GENERAL, RANGELAND MEATS LIMITED AND GOLDSTAR MEATS LIMITED

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 8th day of October, 2007.

1. The Plaintiff in this case is Emerald Meats Limited. It is a company which was incorporated in Ireland in 1983. The company was established, operated and at all times controlled by a Mr. John McCarthy. It operated in the meat business and prior to its incorporation Mr. McCarthy had developed an expertise and knowledge of that business.

2. As a young man in 1975, John McCarthy became involved in the meat business. He obtained a job with a meat trading company known as Sanger Dublin Limited. That company was a wholly owned subsidiary of an international meat trading company known as JE Sanger Limited which had offices in Europe, America and Australia. In the period from 1975 to 1980 Mr. McCarthy worked as a meat trader. The parent company JE Sanger Limited got into financial difficulties in 1980 and went into liquidation. The Irish company was a solvent entity and its assets were bought out by Eamon Waldron and his company Waldron Meats Limited. Mr. McCarthy worked for Waldron Meats Limited from 1980 to 1983 and became a share holder in that company.

3. During the period from 1975 to 1983 Mr. McCarthy developed a considerable knowledge of meat trading. By 1983, Mr. McCarthy, in his own words, had determined "to become self employed". He set up his own company Emerald Meats Limited which was incorporated in 1983. The incentive for Mr. McCarthy to set up his own business was not only the fact that he had developed expertise and a good reputation but that by 1983, he was making "very substantial profits for the company I used to work for".

4. In establishing his own company Mr. McCarthy recognised that experience and reputation were important but that credit worthiness was critical. The meat trading business involved participation in a highly competitive market with small margins and was a business where contracts were often obtained as a result of personal contacts. Against that background a reputation for prompt payment was "imperative". As Mr. McCarthy stated in his evidence it was a business in which you did not survive "If you don't pay". "There is no room for mistakes." In the years from 1983 to 1990, Emerald Meats became established as a trading company and Mr. McCarthy's reputation grew. Emerald Meats prospered and as turnover increased it's reputation for meeting its financial responsibilities became established and the credit facilities available to the company increased. Initially the credit facility of the company was £20,000 and by 1986 that had increased to a sum of £50,000. Allied Irish Banks further increased the credit limit from £50,000 to £130,000 in 1987 and by 1989 the credit limit had expanded to £200,000.

5. Access to credit was not only a vital ingredient of a meat trading business but also the extent of the credit available to a company impacted on its capacity to trade. Indeed Mr. McCarthy was of the personal view that he could always have done more business if the funding available to him had permitted him to do so.

6. One of the complicating factors in the issues of this case, to which I will return to later in this judgment, is that notwithstanding the importance of the availability of credit and the size of the credit limit Mr. McCarthy determined as early as 1985, to diversify part of company's available funds into property. The initial diversity into property arose in circumstances where Emerald Meats Limited was renting office space in Fitzwilliam Square for a sum of £45,000 per annum and a property became available to purchase at No. 8 Herbert Street in Dublin for the sum of £68,000. That property was bought. It was envisaged that the purchase of that property would enable the offices of Emerald Meats Limited to transfer to Herbert Street with the saving of rent resulting in a benefit to the cash flow position of the company within the short to medium term.

7. The diversification into property continued in 1987, when Mr. McCarthy used some of the funds and credit which were available to purchase No. 18 Lansdowne Road. A separate property company called Emerald Properties Ireland Limited was established. Further purchases of No.'s 20 and 22 Lansdowne Road/Park were made in 1989.

8. In 1987, a significant development in relation to the meat business took place when a company was established in London. That company was Emerald Meats London Limited (Emerald London) and it was set up by Mr. McCarthy in conjunction with a friend and former meat trading colleague by the name of Des Marshall. The London company was effectively a joint venture between Mr. Marshall and Mr. McCarthy and it commenced trading in October, 1987.

9. The Irish company, Emerald Meats Limited, the Plaintiff herein, continued to trade in meat throughout the period from 1983 to 1990. However in the later of those years Emerald Meats Limited increasingly directed its trading activities towards GATT Trading. The nature and concept of GATT Trading is dealt with in the earlier High Court judgment of Costello J. and the Supreme Court judgment of Blayney J. within these proceedings and it is unnecessary to repeat the details therein contained. GATT Trading was part of a European Community regime which was in place during the late 1980's and which was radically altered in 1990. The European Community had a regime which permitted a certain quantity of frozen beef and veal to be imported into the community each year free from the normal Community tariff but subject to a duty of 20%. In these proceedings the annual quantity permitted to be imported into the Community was referred to both in evidence and in the earlier judgments as the "GATT quota" and the meat imported pursuant to the quota was referred to as "GATT meat".

10. Due to a removal of a ban on imports it became possible to import GATT meat into Ireland in 1986. Ireland was allocated in 1986, a quota of 455 tonnes of GATT meat. That was reduced to 395 tonnes in 1987 and was increased to 418 tonnes the following year and in 1989, was reduced to 381 tonnes. The regime provided that the distribution of the Irish quota was to be the responsibility of the Department of Agriculture as the responsible authority for the State. The Department determined that the quota should be allocated between meat processors and the allocation was based upon the certified figures for usage of meat for processing.

11. The evidence at this hearing established that Emerald Meats Limited applied to the Department of Agriculture for an allocation of part of Ireland's quota of GATT meat but that such application was refused. This was due to the fact that the quota was allocated amongst meat processors and Emerald Meats Limited was a meat trader rather than a meat processor.

12. Mr. McCarthy acting on behalf of Emerald Meats Limited then set about obtaining part of the GATT quota by buying from the meat

processors the quota which had been allocated to them. The motivation for purchasing such quota was that a quota had value in that, even after the 20% duty had been paid, the meat could still be sold within the European Community at approximately one half of the prevailing Community price. This was due to the relatively inexpensive cost of the meat in certain meat producing countries outside of the Community.

13. The evidence before this court establishes that in it's early years Emerald Meats' business consisted entirely of non-GATT meat. This was due to the fact that it was not until 1986, that GATT meat could be imported into Ireland. Thereafter Emerald Meats Limited rapidly developed its GATT meat business to the extent that by 1989/90, it was by far the most significant part of its business.

14. In 1987 and 1988, Mr. McCarthy acting on behalf of Emerald Meats Limited purchased a substantial portion of the total Irish GATT meat quota. In 1987, Mr. McCarthy and Emerald Meats Limited bought 177 tonnes of the Irish GATT meat quota and imported 159 tonnes of meat. 20 tonnes of the quota which was not used for imports were sold to another party. In 1988, the amount of quota purchased increased to 385 tonnes. The cost of purchasing the 177 tonnes of quota had amounted to approximately £160,000 in 1987 and the 385 tonnes of quota cost somewhat over £400,000 in 1988.

15. Mr. McCarthy had identified a potential profit source in meat trading in the purchase of GATT meat quota and the importation of GATT meat into Ireland. In 1988, Mr. McCarthy purchased nearly the entire Irish GATT quota and imported almost all the meat brought into Ireland under the quota.

16. The meat imported into Ireland under the Irish GATT quota was not intended for consumption or sale in Ireland but rather was imported for onward transportation to other European Community countries for consumption and sale in those countries. The reason for this was that Ireland was a large scale producer of meat and produced substantially more meat than was required for consumption or sale within Ireland. It therefore followed that the GATT meat imported into Ireland under the Irish GATT quota was cleared through Ireland and then re-transported out of Ireland to other European Community countries. This system was called 'turnabout'.

17. In Ireland the Department of Agriculture had decided that the quota should be allocated among meat processors. These companies were involved in the export rather than the import of meat and meat products and therefore did not require the GATT quota or the GATT meat imported thereunder for their own use. This resulted in the meat processors, who were the owners of the GATT quota, being willing sellers of the quota. Mr. McCarthy exploited this willingness to develop a profitable business. Meat was imported from outside the European Community through Ireland (using the Irish GATT quota) for ultimate sale and consumption in other European Community countries.

18. The European Community regime started to alter in 1989. In that year 90% of that years quota was dealt with in the same manner as in 1987 and 1988, but 10% of the quota was retained for later distribution and administration by the community at the end of that year.

19. 1989 also saw a change in Emerald Meats dealings with the meat processing companies from which they purchased the GATT quota. In 1987 and 1988, licences to import GATT meat were issued to Emerald Meats Limited by the Department of Agriculture "for and on behalf of" the relevant meat processors and Emerald Meats Limited took all the necessary steps to import the meat pursuant to those licences. However in 1989, Mr. McCarthy adopted a different system and in that year the licences which were obtained from the Department were issued to Emerald Meats Limited as the "transferee" of the meat processors who were entitled to the licences.

20. In 1989 the community had retained 10% of the total annual community quota of some 53,000 tonnes for administration and distribution at the end of that year. During the late summer of 1989, the community decided, by regulation, that some 90% of the retained 10% quota would be given to traditional importers. That approach to the 10% retained portion of the 1989 annual quota proved to be indicative of the fundamental change to the Community GATT regime which was to be introduced in 1990. In 1990 the Community GATT meat regime meat was totally transformed. Instead of a portion of the total GATT quota being allocated to each Member State to be distributed in the manner determined by the competent authority within such State a new and dramatically altered regime was introduced by Council Regulation 3889/89/EEC adopted on the 11th December, 1989 and Commission Regulation 4024/89/EEC adopted on the 21st December, 1989. Those Regulations taken together provided that 90% of the total Community GATT quota of 53,000 tonnes should be apportioned among importers who could prove that they had imported GATT meat during the previous three years. The 10% balance was apportioned between traders who could furnish proof that in 1988, or in 1989, that they had imported or exported at least 50,000 tonnes of non-GATT meat. Significantly it was also the case, under the Regulations, that it was no longer the individual Member States who decided how the quota would be distributed. That function was taken over by the Commission. (See article 6 of the Commission Regulation 4024/89).

21. Prior to 1990, the GATT quota regime was operated on an individual nation basis. Methods by which each E.U. country applied its GATT allocation varied from State to State. As indicated above in this country the GATT quota was allocated to beef processors. In 1990, the system changed and thereafter to obtain a quota one would either have to qualify as a traditional importer or under the newcomer's entitlement.

22. The newcomer's entitlement applied both to imports and exports of non GATT beef. The quota was E.U. wide with a portion allocated to each country. However there was no longer any need to import into a particular E.U. country and therefore an Irish company which had a GATT quota could import beef directly into any part of the E.U. After 1990, the Irish processors would only be allocated GATT quota if they could establish trade in their own name.

23. The alterations to the GATT quota system affected the Plaintiff in a number of ways. Firstly, the Plaintiff benefited from the changes insofar as the traditional quota was concerned. It was the Plaintiff who as the importer became entitled to the traditional element of the quota rather than the beef processors to whom the original quota had been allocated. This was confirmed by the judgment in the original hearing where the Plaintiff was identified as the importer of the GATT beef for the years 1987, 1988 and 1989, and the company was thereby entitled to benefit as the traditional importer under the new Regulations. The consequences were that the Plaintiff was confirmed as being entitled to a large part of the traditional GATT quota which was allocated to Irish companies.

24. Secondly, the Plaintiff's position was significantly altered in relation to the qualification for newcomer's quota. As a result of the changed regime all exporters of Irish beef became entitled to qualify for newcomer's quota. The entitlement arose as a result of trade by those companies. The consequences of the fundamental change in the GATT regime from 1990, in relation to newcomer's quota was that the new system favoured companies with meat available for export and who had customers to purchase Irish meat. This favoured integrated meat companies who could both source the meat and identify the purchasers.

25. Patricia Cannon, an official of the Department of Agriculture gave evidence in relation to the actual out turn relating to GATT

newcomer's quota in the fourteen years from 1990. This established that the companies who obtained by far the greatest amount of newcomer quota were large integrated companies who could source meat, process such meat and identify customers. The companies which received the vast bulk of the GATT newcomer quotas were large integrated companies with substantial turnover and assets.

26. The emphasis on exports from Ireland in relation to newcomer quota from 1990, was indicative of the fact that Ireland always produced more beef than was required internally.

27. A further significant alteration as and from 1990, was that turnabout was no longer operated. There was no need to import into Ireland beef from outside Ireland for sale in other E.U. Countries and therefore no need to incur the additional transport costs. This was the case because meat could be imported into any part of the E.U. on foot of the quota.

28. It is also the case that as and from 1990, all companies within the meat industry became and continued to become more cognisant of the benefits of a GATT quota. The window of opportunity which had been available to the Plaintiff in the 1987, to 1989, period, which the Plaintiff had so successfully exploited, was to some extent based upon a lack of awareness of the value of GATT quota within the market. That was no longer the case after 1990 as meat companies became aware of the value of such quota and were no longer prepared to sell their licences in the manner in which they had been prior to 1990.

29. As and from 1990, for a company to qualify for traditional GATT quota that company would have to establish that it was the importer in the reference years in issue. However to qualify for newcomer quota a company would have to establish either imports or exports of non GATT beef in the reference years. As pointed out above because of the nature of the beef industry in Ireland, the vast majority of the Irish trade qualifying came from exports rather than imports.

30. As and from 1990, if the Plaintiff was to increase its quota it would have to do so by making imports or exports of non GATT beef in its own name. There was a limited capacity to purchase licence and that could no longer be done with the same ease or at the same cost as prior to 1990. The system as operated in fact required substantial trading to qualify for newcomer quota. Even though there were some alterations to the quota allocation system after 1990, the basic concept remained the same and absent the accumulation of newcomer quota the consequence was that the traditional GATT allocation was diluted year by year as companies qualified for newcomer quota. Also under the new regime companies who qualified for newcomer quota would in time qualify for a proportion of the traditional quota which was finite.

31. In dealing with the consequence of this alteration Blayney J. in the judgment of the Supreme Court in *Emerald Meats Limited v. Minister for Agriculture (No. 2)* [1997] 1 I.R. 1 at p. 6 stated as follows:

> "The meat processors were directly affected by this change. As long as the previous regime was in force, it was immaterial that they sold their quotas to Emerald. It did not affect their right to continue to receive them each year from the Department. But that situation was now finished. In future the distribution of the quota was in the hands of the Commission and the parties entitled to the major part of it were what the learned trial judge referred to in his judgment as 'traditional importers' i.e. importers who had imported GATT meat during the previous three years."

32. Article 4 of Regulation 4024/89 provided that Member States should forward to the Commission by the 31st January, 1990, at the latest, the list of applicants for a quota of GATT meat. Emerald Meats Limited applied to the Minister for Agriculture to be included in the list of applicants on the basis of the GATT meat it had imported in 1987, 1988 and 1999. Twelve meat importers made similar applications based upon portion of the same imports claiming that Emerald Meats Limited had acted as their agent in relation to the 1987 and 1988 imports. It was that conflicting claim which was at the centre of the earlier proceedings within this case. The Department of Agriculture forwarded to the Commission the Plaintiff's application in respect of its 1989 imports but forwarded the meat processors applications in respect of the 1987 and 1988 imports. It did so on the basis that the quotas had been awarded to the Meat Processors in those two years and that Emerald Meats had acted as their agent rather than being the true importer. It was that decision of the Minister for Agriculture which was central to the proceedings herein. Emerald meats claimed that it, and not the meat processors, should have been identified as the true party entitled to the GATT quota for 1987 and 1988. A number of the meat companies were added as defendants to the High Court proceedings wherein they disputed Emerald Meats claim.

33. The High Court held that the Plaintiff was entitled to damages against the first Defendant. The High Court held that the Plaintiff was only entitled to special damages and not to general damages. Notices of appeal against the High Court order were served by the defendants and a notice of cross appeal, relating to the failure to award general damages, was served by the Plaintiff.

34. The Supreme Court confirmed that the Plaintiff was the importer of the GATT meat in the relevant years, that is 1987 and 1988, and that the first defendant, the Minister, was in breach of his duty to the Plaintiff under Regulation 4024/89/EEC by failing to forward the Plaintiff's application to the Commission and went on to determine that the Plaintiff was entitled to claim compensation from the State for the Minister's failure to carry out the obligation imposed on him by Regulation. The Supreme Court determined that all damage suffered as a result of a tort was divided into general damage and special damage. General damage was damage which the law implied in every infringement of an absolute right, while special damage meant particular damage beyond general damage. The Supreme Court determined that it was difficult to see how the Minister could be liable for special damage but not for general damage and that further since both were equally caused by the wrongful act, that there was no reason why the Minister should not be liable for both.

35. Blayney J. dealt with the issue of general damages and Emerald Meats Limited entitlement thereto at pp. 18, 19 and 20 of the judgment and ultimately concluded (at p. 20):

> "I am satisfied in the circumstances that Emerald is entitled to general damages, in addition to the special damages already awarded to it, and I would allow its cross appeal on this issue."

36. It is the assessment of those general damages which is the issue for determination by this court and which was remitted to this court by the Supreme Court.

37. The changes which came into effect to the GATT regime in 1990 have been identified in the earlier judgment in the High Court, as being a startling and dramatic change in the law. When the Department refused to accept that the Plaintiff was the importer of GATT meat for 1987 and 1988, the Plaintiff responded in writing indicating that it would suffer huge losses if their application was not lodged in full with the Commission. The High Court ultimately determined in favour of the Plaintiff. As a result of the actions of the Department, the Plaintiff failed to obtain its full share of the 1990 quota. As pointed out in the earlier judgment in the High Court the evidence established that the Plaintiffs share in the quota should have been based upon imports for the years 1987, 1988 and 1990 amounting to 863 tonnes. Under Regulation 337/90 the Plaintiff should have obtained licences to permit the importation of 277 tonnes

of GATT meat in 1990. In fact it only obtained licences to import 100 tonnes. The Department's failure to properly apply the regulation meant that the Plaintiff suffered substantial financial loss in not receiving the balance of 177 tonnes. It did at a later date receive its entitlement and it is the delay in receiving such entitlement and the loss of opportunity during that period which underpins the claim for general damages.

38. The High Court determined that the Plaintiff was entitled to damages for breach by the Department of the duty it owed to the Plaintiff under the regulation. The High Court awarded a figure for special damages but made no award in relation to general damages.

39. There was a delay in the issuing of licences which the Plaintiff obtained in 1990 and it did not obtain licences for the full amount granted until the end of July 1990. The Department was under a duty to issue them after 9th February, 1990 and was in breach of that duty.

40. It is of significance that the High Court was satisfied, and so stated in the earlier judgment, that the failure to obtain the quota to which it was entitled severely disrupted the Plaintiffs business and its relationship with other traders. The evidence before this court confirmed the significant disruption of the Plaintiffs business and there is no doubt that the Plaintiff's relationship with other traders and indeed with its bank was adversely affected by the wrongful act of the Department.

41. The High Court determined that the Minister for Agriculture had committed a wrong under European Community Regulations and decreed a sum of £416,795.76 for damages and interest to the Plaintiff. The High Court trial judge granted a stay upon the order and decree in the event of an appeal and such appeal was duly prosecuted by the defendants. The result of such an appeal was that the Plaintiff did not have access to the sum decreed for damages and interest. In 1992 the Plaintiff's finances were in such a perilous state that its auditors advised that liquidation was a real risk. The Plaintiff brought a motion on notice to the Supreme Court and applied for a removal of the stay and argued that the continuation of the stay threatened the extinction of the Plaintiff. It was held by the Supreme Court in a judgment delivered on 16th July, 1992 ([1993] 2 I.R. 143) that the stay should be removed. In the judgment of the court McCarthy J. held (at p. 445):

> "That … the financial position of the Plaintiff company is precarious. It has a permitted overdraft of £300,000 and at the date of swearing of the affidavit grounding this application the overdraft was approximately £350,000. …
>
> The Plaintiff's case is that is was denied access to its rightful GATT quota in the year 1990 which, in itself, damaged the business severely. If the Plaintiff company has to await a full hearing of the appeal it is stated to be highly likely that it will be out of business, even if it ultimately succeeds in full."

42. The effect of the Supreme Court order which removed the stay was that the Plaintiff was entitled to access immediately the amount of the decree with accumulated interest.

43. The Supreme Court gave judgment in the full appeal on 3rd March, 1997. The judgment is reported in [1997] 1 I.R. at p. 1. The Supreme Court dismissed the defendants' appeals and allowed the Plaintiffs cross appeal. The Supreme Court held that it was difficult to see how the Minister could be liable for special damage but not for general damage. Further, since both were equally caused by the wrongful act, there was no reason why the Minister should not be liable for both. The court held (Blayney J. at p. 20):

> "That Emerald is entitled to general damages, in addition to the special damages already awarded to it."

44. Up until the decision of the Supreme Court the Plaintiff company was in a position of significant financial uncertainty. It had succeeded in its claim in the High Court and had obtained payment of the decree together with interest. However, if the defendants appeal had been successful before the Supreme Court it would have had to repay that sum together with interest. That position, even without reference to the ongoing exposure to legal costs ensured that there was real and damaging uncertainty concerning the Plaintiff's financial position. In the light of such uncertainty the capacity of the Plaintiff company to plan its operations and to order its finances was all but impossible.

45. It is also part of the background to the proceedings herein that the Plaintiff brought an application for interim measures in a case entitled *Emerald Meats Limited v. Commission of the European Communities*. In that case the Plaintiff claimed that it was unable to obtain satisfaction in discussions and that therefore it was necessary to bring an action seeking a declaration that the contested measures were void. The European Court determined that Emerald Meats had failed to make out a prima facie case for concluding that, if the contested provisions were annulled, the Commission would itself have the power to apportion the tariff "among the individual operations" and that in those circumstances the court held that Emerald Meats had failed to substantiate the factual and legal ground establishing a prima facie case for the interim measures applied for. The European Court ultimately determined in a decision delivered on 20th January, 1993 that Emerald Meats applications for annulment must be dismissed. At para. 57 of its judgment *Emerald Meats Limited v. The Commission of the European Communities* [1993] E.C.R. 1- 290, it held:

> " … the documents before the Court show that, in intervening with the Irish authorities on several occasions and making various amendments to its own measures to take account of the progress of the proceedings brought by Emerald Meats in the Irish courts, the Commission afforded Emerald Meats much more extensive assistance than it was under an obligation to give under the legislation at issue."

46. The Court went on to hold in an observation (at para. 60):

> "That by bringing proceedings against Ireland under Article 169 of the Treaty and by amending the reallocation regulation following the proceedings for interim measures in case C/317/90 R. in order to safeguard the rights asserted by Emerald Meats in respect of the newcomer's quota, the Commission might have led Emerald Meats to believe that its claims were well founded."

47. Arising out of such observation no order for costs was made against Emerald Meats notwithstanding that its claim was rejected.

48. Following the decision in the European Court in 1993, the Supreme Court proceedings continued until their ultimate conclusion in 1997.

49. The Plaintiff in these proceedings is the limited liability company and the claim is limited to that company and is not a claim by any of its shareholders or any related company such as Emerald London. As hereinbefore identified the assessment of general damages, which is the issue before this court, arises from the failure to allocate to the Plaintiff company in a timely manner the full amount of its GATT quota. The basis of the claim is not limited to the temporal failure to allocate the full amount of GATT but also to the

consequence arising from such failure including the damage to reputation and business confidence. The central issue which the court must assess, in seeking to establish the general damages is the nature and extent of the loss of profits the company suffered as a result of the defendants' wrongful act.

50. The Plaintiff puts forward its claim based upon the potential loss of business which it is claimed that the Plaintiff company suffered in its business of meat trading. That market is a wide and varied market and is one in respect of which there is a considerable volume of official information in the form of statistics. It is also the case that the court is looking at a market for a period that has actually occurred and is not in the position of endeavouring to ascertain or predict a future market. Therefore in looking at the meat trading market the court has the benefit of considering how that market actually developed. It is common case between the parties that the court can and indeed must have regard to how the actual market operated.

51. The basic rule of common law in relation to damages is that a party who sustains a loss by reason of a breach of contract or wrongful act by a party is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed or the wrongful act not committed. It is for that reason that the court in this case has to have regard as to what is the likely loss of profit that the Plaintiff company has suffered due to the wrongful acts of the first named Defendant.

52. One of the methods upon which the Plaintiff endeavours to calculate the potential or likely loss is on the basis of a calculation relating to the GATT quota share that the Plaintiff obtained in the market prior to the date of the wrong the subject matter of this claim.

53. There is no doubt, whatsoever, but that the market in which the Plaintiff obtained its GATT quota share prior to the wrongful act was fundamentally different from that market from 1990 onwards. The wrong occurred when there was a fundamental shift in the GATT market. That causes real and substantial difficulties in comparing the market performance of a company prior to such fundamental change with its likely performance in a different market at a later date. It is difficult to assume that such a company would have performed in a proportionate manner.

54. It is part of the Defendant's response to the Plaintiff's claim based upon the calculation relating to the GATT quota share obtained in the market prior to the fundamental change that the Plaintiff is attempting to assess its potential loss on a basis which does not confront the reality of actual trading experience in the market. It is claimed that the Plaintiff has provided no satisfactory explanation for ignoring, in its claim, how the market in fact changed after 1990.

55. The Defendant produced in evidence before the court a detailed and highly accurate assessment and analysis of the Plaintiff's track record in the market place from the date of its establishment in 1983, up to the end of 1989. Mr. John White gave detailed and precise evidence in relation to the business conducted by the Plaintiff company during those years. That evidence is substantially unchallenged and the import of such evidence is accepted by this court as representing a true and accurate assessment of the Plaintiff's actual track record. Mr. White prepared a report which he proved in evidence. In preparing that report he had access to the Plaintiff's records and also to the extensive official statistics in relation to the meat trade. The evidence of Mr. White highlights the non GATT trading of the Plaintiff in the relevant years. The reason for this is that the Defendant contends that it was such trading that would be pivotal to making profits in the years from 1990, onwards.

56. The evidence of Mr. White, based upon his detailed analysis, is that by the end of 1989, the Plaintiff had effectively ceased the business of purchasing and supplying manufacturing beef and offal in Ireland. In the light of the evidence before this court that represents an overstatement but there can be no doubt but that during the period leading up to 1989, the evidence shows that the Plaintiff substantially reduced its business of purchasing and supplying manufacturing beef and offal in Ireland. That trade had been a significant part of the Plaintiff's business in its initial years.

57. However the decline in the Plaintiff's business of the purchasing and supplying of manufacturing beef and offal in Ireland does not represent a complete or accurate view of the Plaintiff's business prospects. The reason for the decline is partially explained by the fact that in the years immediately prior to 1990, the Plaintiff company, had through Mr. McCarthy, identified a more profitable source of trade and had concentrated its endeavours during those years in the "turnabout" business.

58. During those years the Plaintiff, through Mr. McCarthy, had shown an ability and a capacity to identify a market opportunity. The court can conclude not only from the evidence of Mr. McCarthy but also from the other witnesses called by the Plaintiff that Mr. McCarthy had demonstrated an astute and inventive business mind capable of identifying and exploiting a real business opportunity. The court is satisfied that by the year 1990, Mr. McCarthy had the ability to understand and participate in a complex and competitive market and to be at the forefront of identifying a potential business opportunity. It is against that background that the court must assess the Plaintiff company and consider how it would have performed from 1990, onwards.

59. It is correct that during the period that the Plaintiff concentrated on "turnaround" that it had significantly reduced its earlier business of purchasing and supplying manufacturing beef and offal in Ireland. Given that such type of business would be central to the profitable exploitation of the market from 1990, onwards there clearly would be considerable challenges for the Plaintiff in re-orientating itself following the market change in 1990. The Defendant correctly identified the importance to the Plaintiff of non GATT trading activities in the period from 1990. In this court's view the Defendant placed excessive emphasis on the decline in the Plaintiff's trade in that area up to the end of 1989. The Defendant endeavours to use such decline to suggest that the Plaintiff would not have been able to develop its non GATT trading activities from 1990, onwards. The Defendant claims that such pre-1990, decline is inextricably linked to the analysis of any loss calculation. That emphasis fails to have sufficient regard to the fact that it was the Plaintiff company's concentration on a more profitable form of trade during the years 1987, to 1989, which provides a substantial explanation of such decline.

60. The evidence before this court and Mr. White's analysis demonstrate that in the years 1987, to 1989, the Plaintiff's business concentrated on a type of trade where it in effect acted as a forwarding agent. The evidence shows that the vast majority of the GATT beef imported by the Plaintiff into Ireland was 'turnabout' business and related to the then regulatory requirement to import beef, to which a separate Irish GATT licence applied, into Ireland. The beef was only imported into Ireland so that the Irish GATT licence could be used and as soon as the import was completed the beef in question was shipped back out of Ireland usually to the U.K. At that time the GATT licence was of sufficient value to allow and permit a profit to be made even though the beef had to be directed through Ireland.

61. In carrying out its turnabout business the Plaintiff did not actually have to purchase the beef or to find a customer willing to buy the beef. The risks associated with such transactions were relatively modest both in relation to non payment and as to capital requirement. The evidence establishes that the majority of the business carried out by the Plaintiff in the years 1987, to 1989, was of a type which was significantly different from what would be required from 1990, onwards. That fact however cannot and must not be

viewed in isolation. As stated above the lack of concentration on ordinary trade is partially explained by the Plaintiff's concentration on the profitable and relatively risk free business of turnabout in the years 1987, to 1989. The court is careful to ensure that it does not place too much emphasis on the precise nature of the Plaintiff's trade in the years 1987, to 1989.

62. By 1990, the Plaintiff had an established record in the meat trading business and had a developed a reputation which enabled it to do significant business in a trade which required and demanded a good reputation. In particular the Plaintiff had developed a reputation for honouring its commitments. Such reputation is an essential part of the capacity of a company to do business in the meat trade. Also by 1990, due to the fundamental shift in the GATT regime, the Plaintiff was faced with a situation where it was going to have to significantly alter its type of business from the business carried out by it during the years 1987, to 1989. The Plaintiff from 1990, onwards was trading in a different market and would have to establish new markets and clients. However the Plaintiff's principal Mr. McCarthy had demonstrated a capacity, in the years before 1987, to develop and deal in non GATT meat. Also the development of Emerald London, both before and after 1990, demonstrated that a company with which Mr. McCarthy was involved could prosper in ordinary meat trading.

63. At the very time that the Plaintiff was required to fundamentally alter the nature of its business, to maximise its future profits, the Plaintiff was embroiled in extensive complicated and time consuming litigation. The Plaintiff was effectively a one man operation and therefore the consequences of the coming together in time of financial and legal uncertainty with the occasion when the Plaintiff would have to concentrate on altering its market activities inevitably had a significant adverse consequence for the Plaintiff.

64. The Plaintiff had a related company known as Emerald London. Mr. McCarthy who is the effective sole operator of the Plaintiff was a 50/50 owner of Emerald London with Mr. Marshall. The relationship between the Plaintiff and Emerald London was close and their businesses were intertwined. In the years 1987, to 1989, when the Plaintiff's business was substantially based upon turnabout it was Emerald London who actually traded the majority of the GATT beef. The evidence of Mr. McCarthy and of Mr. Marshall confirmed a close continuing and intertwined business connection between the Plaintiff and Emerald London. There was an informal, but substantially observed business arrangement, whereby profits would be split equally or 50/50 between the two companies. In the years 1987, to 1989, trade was conducted whereby Emerald London would source the beef outside Ireland and arrange for the beef to be imported into Ireland from bonded storage, usually in the U.K., and the Plaintiff would act as the importer of the beef into the E.U. and then after it had been imported into the EU and had been the subject of an Irish GATT licence would be shipped back to the ultimate customer. This meant that Emerald London was the party actually involved in the trade insofar as the trade could be said to relate to identifying the source of meat and the ultimate customer.

65. The interconnection between the Plaintiff and Emerald London continued from 1990, onwards and financial support was provided by Emerald London in various forms. Emerald London continued to trade and did so without using turnabout as it was no longer available. Emerald London was able to develop its pre-existing trade connections and Mr. McCarthy, the effective proprietor of the Plaintiff, assisted in and supported Emerald London in such a venture. There is no doubt but that Emerald London had, by 1990, existing customers and contacts to facilitate non GATT trading activities and that these were availed of by Emerald London from 1990, onwards. The actual business record of Emerald London is of assistance to the court in demonstrating how a small, one or two man business, was able to develop and produce profits from 1990, onwards. Emerald London is not directly comparable with the Plaintiff because of a different history and due to the fact that it was primarily trading in the U.K., which was a beef importing country. However it had many similarities which are of assistance to the court in using Emerald London as a partial comparator. It was a small company operating in a large market which had to develop its trade and business within its own geographical area and rely upon its reputation and expertise to generate profit.

66. The intertwined relationship between the Plaintiff and Emerald London causes the court some difficulty in making direct comparison between the two companies. That is not only because they were operating in different countries and different markets but also because they were supporting one another. Post 1990 the companies would have been in competition for trade and would have to retain contracts for their own use rather than sharing them with the other company.

67. However the actual results achieved by Emerald London, operating on a not dissimilar scale from the Plaintiff, demonstrate how a well run small company could generate profits in the post 1989 EU wide meat market.

68. A number of factors are relevant in considering the position which the Plaintiff from 1990. Its ability to trade under the new regime was affected by a number of external and internal matters.

69. Those external matters were established in evidence before the court and confirmed by reference to actual real trading outturn. It is clear that there was increased competition for the manufacturing supply business from Irish and non Irish trading companies. It was also the case that direct sales played a more significant part and that there was an increasing tendency for direct dealings between the suppliers and the processors. Those direct dealings arose out of an attempt to reduce costs by removing the middle-man trader. It is also the case that from 1990 onwards there was an increased tendency towards integration. That is say that there were a number of instances of processing companies being taken over by larger meat companies who would then substantially supply the subsidiary direct from the meat companies own production. It is also the case that the type of trade which was carried out from 1990 required greater capital. This arose in part due to the fact that GATT beef was more expensive than manufacturing beef.

70. Mr. White's evidence also shows that one of the consequences of the fundamental changes to the GATT regime was that from 1990 there was an expansion in the number of companies which applied for the share of newcomer GATT quota, using export qualification. This resulted in a wide dispersion of the Irish GATT quota among the new quota owners. This would have reduced the potential for a single trading company, such as the Plaintiff, with the limited resources, to grow its share of the Irish GATT quota in the manner claimed by the Plaintiff.

71. The manner in which the Irish beef market actually traded in the years from 1990 confirmed a consistent and ever present predominance of the export trade over the import trade. The evidence of Mr. White demonstrates that for the fifteen year period from 1990 that the average annual import volume was invariably significantly less than 10% of the export volume. The actual trade done by Irish meat trading companies during the relevant period was overwhelmingly directed towards the export trade.

72. The evidence also establishes that from the mid 1990s onwards the market operated on the basis that there were increased imports of non E.U. higher quality beef into the Irish market and that the same provided a potential trade opportunity. From 1995 onwards there was a market in chilled or frozen South American boneless hindquarter beef and that product was used by importers under the Hilton Beef Concessionary Scheme. The development of this business from 1995 onwards represented a potential area for business development for the Plaintiff.

73. There are a number of internal factors which were relevant to the Plaintiff's capacity to generate trade from 1990. Firstly as

identified above, the concentration on the turnabout business had resulted in the Plaintiff company having limited contact with suppliers and customers in the trading business in the years immediately prior to 1990. There had been a relative decline in the Plaintiff company's non GATT trading business from 1988 onwards. This reduced contacts with the type of persons and companies who would be necessary contacts in the post 1990 market. It is also the case that even though the Plaintiff company's credit rating was improving that there would have been an increased requirement for capital from 1990 onwards. This would have been of benefit to larger and financially strong companies. The internal operation of the Plaintiff in the years leading up to 1990 was such that part of the cash resources of the Plaintiff was transferred out of the meat company and into an associate property company. This reduced the financial flexibility of the Plaintiff. However, it is clear from the evidence that the overall financial position of the Plaintiff company, as viewed by its bank, took account of the financial resources available within the associate property company. The Bank took account of the assets within the property company when assessing the Plaintiff's credit rating. However the transfer of funds into the property company inevitably reduced the financial flexibility of the Plaintiff. It was also the case that the development of the property company would have required the attention and time of Mr. McCarthy.

74. The change of the regime in 1990, coincided with the wrong the subject matter of these proceedings. At the very time that the Plaintiff was required to fundamentally alter its business its capacity to do so was significantly diminished. The availability of Mr. McCarthy to concentrate on the necessary far reaching changes in the business of the Plaintiff was reduced. The Plaintiff was also required to make funds available for litigation and became exposed to a substantial potential liability for third party legal costs.

75. The earlier High Court decision established that the Plaintiff did not receive the quota of 294 tonnes to which it was entitled in February 1990. 116.5 tonnes of the 294 tones were received during the calendar year 1990. That left a balance of 177 tonnes which were not received until July 1992. There was therefore a clear loss of cash flow both in relation to the delay in the initial allocation and the further delay of the final amount of 177 tonnes. The loss of cash flow was caused by not having access to the capital asset value of the full quota and the use of such asset to generate turnover. The loss of this cash flow is of particular significance because it is common case that the GATT quota that the Plaintiff should have received in 1990 would not have had any associated costs. It follows that if the Plaintiff had received its full entitlement in February 1990 that it would have had the effect of a significant capital boost and positive cash flow at the every time that the Plaintiff needed to alter its type of trade.

76. The court heard evidence in relation to an agreement between the Plaintiff and Emerald Meats London to the effect that 50% of the quota, or the proceeds thereof, would be remitted by the Plaintiff to the London company. That was an informal arrangement based upon the interlocking nature of the two companies. However it must be recognised that the evidence also established that the London company provided considerable financial assistance to the Plaintiff company.

77. Therefore as a result of the wrong the Plaintiff was a placed in a position at the time of the commencement of the new GATT quota regime that rather than have the additional substantial resources which would have emanated from the receipt of the 294 tonnes of quota in February 1990 that the reverse was the position. The loss of cash flow impacted not only on the Plaintiff's business but also caused further pressure as a result of the obligations entered into by the associated property company.

78. At a time when the Plaintiff company needed its financial resources and cash flow to reorganise its business it was faced with having to use available resources to fund litigation. In the period up to the end of December, 1990 some €74,000 was expended in relation to legal costs. The figures which have been produced in evidence, including a table of legal costs, demonstrates that in the year 1991 a further €110,000 was spent on legal costs. Those costs were discharged out of available cash flow prior to the balance of the quota being received in July 1992. There was also considerable legal costs discharged by Emerald Meats London Limited. In total up to and including September 1995 over €600,000 was expended in relation to legal costs. It was not until October 1998 that the Plaintiff received the High and Supreme Court costs together with interest thereon. The Plaintiff received some €475,000 in High and Supreme Court costs together with interest of almost €210,000 resulting in a payment of some €684,000 in October 1998. The defendant in its defence endeavours to minimise the effect on cash flow of legal costs by suggesting that only a small portion of legal costs were discharged by the Plaintiff company up to October 1990. This fails to recognise the very substantial payments made on behalf of the Plaintiff by Emerald Meats London Limited and the increasing and uncertain financial position arising from incurred legal costs and the potential exposure of an adverse award of third party costs.

79. There is also no doubt but that there was a loss of management time due to the litigation. It was not just Irish litigation but there was also the associated litigation in the European Court.

80. The Plaintiff suffered a loss of reputation in that it was openly and publicly known to be involved in litigation with the Department of Agriculture and that in such litigation the Department had sided with the meat processors. The defendant contends that any damage to the relationship between the Plaintiff and the meat processors is not and cannot be attributed to any action on the part of the first named defendant. It is clear that by effectively siding with the meat processors in the High Court litigation it was inevitable that the Plaintiff's relationship with the meat processors would be significantly damaged.

81. A small one man business requires financial and business certainty to prosper. The financial and business uncertainty brought about by the wrongs herein had a significant impact on the Plaintiff company. The Plaintiff's legal entitlements were not established with certainty until the Supreme Court decision in 1997.

82. Mr. Eugene Sheehy of AIB, who was the manager dealing with the Plaintiff company in 1990, gave clear and precise evidence to the court. It is quite clear from his evidence that the Plaintiff and Mr. McCarthy had both established a good reputation and were deemed a credit worthy risk prior to the wrong the subject matter of these proceedings. The evidence established that Mr. McCarthy kept the bank informed as to the true position and was open in relation to the consequences and effect of the ongoing litigation. Mr. Sheehy in his evidence confirmed that the documentation provided to the bank by the Plaintiff in November 1990 stated that the Plaintiff company was experiencing difficulties. As of December 1990 there is reference within an internal bank memorandum dated the 7th December, 1990 to the fact that the Plaintiff company's decision to sell GATT forward had been taken following a recent meeting with the bank branch where the need to cover interest, running costs and ongoing legal costs were discussed and the company were informed as of that time that the bank had no leeway beyond the present level of debt to support the company. The internal bank documentation, as proved by Mr. Sheehy, confirmed a continuing keen interest on the part of the bank in the litigation.

83. The bank were informed of the successful outcome of the High Court proceedings and also of the subsequent appeal and continued to monitor the litigation. On the 21st August, 1991 Mr. Sheehy wrote to his then superiors that the bank supported the company's request and that it had full confidence in Mr. McCarthy's ability and judgment in expediting the legal action and damages issue. The appeal by the State and the meat processing companies was identified by the bank as being disappointing with the consequent effect of causing further substantial delays. Finally undertakings had to be given to the bank in relation to the proceeds of the litigation. On the 5th August, 1992 the Plaintiff's solicitors forwarded to the bank a cheque for £392,596.17 which was the amount of the award less an agreed retention of £58,000. It must be recognised that that payment to the bank was made out of

proceeds of an award which remained under appeal.

84. By letter of the 15th August, 1994 Mr. McCarthy, on behalf of the Plaintiff wrote to Allied Irish Banks indicating his agreement that under the then current circumstances that no more cheques should issue and no more facilities would be made available from the bank and went on to state in the letter:

> "It is most likely that we will get this appeal heard next year but in view of everything else that has ever happened with these legal proceedings it is only proper that I should mention the feasibility of an Article 177 referral to the court of justice following the appeal. I believe your legal department will understand exactly what I am thinking when I say this."

85. The evidence from Mr. McCarthy, supported by Mr. Sheehy makes it clear that there was a real and continuing impact caused to the Plaintiff by the delay in the litigation and the uncertainty concerning the ultimate outcome.

86. Following the wrongful act the subject matter of these proceedings the Plaintiff suffered irreparable damage to such an extent that it had to effectively cease ordinary trade in 1990 and limit its business to the selling on of the GATT quota which it had acquired by its previous trading. It is correct to say that the award of special damages did not put the Plaintiff back in the position it would have been if the wrongful act had not occurred. This court is faced with the considerable difficulty of trying to establish a sum of money which would be appropriate to award to the Plaintiff based on a calculation of what would have occurred if the Plaintiff had been able to engage in normal trade.

87. A court in approaching damages should do so on the basis identified in *Ratcliffe v. Evans* [1892] (2 Q.B. 524) where it was stated by Bowen L.J. at p. 532 to 533:

> "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

88. That statement of the law recognises that the requirement of certainty and particularity must be approached against what is reasonable and having regard to the circumstances and nature of the acts themselves by which the damage was done. In this case the circumstances and acts giving rise to the damage had a significant impact on the Plaintiff company's ability to trade and to develop into the future. It is against that background that the court must determine what is reasonable in relation to certainty and particularity.

89. The obligation on a court in relation to general damages, in cases such as this case where it is difficult to identify with certainty or particularity the damage suffered by a Plaintiff, is identified by the Supreme Court in *Callinan and Deane v. VHI* (Unreported, Supreme Court, O'Flaherty J., 28th July, 1994) where it was held (at p. 8):

> "A party who suffers damage is required to be put in the same position as he would be if he did not suffer the damage: *restitutio in integrum*. It is obviously not the case that the Plaintiffs are in the same position as if the wrong had not been done to them; therefore, they must be entitled to damages. The fact that the actual figure to which they maybe entitled may not have been presented to the satisfaction of the judge does not mean that the Plaintiffs should not get any damages at all under this heading."

90. In that judgment O'Flaherty J. quoted (at p. 9)with approval a statement from *McGregor on Damages* (15th Ed.) in a particular para. 344 thereof where it was stated:

> "… where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v. Hicks* [1911] 2 KB 786, the leading case in the issue of certainty:
>
> > 'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.'
>
> Indeed if absolute certainty were required as to the precise amount of loss that the Plaintiff had suffered, no damages would be recovered at all in the great number of cases."

91. As it is necessary to attempt to predict the type of profit that the Plaintiff would have generated if it had not been for the wrong committed it is appropriate that various theoretical scenarios should have been put forward and for the court to consider same. It is the case that the damages cannot be assessed with certainty but it is also the law that the Defendant in this case is not relieved of the necessity of paying damages. It is clear from the judgment of O'Flaherty J., quoted above, that the fact that the actual figure that the Plaintiff may be entitled to may not have been presented to the satisfaction of this court does not mean that the Plaintiff should not get any damages under the heading of general damages.

92. The court has had considerable assistance, from both sides, as to what actually occurred in the market after 1989. Due to the fact that the Plaintiff effectively ceased ordinary trade after 1990, what the court has to consider firstly is whether or not the effective cause of that cessation was the circumstances and nature of the wrongful act and the consequences flowing therefrom and secondly what would have been likely to have occurred if the Plaintiff had not ceased ordinary trading.

93. This court is satisfied that on the balance of probabilities the evidence establishes that the wrongful act in respect of which the claim is made gave rise to circumstances which had the consequence of effectively causing the Plaintiff to cease trade as and from 1990. The main trade carried out thereafter was limited to the business of selling on the GATT quota. Once the court is so satisfied it follows that in endeavouring to predict trade, which never occurred, that a considerable element of uncertainty and conjecture will arise. In those circumstances the arguments put forward on behalf of the Defendant that the Plaintiff has failed to discharge the onus of proof in this case cannot succeed. The general requirement of strict prima facie proof being required must be viewed against the facts and circumstances of the case. This court is satisfied that it was the coming together of a series of events and circumstances together with the wrongful act the subject matter of the claim herein which gave rise to the inability of the Plaintiff to continue to trade from 1990, onwards. The court is satisfied that the inability to properly trade, and therefore the ability to generate net profit, was caused by the wrongful act the subject matter of this claim.

94. The Plaintiff's business was interfered with at a critical time causing a diversion of management time and of financial resources. The court must endeavour to calculate a reasonable basis for determining what would probably have occurred if the wrong had not

been done and the Plaintiff had continued to trade. What trade the Plaintiff company would have done, absent the wrong, must inevitably be based upon conjecture but the court is able to consider such against what actually happened in the overall meat market. The court has that benefit because of the passage of time.

95. The facts of this case do not relate to the circumstances where a company has suffered financial loss of earnings or profits as a result of a diminished capacity to operate consequent upon a diversion of management time and resources but rather one of a company being effectively unable to trade because of the consequences of the impact of the wrong giving rise to this cause of action.

96. In summary the contention upon which the Plaintiff's claim for general damages is based, is that the Plaintiff was in a good position to take advantage of unique opportunities that presented themselves in 1990, following the momentous changes in the Commission Regulations. It was at the same time as those changes occurred that the Plaintiff ought to have received the 294 tonnes of GATT quota, which was valued in 1990, as being worth IR£640,000. Such quota represented a valuable asset and could have been used to reposition the Plaintiff's trading activities and to finance same.

97. Mr. Cyril Maybury of Ernst & Young gave detailed evidence for the Plaintiff in relation to projections, calculations and estimations of potential loss. He identified his instructions and the assumptions used and proposed two separate methods for assessing potential loss.

98. Both those methods were based upon conclusions which Mr. Maybury formed as a result of the information and instructions available to him. They were identified in four separate numbered paragraphs in the submissions from the Plaintiff in the following terms:

> "1. That the Plaintiff suffered severe cash flow difficulties caused and shortly after the wrongful acts of the Defendant.
>
> 2. That the severe cash flow difficulties combined with the reputational damage caused by the Defendant's wrongful acts resulted in a significant disruption to the Plaintiff's business and the Plaintiff's trade reduced dramatically.
>
> 3. That the Plaintiff received damages for the GATT quota but it has never received any compensation for the delays in receiving its due licence in respect of 1990 and 1991.
>
> 4. That the Plaintiff is not in a position to greatly benefit from the changes in the Commission Regulations and generate significant profits as a result of the actions of the Department."

99. The first of the two methods is based upon a methodology where Mr. Maybury seeks to estimate the amount of GATT quota that the Plaintiff should have obtained from the Community and or purchased with rights in order to calculate Emerald's losses from 1991, to 2001, based upon an historical fact that in 1989 and 1990, Emerald was actually allocated a weighted average of 39.24% of the total GATT quota allocated by the Community to Irish companies. In preparing method 1 Mr. Maybury assumed that but for the Department's acts, the Plaintiff would largely have maintained that percentage share (i.e. 39.24%) of GATT quota allocated to Irish entities from 1991, onwards. That was described in his report as method 1.

100. That method was not put forward in the statement of claim. A different method resulting in a considerably lower figure for the potential loss was used. This court is satisfied that the foundation upon which method 1 is based is unrealistic and represents an unwarranted assumption not supported by the evidence. The momentous changes in the Commission Regulations relating to GATT which came into effect in 1990, meant that the trading record in the prior years had very limited relevance for subsequent years. The type of market and the nature of the trade was fundamentally altered. It was no longer possible to use turnabout and the whole basis of the type of trade upon which the Plaintiff had established its percentage share of the GATT quota effectively no longer existed. It would be necessary as and from 1990, to develop a new type of trade in order to acquire newcomer GATT quota. The Defendants contend that the advantage which the Plaintiff had during the 1987, to 1989, period could never be repeated after 1990. This court is satisfied that that is a correct contention.

101. Under the 1989 Regulations a company could qualify for quota under two headings either traditional quota or newcomer quota. To obtain traditional quota a company would have to show that it was the importer in the applicable reference years. To qualify for newcomer quota a company would have to demonstrate that it imported or exported non GATT beef in the reference years. Against that regulatory background the Defendant contends that the quota allocation to which the Plaintiff was entitled to in 1990, could not be maintained. This court is satisfied that that is correct. The factual and expert evidence demonstrates to the court that to increase quota as and from 1990, that the Plaintiff would have to have traded in qualifying exports or imports in very significant amounts. The Plaintiff's real trading history up to the end of 1989, was such that it had limited expertise, contacts and existing customers to enable it to make exports or imports of significant amounts. Therefore the Plaintiff company would have to have developed those elements in a more open, transparent and competitive market. Also under the 1989 Regulations and thereafter the traditional GATT allocation would be diluted year on year as more companies qualify for newcomer's quota which of itself would then subsequently, in later years, also qualify for traditional quota.

102. An examination of the evidence and the information produced in court demonstrates that the Plaintiff purchased a weighted average of over 70% of the total GATT allocated by the Community to Irish entities for the years 1987, to 1989. The claim for lost GATT trading made on behalf of the Plaintiff is that it would have continued to purchase GATT quota on a weighted average of that level either from Ireland or from elsewhere within the European Union. The Defendant contends that such scenario is most unlikely. This court is satisfied that the evidence and in particular the expert evidence of Mr. White confirms same. As and from January, 1990, under the new GATT Regulations there was an EU wide market for GATT quota that is quota sold without rights. The statistical evidence as to what occurred in the market place from 1990 and the evidence relating thereto confirms that there was a very small market for imported GATT beef into Ireland. Such beef as was imported into the EU was imported into countries other than Ireland where there was a significant demand for imported beef over and above the home produced beef. The court is satisfied that the assumption based upon the Plaintiff company trading to the extent required, as indicated above, to maintain its existing percentage of over 70% purchase of the total GATT allocated by the Community to Irish entities, is unreal and is not supported by the evidence. Indeed the very choice of the use of a weighted average over such a small number of years begs the question as to what can be gleaned from such a short term unique market.

103. It is part of the Plaintiff's claim including the claim based upon method 1 that its business would have grown by a number of methods. It is contended on behalf of the Plaintiff that the use of newcomer companies to achieve GATT quotas based on exported beef to non EU countries would have earned the Plaintiff company 364 newcomer quotas. When one looks at the number of newcomer quota actually earned by other companies including companies with considerably greater assets and contacts within the market it is

demonstrable that such a number of newcomer quotas is unrealistic. Companies which had greater financial assets, who were integrated throughout the entire meat business and who were in a considerably better position to identify and supply customers actually earned considerably less newcomer quotas. The court is satisfied that the type and nature of the market as and from 1990, was such that it is unrealistic and unsustainable to base a calculation on an assumption that the Plaintiff could have earned 364 newcomer quotas in the eleven year period from 1990, to 2001. Such a number is unrealistic by comparison with other companies within the market and would have been unachievable given the lack of financial strength and trading record of the Plaintiff company. The central basis of the Plaintiff's claim under method 1 is predicated upon a growth in GATT earnings that is to say a growth in the Plaintiff's GATT quota over the years 1990, to 2001. The evidence establishes that to do so the Plaintiff company would have been required to have obtained large amounts of newcomer's quota. As pointed out above to qualify for such newcomer's quota the Plaintiff would have had to export or import GATT beef. The actual breakdown in Mr. Maybury's calculations as between imports and exports is based upon an assumption of 75% for exports and 25% for imports. Any comparison between the Plaintiff's actual trading activities up to the end of 1989, with the extent of such activities required within the assumptions of Mr. Maybury demonstrates the unrealistic scale, scope and cost of same when compared.

104. When the court looks at the projections contained in method 1 the court finds that such projections are based on out turns which are most unlikely to have occurred and which are not grounded in actual events which occurred in the market from 1990. The link between the Plaintiff's trading history and the suggested future is so tenuous and so without factual support as to be unreal.

105. The second method put forward in Mr. Maybury's evidence in relation to the potential loss to the Plaintiff is that pleaded at para. 19(a) of the points of claim delivered on the 27th February, 2001. Those points of claim were delivered many years after the acts which gave rise to the claim. The claim put forward in para. 19(a) of the points of claim was as follows, namely:

> "As a direct consequence of the Department's acts the Plaintiff's entitlement to GATT quota from the European Community (as it then was) significantly diminished from 1991, onwards. In or around 1990, the Plaintiff held a significant share of the total Irish GATT quota that was allocated by the European Community. In 1989 and 1991, the Plaintiff was allocated a weighted average of 68.65% of the Irish GATT quota and the Plaintiff claims that but for the actions of the Department it would have had growth in GATT quota allocated similar to that of Emerald Meats (London) Limited. In replying to particulars raised arising from the points of claim the point is stated at para. 2(b) of the replies of the 21st December, 2001:
>
> > '… the figure of 68.65% used as a benchmark is derived from a calculation of the GATT allocation made to the Plaintiff in 1989 and 1991, as a percentage of the total quota allocated to Ireland at that time.'
>
> In 1989, the Plaintiff received 32 tonnes out of a total allocation of 42 tonnes or otherwise 80.95% of the quota allocated nationally (this is the first time in which the Community administration of the system operated). It is not possible to establish a true figure for the 1990 allocation because of the first named Defendant's unlawful actions. The fact that in 1990, the Plaintiff did not receive the quota to which it was lawfully entitled, whereas other parties did receive quotas to which they had no lawful entitlement, does not make a basis for the true calculation for that year. In 1991, the Plaintiff received 336 tonnes out of a total allocation of 497 tonnes which equates to 67.61% of the quota allocated nationally. If the average of the percentage allocated for 1989 and 1981, had been adopted the benchmark would have been 74.28%. However the figure of 68.65% used as a benchmark is a conservative estimate of the weighted average of GATT allocations made to the Plaintiff in 1989, to 1991."

106. In the points of claim the Plaintiff contended that but for the actions of the Department the Plaintiff would have had growth in the allocated GATT quota similar to that of Emerald Meats (London) Limited. In para. 2(c) of the replies to particulars of the 21st December, 2001, it was contended that Emerald Meats (London) Limited's experience could be used as a useful comparison in that it was able to trade without unlawful disruption during the relevant period. It was contended that this made Emerald Meats (London) Limited a useful benchmark for calculating the growth that the Plaintiff should have achieved but for the Defendant's unlawful actions.

107. At the time of the replies to particulars it was indicated that although a comparison with Emerald Meats (London) Limited's experience was useful it was not the only method by which the Plaintiff could assess its loss. Whilst the position was reserved in the replies to particulars, in the absence of actual figures for the quantities of GATT allocated by the Department in Ireland since 1991, no alternative method was put forward or identified until a later date when what is now known as method 1 was expounded.

108. This court is satisfied that Emerald Meats (London) Limited's experience as to how it traded in relation to GATT in the years from 1990, onwards is of some benefit to the court in endeavouring to establish the extent of loss which the Plaintiff suffered. The trading activities of the London company are a useful comparison. The London company was a small, effectively a one man company, operating in the meat industry. However whilst the London company is a useful comparison it is far from a complete or accurate proxy of the Plaintiff. The London company was operating in circumstances of a different trading history, in a different jurisdiction, in a location where customers were present who desired to import substantial quantities of meat and where its earlier involvement in the Plaintiff's turnabout business had resulted in it identifying customers and trading contacts which would continue to be of use after the change in the GATT Regulations in 1990. The customers and trading contacts prior to 1990 were effectively dealing with the London company and after the regulatory change the great probability is that the London company would continue to benefit from those contacts. This gave rise to the situation, hereinbefore identified, that the Plaintiff company would have to develop its own customers and trading contacts. That was not the position in relation to the London company. Also the London company operated in a country which had substantial requirements for beef imports. For the above reasons and a number of other reasons the London company is of assistance to the court in endeavouring to ascertain how the Plaintiff company might have operated but cannot be used as a true comparator or proxy. It is also the case that Mr. McCarthy continued to work with and to assist the London company and to benefit form its profits and at least part of expertise and work of Mr. McCarthy was thereby rewarded.

109. There is also a real issue in relation to the methodology used in method 2 insofar as it seeks to adopt 68.65% as a benchmark. That benchmark is derived from a calculation of the GATT allocations made to the Plaintiff in 1989 and 1991. Those allocations clearly would be of benefit in relation to traditional quota but for the reasons hereinbefore identified would have limited relevance in relation to the capacity to generate newcomer's quota. It was for that reason that the court must approach with caution any comparison based upon the benchmark figure of 68.65% identified in the pleadings.

110. It was asserted by Mr. Maybury in his evidence and in his report that when assessing what would have been achieved by the Plaintiff company but for the actions of the Defendant that it is appropriate to consider the Plaintiff's historic performance and use this as a benchmark (see para. 5.25 of his report). This court is satisfied that whilst in a majority of cases such an approach might be justified that the facts of this case result in such an approach being inappropriate. The historic performance of the Plaintiff company concerning share of GATT prior to 1990, was based upon a short, temporary unique opportunity. After the regulatory change in 1989,

turnabout was no longer in operation and trading had to be based upon identifying customers and trading contacts for the actual import and export of beef. The Plaintiff's historic performance was limited in that area and in those circumstances the use of the Plaintiff's historic performance as a benchmark is inappropriate. The Plaintiff's allocation of GATT quota in 1990, was 294 tonnes and given the circumstances, regulatory regime and manner in which the Plaintiff had obtained such quota it is not appropriate to take the entire of that figure as a base figure to apply to any gross percentage.

111. This court is satisfied that the methodology adopted in relation to both method 1 and method 2 is inappropriate and unjustified on the facts and circumstances herein. The central factual matter which underpins both methods of projections is the Plaintiff's pre 1990 trading history. The court is satisfied, that the evidence demonstrates, that such history had limited relevance to post 1990 market. Absent the fact of the pre 1990 trading history the Plaintiff rests its calculations on projections which are aspirational rather than consistent with the actual market.

112. The methodology used in the points of claim and in method 2 is calculated upon a particular basis. It is that Emerald London's GATT share increased in the years from 1990 to 2001 by over 300% from an allocation of some 66 tonnes in 1990 to an allocation of 286 tonnes for the year 2000/2001. In making the calculations under method 2 Mr. Maybury applied the actual growth rates for GATT quota allocated to Emerald London to the Plaintiff company. This resulted in an approach being adopted whereby the rate of growth achieved by Emerald London was applied to the Plaintiff company's allocation of 294 tonnes which it achieved in 1990. This court is satisfied that given the manner in which the Plaintiff company had obtained its 294 tonnes that it is neither appropriate nor rational to take the figure of 294 tonnes as a base figure. There is no logic in taking 294 tonnes as the base figure when the later tonnes would have to be earned in a completely different market.

113. The court is satisfied that if one was to adopt the methodology used by Mr. Maybury in method 2 that the projected outturn results in the Plaintiff company having an entirely unrealistic and unachievable percentage of the total Irish market. The court is satisfied that the methodology used in method 2 is invalid in that it is inappropriate to apply a percentage growth rate to the Plaintiff's GATT allocation of 1990. The amount of the Plaintiff's GATT allocation in 1990 has very limited bearing on the amount of new comers quota that the Plaintiff might have earned in the following years.

114. The dissimilarity between the Plaintiff's trading history and the trading history of the London company is demonstrated by the evidence which establishes that the majority of the London company's GATT quota up to 1990 was earned by importing non GATT meat into the United Kingdom.

115. The unrealistic nature of the Plaintiff's projections is confirmed by the evidence of John Horgan. The true import of Mr. Horgan's evidence is that the plaintiff could not have achieved the level of trade required by the projections unless it had greater financial resources and better and more wide ranging contacts in foreign countries and an established track record of exporting meat to customers.

116. The evidence of Mr. White in relation to the actual developments in the Irish beef market from 1990 shows what actually occurred during that period. In the period between 1990 and 1995 there was a low level of imports of beef into Ireland in response to the new regulations. That low level was a reflection of the lack of any true import demand into this country at that point and time. Mr. White identified in his evidence that:

> "The vast majority of Irish new comer GATT companies in this period were performed using eligible Irish beef exports."

117. Mr. White's evidence also establishes that from the mid 1990's onwards, when duties were reduced post 1995, a market developed for the import of non E.U. higher quality beef into the Irish market. Thereafter a relatively large Irish beef import market for non E.U. product, primarily from Brazil, emerged. The evidence establishes that a company such as the Plaintiff would have been in a position post 1995 to exploit the competitive advantage to import, in competition with other companies, non E.U. beef into Ireland. The fact that is was the Plaintiff company's larger Irish competitors which took over and dominated that growing market does not mean that the Plaintiff company might not have been in a position to obtain some small share of that market but for the wrong the subject matter of these proceedings. By 1995 the financial position of the Plaintiff company and its reputation was such that it was not in a position to exploit this developing market.

118. The real market identified in Mr. White's evidence shows that in the period from 1991 to 2001 that 98% of applicant companies for Ireland's newcomer GATT quota used exports as their means of qualifying for such quota. It is also the case that in the period from 1991 to 1996 that the Plaintiff was the only company to apply for newcomer quota using import qualification. This arose from the fact that in the first half of the 1990's Irish meat export companies had no incentive to engage in trading GATT meat within the EU and there was no significant market for GATT meat within Ireland. This meant that the majority of companies in Ireland sold their quotas without rights for the maximum price obtainable on the market. Mr. White gave evidence to the effect that in the post 1990 period that the most commonly adopted option for Irish GATT quota owners was to sell their quota, without rights, to an E.U. trader, for the best price they could obtain. Thereafter that quota would be used to import GATT meat into the E.U. and sell it in member states where there was, compared to Ireland, a far more substantial import requirement for GATT beef.

119. Elizabeth Murphy gave evidence on behalf of the Plaintiff. Ms. Murphy clearly was an experienced expert in the meat trade. Both in her evidence and in her report she expressed the opinion that the Plaintiff would have been in a strong position to expand. She based such opinion on the fact that the Plaintiff company had built up a significant quantity of GATT quota which gave that company a firm financial basis. Her opinion was also based upon the fact that the Plaintiff was a trading company which had low overheads and was thereby in a position to react to changes in the business environment. She gave evidence that the Plaintiff had established contacts with overseas suppliers and contacts through the European Union and that Plaintiff company was eligible to participate in all the quotas either directly or indirectly and "was well placed to take advantage of full duty imports from 1995 onwards." Ms. Murphy's evidence paid little or no regard to how the market actually evolved from 1990 and was not based on how companies actually traded in the market.

120. The court is satisfied that the Plaintiff had established a good but limited financial base by 1990. It was also a trading company which had low overheads and was in a position to react to changes in the business environment. However the overall evidence, and in particular Mr. White's detailed analysis, establishes that the Plaintiff had only limited contacts with overseas suppliers. Also as indicated above pre 1995 there was almost no beef imports into Ireland and even though the Plaintiff company might have been well placed to take some advantage of full duty imports that did not arise until 1995 onwards.

121. For the reasons identified above this court is satisfied that the two methodologies proposed by Mr. Maybury on behalf of the Plaintiff as a means of calculating the Plaintiff company's potential loss is in both instances inappropriate and unjustified in the light of the facts established herein. That finding however does not result in the court forming the view that the Plaintiff did not suffer real

loss and damage. I have already indicated earlier in this judgment that I will approach the assessment of damages in this case consistent with the statement of law by O'Flaherty J. in Callanan and *Dean v. The V.H.I.* That is to say the fact that the actual figure to which a Plaintiff may be entitled to may not have been presented to the satisfaction of the judge does not mean that the Plaintiff should not get any damages at all under this heading. Therefore even though this court does not accept either of the two methods put forward by the Plaintiff as a satisfactory presentation of the Plaintiff's damages the court is still satisfied that the Plaintiff is entitled to general damages.

122. The court is satisfied that the wrong the subject matter of these proceedings had a real and permanent effect on the Plaintiff's business. The Plaintiff gave evidence in relation to this matter and the court is satisfied that the Plaintiff's evidence is correct. In particular when the Plaintiff stated in evidence that if he had:-

> "… received my GATT, instead of just remaining inert and declining, I would have gone forward, I would have progressed my company. I would have reinvested the money in the company and I would have built up its quota using the methods available to me…"

123. The Plaintiff went on to state that he would have "… reinvested in meat trading …. So that is where I would have gone". Mr. McCarthy confirmed that he would have reinvested a substantial proportion of the profits generated from the GATT allocation (which he was denied) and would have been able to obtain additional bank facilities and that is the first thing that he would have done. The court is satisfied that inertia and decline in the Plaintiff company was caused by severe cash flow difficulties combined with the reputational damage to the Plaintiff. Also during 1990 when the Plaintiff would have to have developed new trade Mr. McCarthy's management time was significantly diverted towards litigation. Mr. McCarthy's evidence confirmed the reputational damage. The common knowledge of the litigation together with the protracted nature of same caused uncertainty and had an inevitable effect on the Plaintiff's capacity to trade. Mr. McCarthy's evidence also confirmed that he spent significant amounts of time "fighting" various court cases rather than repositioning the Plaintiff company and concentrating on meat trading. The court is satisfied that the evidence establishes that the wrong committed by the defendant had in the words of Mr. McCarthy a devastating effect on the Plaintiff.

124. The activity of the property company is of little relevance as to how the Plaintiff company would have operated if it had received its full GATT allocation. The probability is that following the changes arising from the 1989 regulations during 1990 that Mr. McCarthy would have ensured that the funds available from the additional banking facilities were directed towards repositioning the Plaintiff company and building up its trade rather than in making further property investments.

125. The court is satisfied that the Plaintiff company needed to significantly reposition itself to continue to trade profitably from 1990. While Mr. McCarthy had some experience in relation to the export of meat that experience was not recent. Mr. McCarthy in his evidence confirmed that in the years prior to 1990 that he had not exported a lot of meat. The court is satisfied that it would have taken time and effort for Mr. McCarthy to establish contacts and business in the export markets.

126. There is no doubt that there were momentous changes in the meat business in 1990.

127. The main trading activity in which the Plaintiff company was involved in the years immediately prior to 1990 was no longer available after the 1989 regulations came into effect in 1990.

128. In concentrating on the turnabout trade in the years prior to 1990 the Plaintiff company had become less involved in normal meat trading and therefore would have to have built up such business from a low base.

129. The consequences of the changes in 1990 were that the established exporters in the Irish meat business became entitled to qualify for newcomers quota by virtue of the exports achieved by those companies.

130. After 1990 integrated Irish meat companies acquired a significant percentage of newcomer quota. This is shown by the evidence of Patricia Cannon and is set out in the schedule entitled "GATT newcomers by group 1990 to 2003", Ms. Cannon's evidence demonstrated the actual dominance of the integrated companies, such as Kildare Meats, A.I.B.P. and Kepak. The court has particular regard to how the market actually operated and gains considerable assistance, from the evidence of Patricia Cannon.

131. From 1990 Irish meat processing companies required to establish trade in their own name to obtain GATT quota. Thereafter there was a different market in the 'selling of licences' and licences were not sold in the manner that they had been prior to 1990.

132. From 1990 Mr. McCarthy, in operating the Plaintiff's company, would have to have used a combination of import and exports to develop the company. It is improbable that the plaintiff would have operated in a manner significantly different from the Irish meat trade as a whole.

133. There was no specific detail available in the evidence to the court to support the claim that the Plaintiff company could have achieved the volume of trade required to support the projections contended for by the Plaintiff. The amounts claimed are unrealistic and unachievable when viewed against the trade actually carried out by larger and financially stronger companies. The evidence of Mrs. Elizabeth Murphy called on behalf of the Plaintiff, did not deal with any specific matters but rather identified opportunities.

134. The court is satisfied that but for the wrongs done to the Plaintiff it would have had greater financial resources available to it. However those additional resources would have been limited due to the nature and financial structure of the Plaintiff company. The evidence of Mr. Eugene Sheehy confirmed that the Plaintiff company and Mr. McCarthy had a good reputation and also confirmed that it is probable that additional financial resources would have been available to the Plaintiff company. It is clear from the evidence that the extent of those resources would have been dependent on the Plaintiff' company's ability to trade as it was viewed by the bank that it was such trade that provided the capacity to repay loans.

135. The evidence demonstrated that the net profit margin in the meat business was in the 1 to 2% region. Mr. White's evidence suggested that the net profit margin was between 1 and 1 ½ percent whilst Mr. John Horgan the managing director of Kepak, referred to a recent report which stated that the net profit margin for integrated processors was in the region of 2%. Emerald London's performance for the twelve year period to September 2002 showed that it achieved an overall net profit rate of 2.37%. Emerald London operated in a different market but its management structure and capacity to evolve in response to trends within the industry was similar to the Plaintiff's history up to 1990. The 2.37% net profit margin is identified in the expert report of Julian Caplin referred to as an "addendum two". This court is satisfied that the evidence establishes that it is probable that the Plaintiff's overall profit margin would have been higher than the margin achieved within the Irish industry as a whole including NWL or by Emerald London. This is due in part to the fact that it is probable that a higher proportion of the Plaintiff's business would have related to GATT quota.

136. The evidence established that the GATT quota which the Plaintiff should have received in 1990 would not have had any associated costs. This was due to the fact that the allocation of such GATT quota was based upon GATT imports in prior years. Therefore the costs of obtaining the GATT quota which the Plaintiff company should have received in 1990 had already been incurred. The court is satisfied that when one looks at the net profit rate achieved by Emerald London and taking into account the flexibility and expertise within the Plaintiff company and in the light of its low overheads and the probability that a higher proportion of the Plaintiff's business would have related to GATT quota and given that the GATT quota which the Plaintiff company should have received in 1990 would not have had any associated costs that it probable that the Plaintiff company would have achieved a net profit margin in excess of that achieved by other meat companies.

137. The court is satisfied that the net margin of 8% on turnover suggested in the evidence called on behalf of the Plaintiff is entirely unrealistic but on the evidence available to the court it is probable that the Plaintiff would have exceeded the suggested 2% net margin and have achieved a margin of 3%.

138. Emerald London provides assistance to the court in relation to how it is likely that the Plaintiff company would have operated but for the wrongs the subject matter of these proceedings. Both companies are small, flexible and innovative. The fact that Emerald London operated profitably in each of the ten years as and from 1991 confirms the court in its view that but for the wrong the subject matter of these proceedings the probability is that the Plaintiff company would have continued to trade profitably. Emerald London achieved an average margin of net profit over an extended period of 2.37%. However it is also clear from the actual trading of Emerald London that a small company would have difficulty in expanding its turnover in such a competitive trade.

139. On the evidence it is unlikely that the Plaintiff company could have significantly enhanced its turnover by employing additional meat traders. Such traders were not readily available. Emerald London's turnover fell between September 1990 and September 2000. However based on the evidence concerning other Irish companies, including NWL, it is probable that there would have been some limited capacity for the Plaintiff to increase its turnover during the relevant years.

140. NWL provides considerable assistance to the court as a comparator as to how the Plaintiff might have operated during the relevant period. NWL operated profitably, trading in Ireland, during the relevant years and generated a significant number, in excess of 100, newcomer quotas from 1990 to 1999. NWL was a small trading company actually operating in Ireland with real customers and actual business. NWL was a financially stronger company than the Plaintiff with a considerably greater turnover by 1990. In 1989 NWL had a turnover which was 7 times that of the Plaintiff company. The actual turnover achieved by NWL during the relevant period is of assistance to the court in determining the level of turnover which it would have been likely that the Plaintiff would have achieved but for the wrong the subject matter of these proceedings.

141. In his evidence and report Mr. Caplin examined the information in relation to NWL provided by Mr. John White. Mr. White gave evidence from actual experience in the meat industry confirming that it can be a difficult and brutal business. Mr. White identified the actual performance of NWL.

142. Mr. Caplin's evidence and report shows that the turnover of NWL was seven times larger than the Plaintiff in 1989 and that NWL achieved accumulative turnover of 350 million Irish pounds in the ten following years. Mr. Caplin makes an adjustment for the fact that the ten year period was one and a half years shorter than the period covered by the plaintiff's claim and thereby arrives at an adjusted turnover figure to cover the entire period of IR£402.5 million. Mr. Caplin makes the assumption that the relative sizes and growth rates of the two companies would remain constant and on that basis concludes that the Plaintiff company would have achieved a turnover of 1/7 of that actually achieved by NWL amounting to IR£57.5 million for the period of the claim. This was based on the fact that the Plaintiff achieved a turnover of IR£4.9 million between October 1990 and September, 1991. (A realistic figure to use given a turnover of some IR£3,000,000 in 1988 and a turnover of IR£4,418,000 for the 18 months to September, 1990). Mr. Caplin calculated the loss of turnover as a difference between that figure of IR£4.9 million and IR£57.5 million giving rise to a figure of IR£52.6 million estimated loss of turnover by the Plaintiff company for the period of the claim.

143. This court is satisfied that NWL represents the most realistic and accurate comparator in relation to the likely turnover which the Plaintiff company would have achieved during the period of the claim. NWL was a company actually operating within the changed and altered market as and from 1990. Whilst there are significant differences between the two companies the court is satisfied that NWL is the best comparator available in determining what would have been the probable turnover achieved by the Plaintiff. In using NWL the court is relying on real, actual and completed trades. It is also the case that NWL's performance is consistent with the actual performance of the overall market.

144. If one applies the net profit rate of 3% identified above to the loss of turnover of IR£52.6 million one arrives at a loss of IR£1,578,000.00. That figure converts into €2,003,646.60 and is the figure which the court estimates is the loss of profit which the Plaintiff sustained as a result of the wrongs the subject matter of these proceedings in the period up to the end of June, 2001.

145. The projections and calculations which were put before the court and upon which the court has relied extend up to the end of June 2001. However over six years has passed since that date. If the sum identified in the previous paragraph been paid within a matter of months, by the autumn of 2001, then it would have represented the appropriate figure for general damages. However since six years has elapsed it is necessary to adjust the figure identified in the previous paragraph to take into account the time lapse in the identification and discharge of the general damages.

146. These have been protracted and long drawn out proceedings. They commenced in 1990 they went to full hearing in the High Court followed by an appeal resulting in a Supreme Court judgment of the 3rd March, 1997. It was not until the following year that the legal costs were discharged and as late as the 1st March, 1999 the first named Defendant was serving a notice of contribution and indemnity on the solicitors for the fourth and fifth named Defendants.

147. The Supreme Court indicated that the Plaintiff is entitled to general damages and that matter required to be fully litigated through the High Court. It commenced with points of claim in February of 2001 and ultimately came on for hearing before this court in 2006 and 2007. The reality of the first Defendant's defence as set forth in the points of defence and as argued in this court was that whilst the Plaintiff was entitled to general damages on foot of the Supreme Court judgment that such damages should either be nominal or very small. In para. 16 of the points of defence it was expressly pleaded that it was denied that the Plaintiff had suffered very significant general damages over and above the items of special damage awarded to the Plaintiff on foot of the High Court judgment. The first named Defendant defended the proceedings before this court on that basis.

148. The necessity to establish the quantum of general damages has resulted in a further delay of in excess of six years from the delivery of the points of claim.

149. Earlier in this judgment I have identified the figure which the court believes is the appropriate figure for general damages based upon a calculation of such damages as of the end of June 2001 and the payment within a brief period thereafter. The court is satisfied that it is necessary to have regard to the fact that this judgment is been given in October 2007 and that the value of the sum of €2,003,646.60 identified above has diminished since the autumn of 2001. In the intervening years the annual inflation rate in this country has varied from a high of 4.9% for the year 2001 to a low of 2.2% for the year 2004. If the court was to apply the annual rate of inflation for each of the calendar years from 2001 to 2006 inclusive on a simple interest basis to the figure of €2,003,646.60 a figure for the six years of marginally less than €440,000 would arise. The court is satisfied that it is necessary to have regard to such inflation and to the diminution in the value of money from the end of June 2001 to date. In assessing general damages it is appropriate to have regard to inflation and the rate of inflation and to ensure that the figure for general damages is corrected to take proper account of same.

150. The court proposes to allow a figure of €446,353.40 as an additional figure to take account of the diminution in the value of the euro, due to inflation, from the end of June 2001. That figure is not an exact calculation but represents a realistic approximation and results in a total figure of €2,450,000.

151. It is necessary to provide for the diminution in the value of the euro which has occurred over a period of in excess of six years. If such allowance was not made it would result in the general damages awarded being appropriate for the year 2001 rather than the year 2007. The Plaintiff is entitled to an appropriate award of general damages as of October 2007. The protracted nature of these proceedings makes it all the more important that the Plaintiff should be compensated based upon present money values.

152. In the course of the written submissions the Defendant raised an argument in relation to mitigation. In the light of the findings hereinbefore made concerning the damage done to the Plaintiff's capacity to trade the court is satisfied that the issue of mitigation does not arise.

153. The court determines that the Plaintiff is entitled to an award of general damages in the sum of €2,450,000.