**THE HIGH COURT**

**CHANCERY**

**[2012 No. 9535 P.]**

**BETWEEN**

**JOSE MONTEIRO DA SILVA, NUNO PEDRO GONCALVES LOPES, DAVID SARAIVA MATIAS, ANTONIO BARBOSA MOREIRA, JOSE FRANCISCO OLIVEIRA DA SILVA, JORGE DA SILVA LUIS, JOSE TEIXEIRA GONCALVES, ANTONIO JORGE OLIVEIRA BESSA, FRANCISCO DA COSTA FERREIRA and JOSE LUIS FREITAS LIMA**

**PLAINTIFFS**

**[2012 No. 9537 P.]**

**CARLOS MANUEL MIRANDA, ALFREDO MARTINS RODRIGUES FERNANDES, VICTOR MANUEL MARQUES DE OLIVEIRA, MARIA PIEDOSA RIBEIRO CARDOSA GASTALHO, FRANCISCO PEREIRA MARTINS, JOSE MARIA COELHO BARBOSA and CARLOS JOSE LONGA**

**PLAINTIFFS**

**[2012 No. 9538 P.]**

**ARMANDO AGOSTINHO ALVES DA SILVA, ALVARO ABILIO QUEIROS COELHO, HELDER FIGUEIREDO, MARIO AUGUSTO RAMALHO GASTALHO, SAMUEL FILIPE DA SILVA OLIVEIRA, JOSE ANTONIO FONSECA RIBEIRO, ALBERTO BESSA LEITE, LUIS RODRIGUES DIAS MOURATO, JOSE DUARTE MAGALHAES and JOSE MARIA MARTINS VELOSO**

**PLAINTIFFS**

**[2013 No. 12219 P.]**

**CARLOS MANUEL OLIVEIRA MATOS, CARLOS ALBERTO OLIVEIRA MATOS, RUI MIGUEL DOS REIS SERPA CORTE REAL, MANUEL JOAQUIM ALVES MACHADO FERREIRA, HELDER FILIPE BARBOSA GONCALVES, JORGE ALEXANDRE UMBELINO, AGOSTINHO DA SILVA SAMPAIO, JOSE ALFREDO QUINTANS MAGALHAES and VITOR MANUEL CARDOSA ALMEIDA**

**PLAINTIFFS**

**[2014 No. 2244 P.]**

**JOSE MANUEL RIBEIRO ALMEIDA, CARLOS MANUEL MONTEIRO, ALBERTO DA CRUZ COELHO, MANUEL ALBERTO PEREIRA DUARTE, JOAO PAULO RODRIGUES LEMOS, SERGIO ANTONIO CARVALHO, JOAO FILIPE OLIVEIRA GONCALVES and VITOR MANUEL FORMOSO PEREIRA**

**PLAINTIFFS**

**[2014 No. 3319 P.]**

**RAMIRO ABRANTES DO CARMO, MANUEL SEBASTIAO BRAS DE OLIVEIRA and JOSE FERNANDO MAGALHAES DA SILVA**

**PLAINTIFFS**

**[2014 No. 9212 P.]**

**ANTONIO GERMANO ALVES GUEDES MONTEIRO, ANTONIO GUEDES MONTEIRO and ARTUR JOAO ALONSO MOREIRA**

**PLAINTIFFS**

**AND**

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP, CONSTRUCOES GABRIEL AS COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP and EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE PARTNERSHIP**

**DEFENDANTS**

**JUDGMENT of the Hon. Ms. Justice Stewart delivered on the 18th day of December, 2018.**

1. The above entitled matters are linked sets of proceedings, the first three of which were previously heard and determined in the High Court by Keane J. on 18th March, 2016 ([2016] IEHC 152). His decision was mostly affirmed in the Court of Appeal on 4th October, 2017, in a judgment delivered by Hogan J. ([2017] IECA 252). In those cases, the question of general damages for inconvenience, distress and upset was remitted to the High Court for assessment only. These matter will be referred to hereafter as the "old cases". The four remaining entitled matters were heard in their entirety before this Court (hereafter referred to as the "new cases"). At hearing, the evidence between the old cases and new cases was interspersed. The evidence received by the Court will be set out in summary hereafter and this judgment then itemises the periods for which damages are recoverable.

**Background**

2. The plaintiffs are Portuguese nationals. With one exception, they were all construction workers with varying degrees of skill, ranging from general labourers to machine operators. Maria Piedosa Ribeiro Cardosa Gastalho (the fourth-named plaintiff in the second set of proceedings) was married to Mario Agusto Ramalho Gastalho (the fourth-named plaintiff in the third set of proceedings) up until his death. She was employed by the defendants as a cleaner.

3. The defendants are three Portuguese companies that traded in Ireland as a partnership called RAC Eire, which had its registered office at Mill House, Henry Street, Limerick. RAC Eire traded in the State as a contractor and/or sub-contractor to a consortium known as Bothar Hibernian, itself comprised of three companies, namely Mota-Engil (Portugal) Ltd., Michael McNamara & Co. Ltd. and Coffey Construction Ltd. In November, 2006, Limerick County Council awarded Bothar Hibernian the public works contract to design and build the N7 Nenagh-Limerick High Quality Dual Carriageway. The plaintiffs were hired by the defendants and came to Ireland to work on this project. Each plaintiff was employed for different periods of time between 2007 and 2009. Each had a written contract

with the defendants. Most of the plaintiffs do not speak English. Their contracts were written in English and were not translated for them. Most of the plaintiffs signed their contracts in the airport, before they flew to this country.

4. The background to the plaintiffs' employment by the defendants in this jurisdiction was set out with great detail in the judgment of my colleague, Keane J., who delivered his decision on 18th March, 2016. I gratefully adopt that outline for the purposes of this judgment. In summary, it appears that, following a complaint to the National Employment Rights Authority ("NERA"), a number of inspections were carried out by NERA at the plaintiffs' work site. As a result of those inspections, the defendants were deemed to be in breach of numerous employment regulations, including the Organisation of Working Time Act 1997. The defendants' official work sheets indicated that a working day of 8AM-6PM was in operation. In reality, a majority of the workers worked hours far in excess of that. They also worked for periods during the weekend. The companies were subsequently convicted on three counts by the District Court sitting in Nenagh. Two of those convictions were upheld on appeal. The third was set aside because the company representative who attended court was not named on the company registration paperwork for one of the defendant companies.

5. The workers i.e. the plaintiffs, were accommodated in a type of compound accommodation, which was effectively a construction of prefabricated buildings that were joined together. This residential site was located near the N7 work site. Numerous plaintiffs gave evidence that they were forbidden to live anywhere other than the compound. Some even suggested that they had been threatened with the termination of their employment if they attempted to leave. Others said that it had been indicated to them that the deductions applied to their salary for this accommodation would continue, regardless of whether they resided in the compound or not.

6. The Court was provided with an expert engineer's report from a Mr. Ronald Greene, which describes the working and living conditions that the plaintiffs endured in this compound. Mr. Greene also gave oral evidence at the hearing. In their own oral evidence, the plaintiffs corroborated Mr. Greene's findings.

7. There were three to five people residing in spaces that would have served as relatively modest bedrooms if they had been inhabited by one person. Conditions were extremely cramped, with little to no storage space for clothes or personal items and minimal space between the camp style beds that were provided. The layout of the compound was also described by Mr. Greene as a significant fire hazard. Having made the relevant inquiries with Tipperary County Council, Mr. Greene stated that no planning application, environmental assessment or waste discharge licence had been secured for the compound. There was a single communal living/dining area. It was equipped with a completely inadequate set of plastic garden furniture. There was a counter-top kitchen area attached. The cooking facilities provided extended to a microwave and a kettle, but little else. No drinking water was provided. There was a canteen at the work site, which provided a meal during the working week, but no provision was made outside working hours. It is worth bearing in mind that, as far as the companies were concerned, no weekend overtime ever took place, so food would not have been provided during that time. Some plaintiffs purchased portable grills, which they used to feed themselves. They cooked food either in their bedrooms or outside near the laundry facility, in a completely unsafe and unsanitary situation.

8. To further exacerbate matters, the washing facilities provided by the defendants were unfit for any living thing, least of all human beings. The sewerage and drainage systems were completely unusable. Not only did waste water not drain properly from the facilities but, due to the manner in which the compound was constructed, sewerage often overflowed from the septic tanks. The condition of these tanks, along with the defendants' obstinate failure to dispose of the compound's rubbish in a timely fashion, contributed significantly to the strong odour and vermin infestation that plagued the compound and its residents. As the tank overflowed, it would mix with copious diesel run-off from the portable generator that provided electricity to the compound (this same generator was extremely noisy and was located near the plaintiffs' living quarters, thereby rendering restful sleep an impossibility). This mixture would then enter the local river. From there, the river water would be recouped by the compound's water system for the plaintiffs to shower in again. This water was often cold, as the hot water would run out after a handful of uses. Numerous plaintiffs described the water as "yellow" and pungent.

9. In summary, through their feeble attempt to provide washing facilities for dozens of working people, a situation was manufactured wherein human beings were expected to shower in cold, dirty water that had been mixed with diesel and their own sewerage. As the drainage system continued to malfunction, the waste water would pool and several plaintiffs described placing concrete blocks in the bottom of the showers to avoid standing in the foul run-off water. It can come as no surprise that multiple plaintiffs described staining and irritations to the skin, eyes and ears as a result of living in these conditions. A witness by the name of Carlos Manuel Da Costa Silva, who lived in the compound but is not a plaintiff in the new or old cases currently before this Court, described his skin as shedding due to the poor water quality. When he produced a doctor's note to a representative for the defendants, the representative tore up the note in front of him. Some plaintiffs stated that they remain afflicted with their conditions to this day and they showed those afflictions to the Court during the hearing. Jose Maria Coelho Barbosa (the sixth-named plaintiff in the second set of proceedings) explained that he had required hospitalisation and time off work from the N7 project, such was the degree of his illness. He also stated that the defendants made further deductions to his pay for that period of hospitalisation. In summarising his evidence, Mr. Greene stated that prison facilities would have been of a superior standard compared to the conditions in the compound. Based on the evidence adduced before me, that would be an accurate observation to make. The workers made multiple complaints to the defendants about these living and working conditions, which were never addressed in any substantive way.

10. To compound matters even further, the defendants made what can only be described as extortionate deductions from the workers' wages. This money supposedly went towards food that was often insufficient to properly feed the workers and accommodation that was unfit for purpose. Deductions were also made for laundering the plaintiffs' clothes. The plaintiffs' contracts required that such deductions be calculated based on the weight of clothing laundered. Based on the evidence adduced before this Court, it would seem that the clothes were never weighed by the defendants. Instead, the defendants subtracted arbitrary, unsubstantiated and unjustified amounts from the plaintiffs' wages.

11. A lot of the plaintiffs also had deductions taken from their wages for the supposed provision of motor vehicles for their personal use. Although some transport was arranged in a type of minibus from the compound to the work site each day, this was not a vehicle that was for the personal or individual use of the plaintiffs. Based on the evidence adduced before this Court, it seems clear that personal vehicles were never provided. A number of the plaintiffs did not even have driving licences at the relevant time. These entirely unwarranted deductions took the form of "benefit in kind" (BIK). The Court heard evidence from Fran Power and Kathryna Clifford, former employees of NERA, who investigated the goings-on at the work site and produced a report of their findings. Mr. Power and Ms. Clifford were unequivocal in their view that the services provided by the defendants, such as they were, did not even approach the required form that would justify a BIK deduction, never mind a BIK deduction of the magnitude imposed on the plaintiffs.

12. The plaintiffs all commenced their employment with the defendants at different times. Some were fired or quit the project when conditions became too much to bear. Any of the plaintiffs who remained with the defendants were all fired when RAC's involvement in the N7 project was terminated towards the end of 2008. Some of the plaintiffs were re-hired by the company that took over the project. Those that did continue working on the project described working and living conditions of a far superior standard from that

point forward.

13. Keane J. previously found that the events outlined above occurred and his findings were not disturbed by Hogan J. on appeal. This Court accepts those findings without hesitation and agrees with them. The matter is res judicata in respect of those cases. In respect of the new cases, the evidence adduced before me wholly supports and vindicates the findings of fact made by Keane J. I see no reason to depart from them. Keane J. had also found that the plaintiffs were entitled to be reimbursed for the deductions made for accommodation. The Court of Appeal overturned that finding. In their view, some measure of accommodation had been provided to the plaintiffs, which meant that the failure of consideration had not been total. Without that total failure, the plaintiffs were not entitled to full reimbursement. However, they also found that this was a case where the plaintiffs would qualify for general damages under contract arising out of physical inconvenience and mental distress. The proceedings were remitted to this Court for an assessment of damages under that heading. The question of general damages also arises in the new cases, which come before this Court for a full determination at first instance.

14. The plaintiffs' heads of claim comprise of the following: a claim for the underpayment of wages based on the actual hours worked, a claim for the laundry deductions made in breach of contract, a claim for the return of the monies deducted as a BIK and a claim to general damages under contract for physical inconvenience and mental distress brought about by the poor standard of accommodation. A further claim is made on these amounts for interest under s. 22 of the Courts Act 1981, as well as a claim for aggravated damages. With regard to the plaintiffs in the old cases, their claim primarily revolves around general damages, as the first three heads of claim were adjudicated upon by Keane J. at first instance and by Hogan J. on appeal.

**The Hearing**

15. The Court indicated at the outset of the hearing of these actions that it required to hear from each individual plaintiff in order to make a finding in their favour. This requirement is all the more vital in circumstances where the Court is being asked to grant an award in general damages for physical inconvenience and mental distress. It had been suggested to the Court that perhaps only a sample of the plaintiffs' evidence was necessary and the Court could effectively operate on the assumption that this sampling could be transposed across all fifty plaintiffs based on the accountant's reports, which evidenced the plaintiffs' period of work and financial loss. This jurisdiction does not have any provision for a class type of action. Each individual plaintiff is required to prosecute their claim and furnish evidence to the Court before they can succeed in that claim. In this case, where a plenary hearing is being litigated and many matters of fact are in dispute, that evidence must include evidence given viva voce under oath. It remains unclear how precisely this Court was expected to award general damages without an opportunity to examine all the plaintiffs in the witness box.

16. There were a number of plaintiffs who did not give evidence viva voce, either in person or via video link. As explained above, where a plaintiff does not give such evidence, the Court cannot normally grant an award in general damages. When these matters were re-listed on 27th February, 2018, counsel for the plaintiffs had organised for more of his clients to give evidence via video link. I am satisfied that the Court has the power to re-open matters after judgment is reserved for the purposes of bringing clarity to the evidence. But this was not a matter of clarification; counsel sought to adduce new evidence from plaintiffs who had not given evidence during the initial hearing. On foot of objections from the defendants' new legal team (who had come on record that morning), and in light of the fact that I reserved my judgment almost a month prior, I declined to hear further evidence. The plaintiffs had their opportunity to present their case to the Court. Some of them did not avail of that opportunity. Save for my findings at para. 39, that is the end of the matter.

17. In terms of legal representation, a Mr. Jose Nuno Sousa Pinto appeared on behalf of the defendants. He is a Portuguese lawyer. He does not hold any legal qualification in this State and therefore does not have any right of audience before the Irish courts. He occasionally attended court during the hearing. On those days that he did attend, he served primarily as a conduit by which the defendants' instructions were provided to their legal teams. Since the old cases were instituted in 2012, at least five legal teams have successively come on record for the defendants, instructed by different firms of solicitors. The firms of which I am aware are: Mason Hayes & Curran Solicitors, McDowell Purcell Solicitors, O'Mara Geraghty McCourt Solicitors, Lavelle Solicitors and Christie & Gargan Solicitors. Mason, Hayes & Curran and McDowell Purcell came off record for the defendants before these matters came on for hearing before this Court. O'Mara, Geraghty McCourt's application to come off record was also heard and determined before the hearing in these matters commenced in January, 2018, but it was not formally recorded in respect of the old cases until Lavelle Solicitors became involved. On the afternoon of 16th January, 2018, which was the third day of the hearing, the team instructed by Lavelle Solicitors came on record for the defendants. This late arrival raised a number of complications. Firstly, the plaintiffs had issued a motion to strike out the defendants' defence, which they had not progressed at an earlier juncture because there was no firm of solicitors on record for the defendants. But more importantly, over two days of evidence had been heard in the absence of the defendants' legal representatives.

18. Notwithstanding this change in circumstances, I considered it appropriate to continue the hearing without any adjournment or delay. I cannot speculate as to why the defendants have behaved in the manner that they have. But it is clear to me that their every action has stymied and undermined the plaintiffs' cause, both as employees of the partnership and as co-litigators in these actions. The plaintiffs are entitled to have their case dealt with promptly and efficiently. It is not open to the defendants to frustrate those entitlements, least of all by abusing court processes. Lavelle Solicitors came off record on the morning of 26th January, 2018, which was the seventh day of the hearing. The hearing then proceeded to conclusion in the absence of any legal representation for the defendants. A new legal team, instructed by Christie & Gargan Solicitors, became involved in the period between the reserving of this judgment on 30th January, 2018, and the re-listing of these matters. An application was made by this new legal team on 20th February, 2018, to adjourn the re-listing until they had an opportunity to come on record and read themselves into events up until that point. That application was also refused.

19. The vast majority of the plaintiffs do not speak English and translation services were required as they gave their evidence. Three translators provided their services over the course of the hearing. The first translator's linguistic proficiency and expertise in the court environment are beyond doubt. She provided services in respect of a large number of the plaintiffs before withdrawing from the hearing. The second translator provided services for an extremely brief period of time. The abilities of that second translator quickly became a point of concern for the Court and, following an objection from Mr. Pinto as to the quality of translation provided, the Court rose until a new translator was secured and the witness was re-sworn. A third translator provided services for the remainder of the trial. I have no reason to doubt this third translator's mastery of both English and Portuguese. However, it became apparent over the course of the trial that she had little experience in providing court translation. Following directions from this Court as to the manner in which the plaintiffs' evidence should be translated, the remainder of the plaintiff's evidence was translated without major incident.

20. To be clear, I am fully satisfied that the plaintiffs' evidence was accurately translated. I have observed each plaintiff as they gave their evidence in the witness box and I have no reason to question the quality or sincerity of their evidence. However, I believe it is important to stress that court translation is not simply a matter of procuring an individual who is fluent in both the language used by the Court and the mother tongue of the witness. Court translations are a particular art that require a specific form. It would

behove a legal team to ensure that the translator they have hired to perform translations in a courtroom setting has the requisite ability to do so.

21. I think it is vital to state at this juncture that I found the plaintiffs who came before the Court and gave evidence to be decent, hardworking individuals who are entirely blameless in the events that have unfolded since the contract for this project was awarded to Bothar Hibernian in 2006. They came to this jurisdiction with a view to supporting themselves and their families. They were treated appallingly by their employers. It beggars belief that their ordeal could have lasted for so long. The Court is particularly struck by Mr. Power and Ms. Clifford's evidence on this issue. The State authorities put great effort into regularising the defendants' enterprise and the defendants fought them every step of the way. The defendants did not see fit to put an end to their shameful behaviour until its continuance was beyond practicality.

22. There was, on occasion, some confusion in respect of commencement and finishing dates of the plaintiffs' employment. I provide further detail on this point later on in this judgment, but not by way of any criticism of the individual plaintiffs. The Court fully accepts their evidence as to the circumstances they endured whilst residing in Ireland. They are to be commended in this respect and also in respect of revisiting the entire matter by returning to this jurisdiction to give evidence. The Court would also like to record its gratitude for the evidence given by the NERA employees referred to above. They and their colleagues have carried out their statutory functions admirably.

23. The manner in which this case came on for hearing was unwieldly and time consuming. The delay in delivering the Court's decision in this matter reflects the chaotic nature of the paperwork with which the Court was furnished and the time required in order to reconstruct and make sense of the issues. Again, this is not a criticism of the individual plaintiffs. However, it is the Court's expressed wish that some consideration would be given by the legislature as to how actions involving a great many plaintiffs can be efficiently progressed before the courts in a more unified manner.

**The Evidence on Quantum**

24. Expert evidence was provided in respect of quantum. The plaintiffs' expert is a practicing accountant, who was asked by the plaintiffs' solicitor to carry out calculations on underpayment of wages, BIK, laundry and accommodation deductions. He based his calculations on the records procured and produced by NERA, which cover a period from 2007 to 31st July, 2008. NERA's records do not cover a period beyond the 31st July because the meetings and records relied on by NERA in drawing up their report concluded in July, 2008. The expert extrapolated his calculations for the period of August – December, 2008 because the defendants failed to provide and/or maintain records he could rely on for that period. In order to calculate the number of months that each plaintiff worked, the expert used the date on the relevant plaintiff's contract as the commencement date and the date on their P45/last provided payslip as the conclusion date. He found that there was no consistency in the amounts of BIK charged month to month. He was not able to determine why any BIK was charged. No documentation was produced to prove that the laundry had been weighed and the service properly charged, as envisioned in the plaintiffs' contracts.

25. The accountant prepared a report in respect of each plaintiff. He calculated the pay they were due, the amount they were actually paid, the taxes due and the amount of deductions imposed. Based on his calculations, the accommodation provided by the defendants cost them €90 per month per employee. Under the contract, an average of €525 per month was charged to each plaintiff for the accommodation. With regard to calculating the interest figures under s. 22 of the 1981 Act, the first interest figure was based upon an 8% interest rate. In 2017, a new rate of 2% was introduced by the Courts Act 1981 (Interest on Judgment Debts) Order 2016 (S.I. No. 624 of 2016) and the interest was calculated on that basis going forward.

**Submissions**

26. Both oral and written submissions were made on behalf of the plaintiffs. No submissions were made by or on behalf of the defendants, as the legal team instructed by Lavelle Solicitors had come off record by that point. The making of submissions on behalf of the defendants would not only have been possible, it would also have been beneficial for the Court's purposes, had the defendants provided a legal team with the necessary instructions. They did not do so. Instead, their conduct has impeded the proper advancement of this litigation. It is idle to speculate as to the defendants' motivation for behaving in this manner. Whatever their reasons are, they must live with the consequences of their actions. The Court cannot permit them to derail these proceedings to serve their own ends.

27. Counsel on behalf of the plaintiffs made detailed submissions regarding underpayment and improper deductions from wages. Given the findings of fact outlined above, it is indisputable that the defendants have acted in breach of contract and the plaintiffs are thereby entitled to compensation under those headings. Regarding compensation for mental distress, the plaintiffs' submissions require more detailed consideration. As a general rule, a plaintiff cannot recover for the worry and upset occasioned upon them by a breach of contract (*Addis v. Gramaphone Co. Ltd.* [1909] A.C. 488). There are some exceptions to that rule, the most notable of which is the peace of mind exception. Where an important object of the contract is to provide pleasure, relaxation or peace of mind, general damages can be recovered for mental distress or physical inconvenience caused by a breach of that contract and/or a failure to meet the contractual standards set out therein. The seminal case on this issue is *Jarvis v. Swan Tours* [1971] 1 All E.R. 71. In that case, the plaintiff's holiday was completely spoiled by the sub-standard amenities provided to him. General damages equal to half the sum of the holiday were awarded to him. Within the context of Irish law, the plaintiffs rely on *Leahy v. Rawson* [2004] 3 I.R. 1 and *Mitchell & Ors v. Mulvey Developments Ltd*. [2014] IEHC 37. It was submitted that, in calculating non-pecuniary loss under contract, the primary factors are the length and extent of the plaintiffs' inconvenience and distress.

28. The plaintiffs place great emphasis on the defendants' behaviour up to this point. They submit that, in light of the defendants' poor conduct, this is a case where it would be appropriate to make an award in aggravated damages. They rely on *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 as a statement of applicable principle in this regard. The plaintiffs have also claimed interest pursuant to s. 22 of the Courts Act 1981. Bearing in mind Hogan J.'s comments on this issue, as expressed in his judgment dated 4th October, 2017, it was submitted that an award of interest should be made.

**Decision on Damages**

29. The evidence in respect of each plaintiff comprises the evidence they gave in the witness box and the documents submitted in evidence during the course of the hearing. It is worth reflecting on the tenor and nature of the oral evidence adduced before the Court. The plaintiffs seek general damages under contract for the wrongs committed against them. Such an award is to be made for mental distress and physical inconvenience occasioned upon them. There is undoubtedly a degree of subjectivity attributable to this type of loss; an event that was mentally distressing or physically inconveniencing for one person may not have that effect on another person. An award in general damages cannot normally be made unless the claimant gives evidence viva voce, which the Court can assess to determine the degree of non-pecuniary loss suffered. There must also be a good deal of substance to the distress and inconvenience. The peace of mind exception does not extend to trivial annoyances or vague nuisances. There is a real legal standard of mental distress and physical inconvenience that must be met. If the Court is to make an award under this heading, it must be

satisfied that a plaintiff experienced these effects as a result of the defendants' actions.

30. And yet, if one were to review the plaintiffs' evidence on its face, one would be forgiven for mistaking them for witnesses as to fact, rather than plaintiffs seeking to recover for distress and inconvenience. This can be contrasted with the decisions in *Leahy* and *Mitchell*, where there was clear evidence of the personal impact that the defendants' actions had on the plaintiffs. In *Leahy*, reference is made to the plaintiff's distressed state. In *Mitchell*, Hogan J. referred to the plaintiffs as having undergone "a catalogue of miseries". In this case, the plaintiffs' evidence primarily related to the factual background. Their mental state and personal experience of the compound were hardly touched upon at all.

31. Having had the opportunity to directly observe the plaintiffs and their demeanour in the witness box, I have no doubt that the plaintiffs were indeed mentally distressed and physically inconvenienced by their experiences in the compound. The unprompted comments they made about that experience were also significant. Carlos Alberto Oliveira Matos, the second-named plaintiff in the fourth set of proceedings, described his time in the compound as "living in a concentration camp". Like his fellow plaintiffs, he has been greatly affected by his time in the compound. I am satisfied that all the plaintiffs qualify for and are entitled to general damages for mental distress and physical inconvenience. However, in reaching a finding on that entitlement and on quantum, it would have been far more beneficial if the plaintiffs had been examined directly on the issue of their mental state and personal experience.

32. There are fifty plaintiffs to these actions. While they all lived in the same compound, there are differences between each of their experiences. Some of them suffered health issues due to the poor water quality. Some did not. Some resided in a particularly foul section of the compound. Some resided in slightly more pleasant conditions. Some received particularly offensive treatment from representatives of the defendants. Some saw fit to make do with the conditions in which they found themselves. In my view, when assessing general damages under the peace of mind exception, to focus in on these fine distinctions between each plaintiff is to take an overly granular approach to the exercise at hand. The plaintiffs' experiences should be assessed as a whole and not on the basis of the slight differences between each one of them. I could no more decrease a plaintiff's award because he routinely awoke early to enjoy one of the few hot showers available than I could increase a plaintiff's award because his bedroom was closer to the festering rubbish skips than other bedrooms. A general award figure in general damages will be determined for all the plaintiffs. This was one ordeal experienced by the plaintiffs together. In a personal injuries action, the medical condition of each plaintiff would be highly relevant. Expert medical evidence on those conditions would also be made available to the Court. But these are not personal injuries actions. They are contract actions, in which the plaintiffs seek to recover for mental distress and physical inconvenience. That is what the Court is currently assessing. Nothing more.

33. The booklet of documents compiled in respect of each plaintiff comprises of the relevant report from the expert accountant and some ancillary documentation. Each report includes a summary sheet which sets out the expert's determinations as to the period of employment and the monetary amount owed to each plaintiff. Following the reserving of the Court's decision on 30th January, 2018, it quickly became apparent that there were inaccuracies contained in some of the reports with regard to the start and end dates of the plaintiffs' employment. For a significant number of plaintiffs, the dates specified in the summary sheet did not match the dates specified in the P60, P45, payslips and/or contract of employment. I have been unable to determine the exact source from which the expert gleaned the erroneous dates specified in the summary sheets. He may have identified them from the documentation provided to the plaintiffs by the defendants. If that is so, the evidential value of those recorded dates remains dubious. As stated in the plaintiffs' written submissions, over 70% of the discovery documentation provided by the defendants is believed to be fraudulent. Along with these mis-recorded dates, a number of other errors were identified by the Court regarding the calling of witnesses and the provision of the expert reports. These matters were re-listed on 20th and 27th February, 2018, to seek to have these issues resolved.

34. On the 27th February, counsel for the plaintiffs took the Court through a photocopy of NERA's tables of calculations, which were used to compile NERA's report. Counsel argued that this documentation provided guidance as to each plaintiff's start and end date. The photocopy was originally produced for the use of a Mr. Richard Woulfe. Mr. Woulfe is a senior partner in Mason Hayes & Curran, the first of at least five solicitors firms to come on record for the defendants during the currency of these proceedings. There are three tables of calculations in total, broken up across twelve A3 pages, which were held together with a paperclip. The Court was effectively asked to piece these tables back together in chambers with staples and sellotape. As is common with photocopies, the tables are cut off at the edges, thus frustrating the Court's ability to glean any meaningful information regarding the employee unfortunate enough to have his information recorded within that line of each table.

35. The data contained in the tables spans from the date the plaintiffs' employment commenced through to a cut-off point of 31st July, 2008. NERA has no data for the period beyond 31st July. Counsel submitted that these tables remedied the errors highlighted by the Court when these matters were relisted on 20th February. For ease of reference, the table comprising of pages 1-6 of the A3 pages will be referred to as Table A, the table comprising of pages 7-8 will be referred to as Table B and the table comprising of pages 9-12 will be referred to as Table C. Table A is a record of arrears due to employees from March 2007 – December 2008 for the months in which wages were paid to that employee, listed in order of payroll/employee number. Table C is a record of arrears due to a smaller number of employees from March – December 2007, listed in alphabetical order. Correspondence dated November, 2008 from Clare Tiernan, Head of Inspection Services with NERA, to Mr. Woulfe would indicate that Table C was prepared separately because the defendants failed to provide a shred of documentation related to the employment of the individuals referenced therein. Table B is a list of hours and holiday time for the employees. This table covers the period from late 2006 to July, 2008 and the employees are listed in order of payroll/employee number and start date. The entries for each of these tables will be referred to during this judgment by line number, and not by Payroll/Works number, as an entry is easier to track across multiple pages when tracking the number of lines.

36. With respect to general damages, the Court's findings on quantum are predicated upon the length of each plaintiff's stay in the compound. The Court must have regard to this crucial factor if it is to justify awarding one amount to a plaintiff who resided in the compound for three months and awarding a different amount to a plaintiff who resided in the compound for eight months. The latter plaintiff suffered a longer ordeal than the former and so is entitled to a larger award. I am satisfied that a plaintiff's residency in the compound commenced on or around the date their employment commenced and concluded on or around the date their employment concluded. The plaintiffs' period of recovery will be rounded out to half-months, so as to account for any minor discrepancy between the actual periods of residency and the actual periods of employment. This will also assist in the calculation of damages. As an example, where a plaintiff worked for 11 months and 11 days, their period of residency will be recorded in this judgment as "11.5 months".

37. Given the length of time that passed and the arduous nature of the plaintiffs' residency in the compound, I am not prepared to accept their oral evidence as to their start and end dates, most especially because that oral evidence is often contradicted by all the objective evidence contained in the NERA report, the contracts of employment, the payslips, the P60s and the P45s. In calculating each plaintiff's start and end date, the Court will rely on the dates specified in the expert reports, where same are supported by

objective evidence provided in the booklets of documents (namely the P60, P45, payslips and/or contract of employment). Where those documents have not been provided, the Court will rely on the dates contained in the NERA tables. The Court is fully satisfied that many plaintiffs continued to work for the defendants and reside in the compound beyond July, 2008, which is the cut-off point for the data upon which the NERA tables are based. However, if there is no objective evidence to establish an end date, the Court cannot accept the summary dates contained in the expert reports, given the errors identified therein. The Court cannot award general damages for a period beyond 31st July, 2008, without a clear end-point for recovery. It is essential for the Court to maintain legal and evidential certainty. It is not the Court's role to mathematically analyse figures and extrapolate therefrom the period of recovery for the purposes of general damages. That is the role of the plaintiffs' expert and the entire reason he was called to give evidence in the first place. His evidence is insufficient to fully support the periods of recovery he proposes. The Court can only accept evidentially and legally certain periods of recovery.

38. It is worth noting that the defendants' record keeping on these matters was extremely poor. Their failure to properly discharge those duties and comply with the discovery process has had a debilitating effect on the plaintiffs' ability to properly present their case and NERA's ability to establish the facts. While there is a base standard of proof that the plaintiffs must meet if they are to succeed in their claim, and I will fully hold them to that standard, I will afford some latitude to those involved in advancing the plaintiffs' claim, given the blatant attempts by the defendants to obfuscate evidence and hamstring these proceedings.

39. During the initial hearing, counsel for the plaintiffs indicated that one of the plaintiffs had intended to give evidence but his wife went into labour the night before he was due to return to Ireland for the hearing. It has not been confirmed which plaintiff that was. Whichever plaintiff it was, I am satisfied that an exception should be made in respect of him. An identical exception will be made in respect of the plaintiffs who died before these matters came on for hearing, and for whom their family members have instructed that a grant of probate be taken out. Where a plaintiff qualifies for an exception, his case will be adjourned until he, or his family, has the opportunity to get his affairs in order.

40. In summary, each plaintiff's case must undergo a two-step process before I would be satisfied to make an award in general damages for them: 1) The Court must hear evidence viva voce from the plaintiff to confirm that the harm suffered meets the requisite legal standard for recovery under the peace of mind exception, and 2) an evidentially certain period of recovery must be established by which the Court can determine quantum. If a plaintiff's case does not undergo and comply with both of these steps, I cannot make an award in general damages. The Court must make do with the evidence that has been put before it. Where sufficient evidence has not been provided, the Court cannot find for that plaintiff.

41. In light of the errors identified by the Court regarding the start and end-dates of the plaintiffs' employment, I also cannot entirely accept the expert's calculations as to pecuniary loss. Errors in the period of recovery recorded by the expert have a knock-on effect for his calculations of the pecuniary loss suffered by each plaintiff, most especially the amount of wages due. Even if his calculations were an accurate reflection of gross pay due, his net pay calculation is very likely incorrect because his calculations of the taxes due are based on an incorrect number of pay periods. As an example, the expert report for Jose Monteiro Da Silva (the first-named plaintiff in the first set of proceedings) states on the summary page that he was employed by the defendants from July - October, 2007. Page 3 of that same report states that Mr. Da Silva was employed for 21 weeks. There were only 17.5 weeks between July and October, 2007. This means that the expert's calculations have very likely overcharged the plaintiff four weeks' worth of tax, and his net pay calculation is delinquent.

42. Calculations as to pecuniary loss will be accepted only where the Court is satisfied that there is sufficient evidence to establish a link between the calculations and the proven facts. Therefore, the Court will rely on gross pay when calculating the award to make in pecuniary damages, assuming same is supported by the objective evidence. Fortunately, this particular problem only arises in respect of the new cases. Damages in the old cases under headings other than non-pecuniary loss have already been addressed in the decision of Keane J.

43. For a number of plaintiffs, the period of recovery relied on by the expert (i.e. the period in which he says that plaintiff was employed by the defendants) veers into the period for which he extrapolated his figures (August – December, 2008, i.e. the period for which there are no NERA calculations). If that proposed period is not supported by objective evidence and/or if it contains a major error, I am of the view that the figures recorded in the report cannot be relied on. In such cases, the gross pay figure provided in the NERA tables will be used. As for laundry and BIK, where there is doubt over the correct period of employment, the Court cannot find for the relevant plaintiffs at all because the Court has no evidence to establish what the amount of compensation would have been had the expert not added his unreliable extrapolations to the recorded sum. On the other hand, where there is no serious error in the recorded period of recovery and the expert's recorded dates are supported by objective evidence, I will accept all of the expert's calculations, unless there is a reason not to.

44. In light of the evidential infirmities in the case presented to the Court, I have no choice but to rely on gross pay if I am to arrive at a just figure in damages to award the plaintiffs. An award premised on the expert's flawed calculations would not withstand legal scrutiny. This is regrettable, as my decision to rely on gross pay agitates further problems under the rule in *Gourley's* case. Consideration of this rule arises in circumstances where a plaintiff's award will not be taxed, but said funds would have been taxed had they been provided in the proper course of events. In this case, the plaintiffs are to be awarded unpaid wages, which would undoubtedly have been taxed had those monies been paid to them in the proper course of their employment. Furthermore, the plaintiffs' expert carried out calculations as to deductible tax and net pay. This serves as an implicit acknowledgement that the rule in *Gourley's* case does indeed apply to these facts.

45. The law on this issue was considered in detail at para. 23.301 of McDermotts' *Contract Law* (2nd Ed.). In my view, there is some merit to the criticisms of the rule referenced therein. By making a deduction under the rule, a defendant is able to profit at the expense of an injured party while at the same time the Revenue Commissioners do not receive the amount by which damages are reduced. That said, the rule in *Gourley's* case is well established in this jurisdiction and I will apply the rule as it is currently understood. As this issue arises out of the findings of the Court, and was not litigated during the hearing in January, 2018, it is open to me to invite submissions from the parties as to the appropriate level of deduction to make, and I duly extend that invitation.

46. The plenary hearing in these proceedings has taken place and the plaintiffs had a full opportunity to make their case to the Court. If they failed to fully avail of that opportunity, then the Court has no option other than to find against them. It would be entirely inappropriate, and visit a great injustice on the defendants, if the Court were to deliver a reserved judgment diagnosing the flaws in the plaintiffs' case and then allow the plaintiffs to remedy those flaws and maximise their award. The Court assesses the evidence, delivers its decision and is *functus officio* thereafter. It is not the role of the Court to prescribe plaintiffs with the methodology required to properly make their case. To do so would be to take up the mantle of litigator on the plaintiffs' behalf and advise them as to how their action can reach its fullest potential. That responsibility rests with the plaintiffs' legal team and with them alone.

47. Nor can the Court simply make a finding that the plaintiffs are owed compensation and then set a fresh hearing date to hear accurate evidence on quantum. In respect of the cases remitted from the Court of Appeal, assessment of quantum was precisely the issue this Court was asked to determine. It is not open to the plaintiffs to seek to have that question *de facto* re-litigated with a fresh hearing on the same issue after the Court has delivered a reserved judgment, unless such a hearing is directed by an appellate court. Regarding the four new cases, the question of quantum was also litigated before this Court in the substantial eight day hearing that led to this reserved judgment. The question of quantum is the entire reason that the expert accountant was called to give evidence in the first place. Upon the delivery of this decision, the issue of quantum in respect of these plaintiffs is *res judicata* and cannot be re-heard or re-determined by the courts, unless such a course of action is directed by an appellate court. It should be noted that s. 22 interest does not require the expert reports in order to be calculated and can be validly determined notwithstanding the infirmities in the plaintiffs' case that have been identified above. Section 22 of the Courts Act 1981 refers to the interest as a matter of fixed percentages. The Act also states that the operation of s. 22 is a matter of judicial discretion. Once the Court determines that a fixed percentage interest should be awarded over a fixed period, a monetary calculation of that amount can be carried out, which will translate the Court's decision into real monetary terms.

48. A number of plaintiffs gave evidence that they resided in a house during the initial months of their employment, as the level of overcrowding in the compound was so extreme that even the defendants could not stand over it. While some of the plaintiffs also complained about the conditions in the house, I am satisfied that said conditions were significantly better than those in the compound. An award in general damages is not warranted in respect of this period. Those initial months of residence will be subtracted from the period of recovery for the purposes of general damages and the relevant plaintiffs will be marked with a "*". I have assessed the reliably evidenced period of recovery for each of the plaintiffs. That assessment is set out in Appendix 1 to this judgment. Each plaintiff is identified by the number assigned to them by their legal team and by numerical reference to their case number and plaintiff number within that case. I have used these numbers in the hope that it will make the tables contained in Appendix 2 to this judgment more easily navigable for all concerned. Should a review of my findings ever become necessary, I have also specified in the headings of Appendix 1 the date and time at which I heard each plaintiff's evidence.

**Decision on Quantum**

49. As stated above at paras. 32 and 36, the Court proposes to set a fixed amount of general damages for all fifty plaintiffs, which the plaintiffs will be awarded for each month that they resided in the compound. In determining the quantum of that amount, I would rely further on O'Sullivan J.'s decision in *Leahy* and Hogan J.'s decision in *Mitchell*. It seems clear to me that, while general damages awarded under the peace of mind exception can be substantial, they generally remain at a moderate level. They are also routinely awarded in fixed amounts over a recurring set period, which coalesces with my own approach in this judgment. When determining the quantum of general damages, both O'Sullivan and Hogan JJ. undertook a detailed examination of the background facts and the personal experiences of the plaintiffs. I have already carried out that exercise in respect of these plaintiffs, as set out above. The plaintiffs experienced what can only be described as cruel, inhuman and degrading treatment at the hands of the defendants. I am particularly struck by the defendants' complete disregard and lack of care for the plaintiffs' wellbeing. To be treated in this manner by other human beings clearly added to the plaintiffs' misery. Having considered all of these matters, I believe it is appropriate to award the plaintiffs €1,000 in general damages for each month that they resided in the compound. In my view, such an award is a conservative statement of the plaintiffs' entitlements, but one that the Court is obliged to make, in light of the restraint which the authorities urge me to maintain when awarding general damages of this type.

50. The only issues that remain are the plaintiffs' claims to aggravated damages and to interest pursuant to s. 22 of the Courts Act 1981. Having considered all aspects of these matters in the round, and most particularly the issues highlighted over the course of this judgment as to how these cases were litigated by the parties, I do not think it is appropriate to grant an award in aggravated damages. That said, I am satisfied that it is appropriate to award the plaintiffs interest pursuant to s. 22, insofar as that award has not already been addressed by Keane J. The interest rate shall be applied to the whole sum of each plaintiff's award. The period over which this interest rate shall operate is the date at which the cause of action accrued to the date of this judgment. The applicable interest rate shall be 8% per annum up until 31st December, 2016, and 2% thereafter, as envisaged by S.I. 624 of 2016.

51. In reaching this finding, I am cognisant of the fact that s. 22(2) and (3) proscribe the award of s. 22 interest over damages in respect of non-pecuniary loss for personal injuries, including impairment of a person's mental condition (although it must be said that "impairment of mental condition" would have to be given a very broad interpretation if it were to encompass physical inconvenience and mental distress of the type arising from these cases). This also includes personal injuries arising out of a contract. While part of the plaintiffs' award does relate to damages in respect of non-pecuniary loss, that loss is not for personal injuries. It is loss that is provided for under the peace of mind exception, which has been brought about by breach of contract, breach of statute and failure to meet contractual standards. While some of the language employed in this judgment would not seem out of place in a personal injuries case, this is still a contract action. The pleadings outline a claim to damages for breach of contract and breach of statute. A tortious personal injuries claim has not been pleaded and no damages have been awarded in that context. I can see no reason to circumscribe the application of s. 22 to the damages awarded for pecuniary loss.

52. With respect to Carlos Manuel Oliveira Matos, the first plaintiff in the fourth set of proceedings, I am satisfied to exercise my discretion under s. 22 and award him a monetary figure of interest that is equal to the monetary figure of interest awarded to Jose Fernando Magalhaes Da Silva, the third plaintiff in the sixth set of proceedings. I am satisfied to make such an award because Mr. Matos has effectively succeeded in his claim and is entitled to compensation, including s. 22 interest. He would have been awarded such compensation in the normal way were it not for the consummate failure of his expert and his legal team to properly advance his case on his behalf, which has most unfairly left him with nothing.

53. I have already found that I cannot rely on the plaintiffs' oral evidence regarding the length of their stay in the compound. That said, in oral evidence, Mr. Matos did indicate that he resided in the compound from approximately March, 2007 to November, 2008. Residency in such conditions for over a year and a half can only be described as a gruelling ordeal. That torment has only been compounded by the defendants' complete disinterest in progressing these proceedings with even the ghost of good faith. While it may be unusual to award s. 22 interest in this manner, there does not appear to be any legal provision stating that an award of s. 22 interest must be calculated based on the sums already awarded to the specific plaintiff at hand, and not by reference to the sum awarded to a co-plaintiff. I am satisfied that nothing in s. 22, nor in Hogan J.'s decision delivered in respect of the old cases, militates against this approach. Indeed, the issues that convinced Keane and Hogan JJ. to find in favour of the plaintiffs in respect of s. 22 have only deteriorated since the delivery of those judgments. I have specified the part of the sum and the period over which the interest is to be calculated. Justice demands that I make this award, in light of the defendants' disgraceful conduct to date. In my view, no further obstacle arises.

**Conclusion**

54. For the reasons outlined above, I find for the plaintiffs and accede to their claims for damages. The quantum of damages in respect of each plaintiff is set out in Appendices 1 and 2 to this judgment. Those sums come to a total of €818,081.58. However,

judgment in that amount cannot be entered against the defendants. The deduction under the rule in *Gourley's* case needs to be applied. A monetary figure of the s. 22 interest owed to each plaintiff also needs to be added to that reduced amount. While this may seem to be a complicated and burdensome exercise, it is the only avenue open to the Court through which it can arrive at a legally sound and evidentially certain figure in damages, given the lack of reliable evidence submitted to the Court.

55. Once that assessment is complete, final judgment in this new total will be entered against the defendants. I will hear counsel as to the precise content of that order of the Court. I will also make a further order adjourning the actions of all plaintiffs who qualify for an exception under para. 39.