Neutral Citation Number [2007] IEHC 233

THE HIGH COURT

COMMERCIAL

[2007] No. 103 J.R.

BETWEEN

ATLANTEAN LIMITED

APPLICANT

AND

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

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 12th July, 2007.

1. Introduction

1.1 The applicant ("Atlantean") owns a motor fishing vessel of the same name. Atlantean has over the years benefited from a mackerel fishing quota. In circumstances which are at the heart of these proceedings the first named respondent ("the Minister") has made a number of decisions which have had the effect of reducing the mackerel fishing quota allocated to Atlantean. In these proceedings Atlantean seeks to challenge the relevant decisions of the Minister.

1.2 The background to the Minister's decision stems from the apparent discovery by the relevant authorities in Scotland of undeclared landings of mackerel. Those undeclared landings were brought to the attention of the relevant EU authorities. It would appear that it was contended that Irish boats had, amongst others, been involved in the relevant undeclared landings. As a result, and in purported reliance on the relevant EU legislative regime, the competent authority within the EU (the Commission) has imposed a reduction in the mackerel quota applicable to Ireland. That reduction was implemented by two separate Commission Regulations to which it will be necessary to refer to in due course. In these proceedings Atlantean seeks to challenge the validity of at least certain aspects of the overall quota reduction which Ireland has suffered. However the principal focus of the claim which Atlantean makes, as against the Minister, concerns the way in which the Minister responded to the reduction in Ireland's mackerel quota.

1.3 In October 2006 the Minister came to the view that the MFV Atlantean was responsible for a significant amount of the alleged undeclared landings in Scotland. The Minister further came to the view that the burden of the reduced quotas available to Ireland (resulting from such undeclared landings) should be borne by those boats, including the Atlantean, who had, in the Minister's view, been guilty of making the undeclared landings concerned. In those circumstances two separate decisions appear to have been taken. On 24th October, 2006 the Minister wrote to Atlantean informing its Managing Director that a decision had been taken not to grant any authorisation to the MFV Atlantean to fish for mackerel in the autumn fishery of 2006 ("the October decision"). On 24th January, 2007 the Minister granted the MFV Atlantean what would appear to be a reduced mackerel authorisation for the spring fishery 2007 which was stated to have been the subject of deductions to compensate for alleged over fishing in the years 2001/2004. That letter also indicated that further deductions would be made in the years 2008-2012 for the purposes of "compensating" for the same over fishing ("the January decision"). Against that general background it is necessary to turn to the issues in this case.

2. The Issues

2.1 In substance there are three sets of issues which I have to decide.

2.2 Firstly Atlantean claims that the manner in which the Minister came to the conclusion that Atlantean had been guilty of undeclared landings in Scotland was in breach of the principles of constitutional justice. In those circumstances Atlantean maintains that the Minister's decisions must be quashed. It should be noted that Atlantean does not complain about the principle adopted by the Minister to the effect that persons found responsible for undeclared landings, which result in a reduction in any relevant Irish fishing quota, should bear the burden of any such reductions. Indeed, having regard to the undoubted entitlements of all other fishermen with a legitimate interest in the distribution of the Irish quota, it is difficult to see how any other position could be adopted. It is not, therefore, in contest but that the Minister would have been entitled to impose the reductions concerned had he come to a sustainable conclusion that the Atlantean had been involved in unlawful landings. This issue is, therefore, solely concerned with the process which led to that ministerial conclusion.

2.3 Secondly certain technical arguments are raised concerning the reduction in the Irish quota by Commission Regulation (147/2007) and the timing of the Minister's January decision by reference to that Commission Regulation. It is contended that the reduction in quota imposed on Ireland by the Commission for all years other than 2006 is impermissible. This contention turns on the proper construction of the relevant EU legislation. In addition, under this heading, it will be necessary to deal with the Minister's argument to the effect that these proceedings are not the appropriate means of contesting the validity of the measures concerned. It is also contended that the January decision was ultra vires as it predated the relevant Commission Regulation.

2.4 Thirdly the Minister argues that Atlantean has become disentitled to any relief to which it might otherwise be entitled by virtue of delay. In order to properly analyse the delay issue it will be necessary to go into the principal contention of Atlantean in further detail to consider when it can properly be said that the relevant cause of action accrued. It is also said that the affidavit evidence put forward by Atlantean lacks candour and that this should also, as a matter of discretion, disentitle Atlantean to any relief.

2.5 It, therefore, seems appropriate to turn firstly to the question of the procedures adopted by the Minister in coming to the disputed conclusion. I propose starting with a more detailed consideration of the factual background.

2.6 I should also note that Atlantean claims damages in these proceedings. By agreement of the parties, however, any question as to damages has been left over until the issues which I have identified have been resolved.

3. Fair Procedures – The Facts

3.1 In 1983, for the purposes of the conservation and management of the Community fishery, the European Community established a total allowable catch ("TAC") for mackerel, of which Ireland was allocated 21.2%. As of 1994 the TAC allocated to Ireland was of the order of 99,000 tonnes. However due to depletion in stocks since that time the total TAC for Ireland has been reduced so that, by 2005, it stood at 45,849 tonnes. TAC is frequently referred to colloquially as quota. The quota initially proposed for Ireland for the year 2006 was 47,894 tonnes and that originally proposed for 2007 was 54,369 tonnes.

3.2 The Minister manages Ireland's quota and maintains that the allocation of authorisations to catch mackerel to individual vessel holders are simply a mechanism for the effective and fair management of the resource which is available to the State by virtue of the

TAC. Given the changes in the TAC available to Ireland, it has obviously followed that the authorisations given to individual vessel owners have varied (normally downwards) in recent years. It is not suggested that the existence of a particular level of authorisation to an individual vessel in one year, guarantees the continuance of that level of allocation thereafter. However it is suggested that vessel owners have, in practice, experienced consistency in the manner in which authorisations are given, so that the burden of any general reduction in Ireland's TAC is shared proportionately. While not perhaps, strictly speaking, an accurate term, the amount of the authorisation allocated to an individual vessel is also, frequently, referred to as a quota.

3.3 It would appear that the first intimation of illegal fishing relevant to these proceedings came to two Irish officials at the end of 2005. It would seem that a member of the permanent representation of Ireland to the European Union in Brussels informed officials of the Minister's Department of having been, in turn, informed by UK colleagues, of an ongoing investigation in Scotland and the potential involvement of Irish registered vessels in undeclared landings.

3.4 On 12th December, 2005 officials of the Minister's Department held a meeting with representatives of the Scottish Executive (being the relevant responsible body for Scotland) who indicated that raids had been carried out at a number of fish processing factories at Peterhead and Fraserburgh in Scotland. It would appear that a number of systems designed to hide the quantity of fish landed were described and the Irish representatives were informed by their Scottish colleagues of the intention of the Scottish authorities to carry out a full and detailed investigation of the matter. The Irish officials were also informed that their Scottish counterparts had kept the European Commission informed about the nature of their investigations.

3.5 The matter was the subject of discussions in February 2006 between the Minister and Commissioner Borg, who informed the Minister that, at a minimum, the over fishing in 2005 "would be required to be repaid in full". The position in respect of over fishing in earlier years was not the subject of as definitive an indication at that time, but it would appear that the Commission did not exclude the possibility that the amounts of any such over fishing would have to be recouped from Ireland's mackerel quota in full and within a relatively short period of time.

3.6 Thereafter, further contact ensued with the relevant Scottish authorities, who ultimately provided the Minister with details of what were said to have been the unauthorised landings by Irish vessels. Two separate schedules were produced to the Irish authorities insofar as the allegations were said to be referable to the Atlantean. One schedule represented what were said to be the under declarations of mackerel landings in the period 2001 to 2004 while the second related to the year 2005. In each case a specific date is given for each alleged landing together with a so called ICES area (which represents a broad indication of the area of fishing) and a very detailed account of the amount of tonnes allegedly involved. For the 2005 schedule the fish processor involved is also given.

3.7 At the same time negotiations continued at European level for the purposes of determining the precise extent to which Ireland might have to make recompense for the over fishing alleged. By Regulation (EC) No. 742/2006 of the 17th May, 2006 the Commission adopted certain fish quotas for 2006 in a manner which had the consequence of reducing Ireland's mackerel quota for that year by 6,578 tonnes. That reduction was to take account of the quantity of undeclared landings alleged in relation to 2005 as had been reported to the Commission by the Scottish authorities. Further negotiations took place as to the precise extent to which Ireland might have to "repay" the apparent 33,500 tonnes that had been over fished during 2001 – 2004.

3.8 It was, however, necessary to deal with the existing reduction for 2006 in a more immediate way. In anticipation of the possibility of difficulties arising during 2006, the Minister had not allocated the entirety of the Irish quota for that year. In many years the Minister had allocated the Irish quota in two trenches, one for the spring fishery and one for the autumn. Mackerel fishing takes place during separate spring and autumn seasons. In substance the spring season of 2006 had already taken place by the time of the imposed cut in Ireland's quota. The entirety of the reduction, therefore, for 2006, had to be recouped in the autumn fishing season. The Minister proposed to take a decision based on making deductions from the quotas allocated to those vessels which had, allegedly, been involved in the relevant undeclared landings in Scotland.

3.9 So far as Atlantean was concerned, that process commenced with a letter of 4th October 2006, which referred to the volume of undeclared mackerel landings reported by the United Kingdom, setting out a breakdown by date and amount in the form which I have already indicated. In particular it was stated, on behalf of the Minister, that the Minister proposed to withdraw the mackerel authorisation for Atlantean for the remainder of 2006 on the basis that the amount of the reported undeclared landings in 2005 exceeded the amount which would otherwise have been available for allocation to Atlantean for the reminder of 2006. On that basis it was also suggested that further deductions (to make up the difference) would be required for 2007. The Minister also drew attention to the reports from the United Kingdom of significant undeclared landings for 2001 – 2004 and noted that it was the Minister's policy that the offender must take responsibility. It is clear, therefore, that the Minister proposed applying the same policy of "offender pays" to any deductions which would be required to be made from the overall Irish quota as a result of the 2001 – 2004 undeclared landings. It was not, as of that time, clear as to the precise extent to which the Commission would impose such reductions and over what time scale same would be implemented. The letter does not, therefore, propose a specific level of reduction for Atlantean in relation to the alleged 2001 – 2004 under declarations. In reply, by letter dated 17th October, 2006, the Managing Director of Atlantean made a number of generalised complaints but also indicated that Atlantean should "at least have had the opportunity of knowing what was being alleged against us". Atlantean also sought sight of documents detailing the basis of the allegations.

3.10 Thereafter, on 24th October, the Minister confirmed a decision along the lines previously indicated. Subsequently solicitors on behalf of Atlantean wrote, on 20th December, 2006, a letter which, it has to be said, is expressed in somewhat colourful terms indicating, amongst other things, that the behaviour of the Minister's Department "would decorate the actions of the great Mogul Hordes". On a more substantive basis complaint is made (which is really at the heart of the issues which have arisen), concerning the fact that, it was alleged, Atlantean had been given no real opportunity to meet the case made against it because, it was said, that case had not been put to Atlantean. I set out certain passages from Atlantean's initial response and comment further on this exchange of correspondence at par. 4.17 below.

3.11 The negotiations concerning the consequences of over fishing from 2001 to 2004 finally came to an end when the Commission adopted certain arrangements on 15th February, 2007, which amounted to a reduction in Ireland's mackerel quota by an amount equivalent to approximately 70% of the total amount of the undeclared landings reported by the United Kingdom authorities, which reduction was to be implemented over a period of six years. However the meat of the decision had, in fact, been agreed at a meeting on 23rd January, 2007 and in an anticipation of the Commission adopting what had been agreed on that date, a further letter was sent to Atlantean indicating that it would have to bear its appropriate share of the reductions which were to be imposed on Ireland, proportionate to the amount of undeclared landings reported by the Scottish authorities as being referable to Atlantean.

It is as against that background that the legal issues in this case arise.

4. Fair Procedures – The Law

4.1 The legal issue under this heading is, in reality, quite net. It is not contested but that the Minister would have been entitled to take the actions which he did on the assumption that Ireland had a reduced quota (and that question is, to some extent, contested under the next issue which I have to address) and provided that the Minister had come to a proper conclusion that Atlantean was involved in undeclared landings. There is no doubt but that the Minister's decision that Atlantean was responsible for undeclared landings was a decision which has had, and will have, a very significant effect on Atlantean's business and was, therefore, the type of decision where the Minister was obliged to comply with the rules of constitutional justice. The real issue concerns the manner in which the requirements of constitutional justice should be met in a case such as this.

4.2 There is no dispute as to the information supplied, in advance of any decision, to Atlantean. The relevant schedules were supplied which set out the reported undeclared landings supplied to the Minister and his officials by the Scottish authorities. Those schedules would have made clear to Atlantean the dates and amounts, in considerable detail, of the alleged undeclared landings. It seems that those allegations should be seen in the context of the fact that all properly declared landings are recorded in a manner which would enable the Minister and, indeed, Atlantean, to have access to the official records of such landings. It is by no means clear on the evidence before me as to the extent to which there may have been declared landings made by Atlantean on the days in question. It is, quite frankly, surprising that this information has not been put before the court by either side in that it would seem to have been available to both parties. It is not, therefore, clear as to whether the substance of the allegations being made were that Atlantean, on the one hand, had made landings on an occasion when no landings were declared or, on the other hand, made landings in excess of the amounts declared on the relevant occasion. On the evidence it seems clear that both the Minister and Atlantean would have been aware, in respect of each incidence, as to which form of allegation was being made.

4.3 Be that as it may, it is also clear that no additional information was furnished to Atlantean to substantiate the allegations or, indeed, to put forward any other basis for the allegations save that the schedules represented the particulars reported to the Irish authorities by their Scottish counterparts. It is also clear that Atlantean complained about not having been told the case which it had to answer although it did not, specifically, seek any particular details. Against that background the precise nature of the Minister's obligation, in order that he might be said to have complied with the principles of constitutional justice, needs to be addressed.

4.4 That any party who is entitled to the benefit of procedures complying with the rules of constitutional justice is entitled to know the case against him cannot be doubted. However it is also well settled that the precise application of the rules of constitutional justice depends on all the circumstances of the case under consideration. In that context the Minister places particular reliance on *Mooney v. An Post* [1998] 4 I.R. 288. While Mooney was concerned with a purported dismissal from employment, the general principles are, in my view, also applicable to a case such as that with which I am concerned.

4.5 Barrington J. (speaking for the court) indicated the following general approach:-

> "The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with all the circumstances of the case. Indeed two of the best known precepts of natural and constitutional justice may not be applicable at all in certain cases. As the learned trial judge has pointed out the principle of *nemo judex* in *sua causa* seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply, to a contract of employment, the principle of *audi alteram partem* which implies the existence of an independent judge who listens first to one side and then to the other."

4.6 Barrington J. went on to note that it was certain that "the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and circumstances surrounding his proposed dismissal. The minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and make submissions".

4.7 The court went on to consider the specific circumstances of the case before it. The plaintiff was a postman which the court found involved a position of trust. It is also clear that An Post had received complaints which caused it to have misgivings about the integrity of the postal service arising from alleged conduct on the part of the plaintiff. In those circumstances Barrington J. went on to hold that:-

> "It appears to me that the defendant was entitled to expect a candid response from the plaintiff when they put these misgivings to him and that it was not sufficient for the plaintiff simply to deny responsibility and to say that he could not "remember back to yesterday week"".

4.8 This latter paragraph has to be seen against the background of the fact that An Post had available to it statements from a number of witnesses describing suspicious behaviour on the part of the plaintiff. The quoted response of the plaintiff related to circumstances where he had been given details of the suspicions aroused and the statements which gave rise to those suspicions. Barrington J. went on to note that the plaintiff, by his action, had raised no issue of fact which needed to be referred to a civil tribunal. In substance the court held that the plaintiff was not entitled to say "I am not guilty. You prove it".

4.9 The first issue of principle which arises is as to whether that jurisprudence, which of course stems from the employment law field, is applicable to a regime such as fishing authorisations with which I am concerned. I am satisfied that it is. The whole purpose behind the EU quota system is to preserve fish stocks generally and to ensure an equitable distribution of the entitlement to fish. Within the Irish quota, ministerial authorisations are, clearly, designed to the same end. Any fishing boat which receives an authorisation has, therefore, a degree of trust imposed on it, that it will comply with its obligations under the regime as a whole and will not, in particular, engage in undeclared landings. I am satisfied, therefore, that as a matter of principle, a party, should as the Atlantean, is in a similar position to an employee in an office of trust and is not entitled to simply sit back and, in the words of Barrington J. say "I am not guilty. You prove it."

4.10 However counsel for Atlantean did not seriously contest the general application of that principle to cases such as that with which I am concerned. He did, however, seek to draw a significant distinction between the factual circumstances that existed in *Mooney,* on the one hand, and in this case, on the other hand. Reliance was placed on the fact that the plaintiff in *Mooney* had been furnished with the basis for his employers misgivings. He was told about the statements made by various interested observers which, on the face of it, could readily have given rise to an inference of wrongdoing. It was on that basis that the Supreme Court was satisfied that it was not open to the plaintiff to adopt a position which might have been entirely acceptable in a criminal process of requiring the case against him to be proven.

4.11 However the situation in this case, in my view, different. Despite being asked what the case against Atlantean was, the Minister did no more than to specify the reports which he had received from the Scottish authorities. Despite being asked for the various reports, same were not furnished save for the schedules which I have noted. No basis was given for the conclusions which the

Scottish authorities had reached. Indeed what is more surprising is that there is no evidence that any attempt was made to obtain from the Scottish authorities any further information as to the basis upon which those authorities had reached the conclusions which were incorporated into the reports sent to the Minister's officials. I am prepared, for the sake of the argument in this case, to accept that it may well be necessary to give some latitude to the competent authorities in Ireland when faced with a situation similar to that with which the Minister was faced in this case. Subject to the issue to which I will shortly turn concerning the validity of the imposition of quota reductions by the Commission, the Minister was faced with the fact of a reduction in quota. The only matter within the discretion of the Minister was how to deal with that reduction. The Minister was more than entitled to seek to protect those boats who had not, apparently, been responsible for the circumstances giving rise to the reduction, from having to bear any of the burden for that reduction. In those circumstances I am more than satisfied that the Minister was entitled to seek to impose the burden of the reductions on the offenders. In such circumstances a person, in the position of the Minister, charged with implementing an EU regime, may, in substance be required to act on reports received from other competent authorities within the Union. It may well, in those circumstances, be necessary for the courts to pay due regard to the Minister's general obligations in considering the extent to which the Minister may have to comply with all of the requirements of constitutional justice on the facts of any individual case.

4.12 However, it seems to me that any latitude that might require to be given to a competent authority in Ireland, faced with such a situation, is dependent on that authority being able to establish that it had made reasonable efforts to provide as much information and evidence as could be provided, so as to enable the potentially affected party to have a reasonable opportunity to answer the case against him. In those circumstances it seems to me that it was, at a minimum, incumbent on the Minister to at least seek from the Scottish authorities, the basis upon which they had reached the conclusions reported to Irish officials. It is not apparent to me that there should have been any difficulty in the Minister seeking and obtaining such information. The fact that the Scottish authorities were able to produce such detailed accounts of the specific amounts of alleged landings suggests that there must have been some form of records discovered by the Scottish authorities to enable them to carry out those calculations. It is difficult to see why copies of the relevant records, or at least a description of the nature of those records, could not have been obtained and supplied to Atlantean.

4.13 Without any information as to the basis upon which the Scottish authorities had formed the view that Atlantean was guilty of unlawful landings, then it seems to me that it was virtually impossible for Atlantean to answer the allegations. It would, in my view, be more apposite to describe what happened in this case as involving the Minister saying "the Scots tell me you're guilty. Prove you are innocent" rather than Atlantean saying "I'm not guilty. You prove it".

4.14 It may well be that if the Minister had provided Atlantean with an appropriate statement as to the basis upon which the Scottish authorities came to their conclusions the ball would, in the same manner as it did in *Mooney*, have passed into Atlantean's court and Atlantean would have been obliged, if it wished to contest the matter, to put forward its case in some detail. If, for example, it was apparent that in one of the raids described to Irish officials, the Scottish authorities had obtained apparently valid records, suggesting that Atlantean had been guilty of undeclared landings (and preferably if copies of such records could have been made available) then it would have been more than reasonable to expect Atlantean to put forward whatever explanation it wished as to why those records should not be accepted as being accurate. The Minister could then have adjudicated on whatever issues had been raised.

4.15 However the question of there being such records is purely a matter of speculation on my part deriving from the fact that there seemed to have been very detailed knowledge as to the amounts of the undeclared landings. It could well be that the basis for the conclusions reached by the Scottish officials were entirely different, and for, example, dependent on accounts given by witnesses or persons involved in the undeclared landings themselves. I simply do not know. More importantly Atlantean did not, at the time of the decision, know. Atlantean did not, in my view, have a reasonable opportunity, in all the circumstances, to know the case against it. While Atlantean would have been under an obligation, analogous to that identified by the Supreme Court in *Mooney*, to make a candid statement, it is difficult to see what statement could have been made unless Atlantean was told of the basis for the allegation against it. While it is fair to describe the position adopted by Atlantean as a bare denial it is equally fair to describe the position adopted by the Minister as being little more than a bare accusation. It is hard to expect a bare accusation to be met by anything more detailed than a bare denial.

4.16 There is one aspect of this matter which has, I must say, caused me some misgivings. In its initial response to the Minister's letter of 4th October, 2006 Atlantean sought various details of the accusations made against it. On p. 2 of its letter of the 17th October, 2006 it said the following:-

> "In your letter, you state that the UK authorities reported to the EU Commission on undeclared landings of mackerel into Scotland by Irish registered fishing boats. You go on to say that the UK has also advised the Minister of a number of undeclared landings by certain Irish fishing vessels in 2005. Are we therefore to take it that there has been two separate complaints made to the Irish Government with two separate sets of information being supplied? May we see and have a copy of the UK authorities report to the EU Commission? And the opportunity to respond to that report? May we see and have a copy of the United Kingdom's advise to the Minister on the alleged undeclared mackerel landings by Irish fishing vessels in 2005? And have the opportunity to respond to such advice?"

4.17 The Minister's letter of reply (24th October, 2006) did not respond to that request at all, but confined itself to complaining that Atlantean had not responded to the allegations. I find it difficult to see why at least some of the requests made by Atlantean were not, at least, responded to.

4.18 On the other side it does have to be said that the contents of Atlantean's solicitors follow up letter of 20th December are also less than helpful insofar as this issue is concerned. It does, in fairness, set out in some detail the argument, which was ultimately advanced before me, concerning the entitlement of the Commission to reduce the Irish quota. However insofar as the argument concerning the procedures followed by the Minister is concerned, the letter could be described as more closely resembling a polemic rather than a legal argument even though, on a careful reading, it does raise some of the points now relied upon.

It does have to be said that a more focused engagement by both sides, on the issues concerning the appropriate process, might have avoided the necessity for these proceedings.

4.19 In all the circumstances I am satisfied that the Minister was in breach of the principles of constitutional justice by failing to afford Atlantean some reasonable opportunity to know the basis of the allegations against it, so as to pass the burden on to Atlantean to make a more detailed response. In those circumstances I propose to deal with the other issues which arise in this case before turning to the overall consequences of the finding which I have just made. I, therefore, propose turning, firstly, to the issues which are raised relating to the validity of the Commission's reduction in the Irish quota and the timing of the Minister's January decision.

5. The Irish Quota Reduction

5.1 A number of technical arguments are raised on the part of Atlantean in relation to the quota reductions generally. I propose dealing initially with the timing of the Minister's January decision.

5.2 Atlantean claims that that decision derives from Commission Regulation (EC) 147/2007 of the 14th February, 2007 and is invalid because the relevant Regulation was not in force at the time when the relevant decision was made. In that context it is necessary to analyse the nature of the Minister's decision.

5.2 The Minister has an obligation to manage Ireland's quota in an appropriate fashion. There is no absolute entitlement on the part of any fishing boat to the continuance of any particular level of quota. There may well be an entitlement, in the nature of a legitimate expectation, that the Minister, in allocating Ireland's overall quota, will approach the division of the national quota into allocations for individual boats, in a fair and appropriate manner. By the time that the Minister made his decision on the 24th January, 2007, it was clear to the Minister that it was almost certain that Ireland's quota for the year 2007 was going to be reduced in the manner which had already been agreed with the Commission on the previous day. It does not seem to me to be the case that the Minister needed there to be in existence an appropriate Commission regulation in order that the Minister could make a decision in relation to the allocation of quota.

5.3 The Minister's authority to make allocations of quota to individual boats stems from the Minister's entitlement, under the provisions of the Sea Fisheries and Maritime Jurisdiction Act, 2006 to authorise owners of vessels to fish for a quantity of mackerel for a specified period of time. In view of the fact that the overall level of quota likely to be allocated, in the end, to Ireland, for 2007, was, to say the least, open to very considerable doubt, then it would have been wholly irresponsible for the Minister to have fully allocated quota in the knowledge that some of that quota would, as a matter of near certainty, have to be clawed back in very early course. It would, of course, have been open to the Minister to allocate additional quota to Atlantean in the unlikely event that the Commission had a change of heart and introduced a more benign regime so far as Ireland was concerned.

5.4 This is not a case where the Minister has to place reliance on the Regulations for his decision. If it was such a case then it might well have been inappropriate for the Minister to make a decision until the enabling Regulations were in place. This is, in fact, a case where the Minister was faced with managing the national quota in all the circumstances of the case. One of those circumstances was the near certainty that the national quota was going to be reduced by Commission Regulation in early course by a known amount. In those circumstances, I am more than satisfied that the Minister was entitled to take that fact into account in allocating quota and was, therefore, in principle, entitled to calculate the quota which he allocated to individual vessels in a manner which had proper regard to the actions of individual vessels which were the subject of a sustainable finding of having made undeclared landings.

5.5 The second argument put forward by Atlantean places reliance on Article 5(1) of Council Regulation (EC) No. 874/1996. That Regulation, in its terms, provides that deductions in respect of alleged undeclared landings should only be made in the next following year. It is, therefore, submitted that, while it was open to the Commission to make reductions in 2006 referable to undeclared landings in 2005, it was not, it is said, open to the Commission to carry forward any proposed deductions to the year 2007 or to any later year and that undeclared landings prior to 2005 could not be the subject of any deductions at all as, it is said, it is now too late to make same.

5.6 It does not seem to me to be appropriate for this court, at this stage, to enter into a consideration of the issue raised. The Commission Regulation has been adopted by the Commission. The only courts which have competence to determine, as a matter of EU law, the validity of a measure of a community institution, are the EU courts themselves. It is not, therefore, open to this court to declare the Commission Regulations invalid.

5.7 It seems to me that it follows that it is not open to this court to reach any conclusion which would amount to a collateral determination that the Commission Regulation concerned is invalid. There is no relief which Atlantean can obtain from this court which can increase the overall size of the Irish quota. If there is any validity to Atlantean's point as to the proper construction of the regulations (and I should note that detailed argument was addressed on behalf of the Minister which suggests that a subsequent Council Regulation (No. 2371/2002) authorises the Commission's actions) then that argument can only benefit Atlantean if the Commission Regulation is struck down, thus increasing Ireland's quota and, thus, Atlantean's opportunity to benefit from that increased quota. Any order which this court could make, which would benefit Atlantean, therefore, would necessarily presuppose the invalidity of the Commission's regulations.

5.8 I am informed that Atlantean has commenced the appropriate proceedings before the courts of the European Union to seek to have the relevant Commission regulation declared invalid. Such proceedings are the appropriate means for addressing the issue and it does not seem to me that this issue can properly be said to arise in these proceedings. To deal with it in these proceedings would amount to permitting Atlantean to mount a collateral attack on the Regulations in domestic proceedings. If Atlantean succeeds before the EU courts, I should assume that the Minister will deal properly with any additional quota arising. Equally any question of damages would be, at least at the level of principle, a matter for the EU courts.

6. Delay

6.1 The jurisprudence of the courts concerning delay in initiating judicial review proceedings is now well settled. See for example *De Roiste v. Minister for Defence* [2001] 1 I.R. 190; *O'Brien v. Moriarty* [2005] 2 ILRM 321 and *B.T.F. v. D.P.P.* [2005] 2 ILRM 367. The facts are these. Leave to seek judicial review was obtained from this court (Peart J.) on 5th February, 2007. The initial decision of the Minster would appear to have been made on 24th October, 2006 and thus, in respect of that decision, there was a delay of approximately three and a half months. However, it is clear that, insofar as Atlantean may be entitled to any relief in relation to the Minister's October decision, such relief is now confined, in practice, to a claim for damages. By definition no more fishing can take place in the 2006 season. Atlantean cannot get any extra quota for that season. If it is entitled to any relief, other than declaratory or other relief of no practical effect, in respect of the decision taken in October 2006, then it can only be an award of damages. As pointed out earlier, any question of damages has been left over until a later hearing.

6.2 I emphasise this latter point because it seems to me that, in those circumstances, no significant prejudice has been caused by the delay in relation to the October decision. Even had the proceedings been commenced by mid November, it is almost inconceivable that they would have been completed to the point of a decision within the calendar year. There was never, therefore, any reality in Atlantean receiving additional quota for 2006 and there was never, therefore, any practical basis upon which Atlantean could succeed in obtaining any significant benefit arising out of the quashing of the October decision other than in relation to damages.

6.3 In those circumstances I am not satisfied that it would be appropriate to shut Atlantean out from a claim in respect of damages by reason of a delay of three and a half months.

6.4 So far as the January decision is concerned there was not, of course, any significant delay at all in the initiation of proceedings. However the Minister draws attention to the fact that the January decision was, in substance, the same as the October decision even though it related to a different time period. While that contention is true, as far as it goes, it also, it seems to me, needs to be noted that the effects of the January decision were much more far reaching as far as Atlantean was concerned. There is also, contrary to the situation that I have just analysed in respect of the consequences of the October 2006 decision, a real prospect of Atlantean obtaining additional quota. In all the circumstances it does not seem to me to be appropriate to characterise the two decisions as being in substance the same to a sufficient degree so as to prevent time running afresh when the January decision was taken. In those circumstances it does not seem to me that there was any significant delay in commencing the proceedings relating to the January decision.

In all the circumstances of the case I am not, therefore, satisfied that Atlantean is disentitled to any relief to which it might otherwise be entitled, on the basis of delay.

7. Lack of Candour

7.1 Finally I should deal with a contention made on the part of the Minister that Atlantean was guilty of lack of candour in the evidence which it placed before the court. On a close reading of the affidavits it is suggested that Atlantean has not, properly, put on oath, a denial of the allegations of unlawful landings. While there is a very technical sense in which this may be true, I am not satisfied that it amounts to anything more than a technical omission and it does not, in my view, form any basis for exercising a discretion against granting relief to which Atlantean would otherwise be entitled.

8. Conclusions and Relief

8.1 For the reasons which I have set out I am, therefore, satisfied that the Minister's decisions must be quashed. However the entitlements of many parties (most particularly those fishing vessels against whom no allegation of undeclared landings have been made) are involved. In those circumstances it does not appear to me that it would be appropriate to place any barrier in the way of the Minister coming to a sustainable decision concerning the undeclared landings alleged in relation to Atlantean. The Minister is, therefore, entitled to seek to raise again this issue provided that, in so doing, he complies with the principles of constitutional justice in the manner which I have identified earlier in the course of this judgment.

8.2 In those circumstances I propose quashing both the Minister's decision of October 2006 and of January 2007. I should not be prescriptive as to whether the Minister should embark on what would amount to a reconsideration of the issues dealt with in those decisions. Less still should I imply what the result of any such reconsideration should be. It does, however, seem to me, to me that any question of damages must necessarily have to await a final determination by the Minister of Atlantean's quotas entitlements. In those circumstances it seems to me to be appropriate to adjourn the question of damages generally with liberty to either side to re-enter.