THE HIGH COURT

[2007 No. 9273 P.]

BETWEEN

THOMAS KENNEDY, MICHAEL MURPHY, MICHAEL HENNESSY, O'MATHUNA (BÁID) TEORANTA, VINCENT BROWNE, JOHN O'DONNELL, PAUL FLANNERY, JOHN GRAHAM, KIERAN O'DRISCOLL, DONAL HEALY, NEIL MINIHANE, GERARD MINIHANE AND PETER CARLTON

PLAINTIFFS

AND

THE MINISTER FOR AGRICULTURE, FISHERIES AND FOOD, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of July, 2017.

1. The plaintiffs were at all material times fishermen who, during the 1990s, developed a valuable fishery in what was until then a species largely unexplored by Irish fishermen i.e. tuna, also referred to as albacore tuna. Mr. Jeremiah Kieran O'Driscoll, the ninth named plaintiff, gave evidence that he was the first to exploit the resource, starting in 1991. He explained that he observed vessels from France and Spain unloading their catch at Castletownbere for onward transportation to France. He became curious and quite literally followed the French and Spanish vessels out of Castletownbere to observe their *modus operandi*. Satisfied that this was something that he could do, and encouraged by Bord Iascaigh Mhara, which advanced a IR£5,000.00 grant to explore the development of this resource, he started doing so actively in 1991. He said it was successful from the outset. Others then followed suit. By the time of the matters giving rise to these proceedings, all of the plaintiffs were actively involved in fishing for tuna, and in particular had been active in that regard during what became to be a period of particular relevance i.e. the years 1995, 1996 and 1997 (the reason for this will be apparent later in this judgment).

2. At the time, the most effective means of fishing for tuna involved the use of drift nets, laid out at sea by individual trawlers over many kilometres. In 1997, regulations were introduced by the European Union to restrict the length of drift nets to no more than 2.5km There remained, however, a concern amongst environmental organisations (such as Greenpeace) that the use of drift nets was causing a significant problem for other species specifically dolphins, which, accordingly to environmentalists, were being caught in large numbers by drift nets used for the purpose of catching tuna. While this was disputed by the tuna fishing industry, these environmental organisations were successful in bringing pressure to bear upon authorities across various countries within the European Union to the intent of introducing an outright ban on the use of drift nets. This pressure mounted during the course of 1997 and the issue became a priority for the United Kingdom when it assumed Presidency of the Council of Ministers of the EU for the first six months of 1998. During this period, the pressure to introduce a ban on drift net fishing for tuna intensified, with Ireland and France being the only two countries expressing steadfast opposition to the introduction of such a ban. As discussions between Member States progressed, there were simultaneous discussions as to possible compensatory measures for those whose livelihoods would be affected by the introduction of a ban on drift netting. Such measures had been introduced the year before in a scheme to encourage Italian fishermen to retire from drift net fishing, known as "the Spadare decision."

3. While Ireland and France continued to oppose the proposed ban, and indeed voted against it, ultimately the Council of Ministers, on 8th June, 1998, made Council Regulation (EC) No. 1239/98 ("the Regulation") the effect of which was to prohibit fishing for Albacore Tuna through the use of drift nets with effect from 1st January, 2002. Since fishing for Albacore Tuna is an activity pursued during the summer months, this effectively gave all those in the industry four further seasons to exploit the resource using drift nets, before they would be obliged to resort to other methods of fishing for tuna.

4. On the same day, the Council of Ministers and the European Commission issued a joint declaration (the "Joint Declaration") which recognised that the ban on drift netting would have unfavourable economic and social repercussions "in the short term" for a number of fishing fleets. Accordingly, it was decided that the Commission should present to the Council a proposal for a series of supporting measures, (referred to as social flanking or flanking measures) by way of derogation from the criteria for eligibility under the Financial Instrument for Fisheries Guidance ("FIFG") which was the instrument whereby EU structural funds were made available to the fishing industry at the time. The joint declaration stated:-

> *"The measures may include alteration to fishing vessels making it possible for them to convert to techniques that are more reliable and more selective, in particular for taking the same species and avoiding those that are being over exploited: compensation enabling fishermen serving on board and the owners of vessels to face the economic consequences of having to give up drift-net fishing activities; schemes to retrain fishermen for jobs in areas other than fishing or to provide them with new skills; and decommissioning of vessels involved in the drift-net fishery."*
>
> *The accompanying measures will apply only to fishermen and/or the owners of vessels who can show they used drift-nets in 1995, 1996 or 1997.*
>
> *The Member States concerned undertake to draw up detailed plans and send them to the Commission. The plans prepared by the Member States will be devised to ensure early and progressive reduction of drift-net effort in the fishery.*
>
> *In order to respect the conditions imposed under the procedure laid down in Article 43 of the Treaty, the Council undertakes to adopt the ad hoc decision before the end of 1998.*
>
> *In addition, the Commission recalls that priority will be given to cofinancing, in conformity with the "calls for proposals for technical and biological study projects in support of the common fishery policy", of soundly based projects aimed at making it easier to apply alternative legal fishing techniques for taking same stocks."*

The Joint Declaration also stated that "the measures concerned will have to be exceptional in character, however, and **in any event be met from the budget for the affected Member States' existing structural programs**" (my emphasis).

5. During the course of the first six months of 1998, in the lead up to the passing of the Regulation, the then Minister for Agriculture,

Fisheries and Food ("the Minister") had a number of meetings with representatives of the tuna industry, including, on each occasion, some of the plaintiffs – I set out below those of the plaintiffs who attended each of these meetings. These proceedings arise out of assurances which the plaintiffs claim the then Minister, Dr. Michael Woods gave them in relation to compensation for the elimination of fishing for tuna by way of drift net. The plaintiffs maintain that at each of these meetings, two of which were in advance of the adoption of the Regulation, and one of which was on the evening of the same, the Minister promised that in the event of the introduction of a ban on drift netting, they would be paid compensation. Some of the plaintiffs maintain that he went so far as to promise substantial compensation. The defendants deny that the Minister ever made such representations.

The Decision

6. The ad hoc measures referred to in the Joint Declaration were introduced by way of Council Decision on 17th December, 1998 – (Council Decision 1999/27/EC) (the "Decision"). The Decision permitted Member States to introduce compensatory measures for those adversely effected by the Regulation. The most relevant recitals of the Decision are as follows:

> *(3) Whereas this Decision will have unfavourable economic and social repercussions in the short-term for a number of fishing fleets, thus justifying at Community level an appropriate range of actions and special supporting measures for fishermen serving on board and the owners of fishing vessels; whereas the measures concerned will have to be exceptional in character, however, and in any event be met from the budget for the affected Member States' existing structural programs;*
>
> *…*
>
> *(7) Whereas the Member States who wish to avail themselves of the specific measures proposed must draw up conversion plans for this purpose;*
>
> *(8) Whereas, so as to ensure that compensation is granted only to fishermen and owners of vessels whose income depends on fishing with drift nets as banned by the Council, it must be specified that the fishermen and vessels concerned must have practiced these activities in 1995, 1996 or 1997; whereas provision should also be made for effective variation in the amounts of compensation depending in particular on the extent to which these activities are actually practiced, the cost of conversion and the age of the vessels;*
>
> *(9) Whereas the authorities of the Member States concerned must ensure, when implementing their conversion plan, that beneficiaries may not receive aid other than that provided for under this Decision nor obtain other financial incentives which would not be justified; whereas in particular rules should be laid down governing cumulation provided for by this specific measure with aid paid before 1998 pursuant to Council Regulation (EEC) No. 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector …*

The most relevant Articles of the decision are as follows:-

> *"Article 1*
>
> *(1) In connection with the ban on fishing with drift nets laid by Regulation (EC) No. 894/97 Member States availing themselves of the specific measure provided for in paragraph 2 shall draw up a conversion plan and communicate it to the Commission. The conversion plans shall be examined by the monitoring committees for the programs referred to in Article 5(2) of this Decision.*
>
> *(2) To implement the plans referred to in paragraph 1, a specific measure shall be established to grant aid to fishermen and owners of vessels under the conditions laid down in Articles 2 to 6 of this Decision.*
>
> *Article 2*
>
> *Fishermen who are nationals of a Member State and worked in 1995, 1996 or 1997 on board a fishing vessel flying the Spanish, French, Irish or United Kingdom flag, using one or more of the drift nets intended for the capture of the species listed in Annex VIII to Regulation (EC) No. 894/97, may receive:*
>
> *(a) an individual compensatory payment of up to a maximum of ECU 50,000 if they cease all economic activity before 1 January 2002; this payment:*
>
> *(i) may be cumulated with benefits from early-retirement schemes provided for by the legislation of the Member State concerned, including when the early-retirement scheme in question is part-financed by the FIFG pursuant to Article 14a(3)(a) of Regulation (EC) No 3699/93;*
>
> *(ii) may not be cumulated with the individual compensatory payment provided for in Article 14a(3)(b) of Regulation (EC) No 3699/93;*
>
> *(b) an individual compensatory payment of up to a maximum of ECU 20 000, in the case of conversion to another fishing activity or another sector before 1 January 2002. This payment may be cumulated with the individual compensatory payment pursuant to Article 14a(3)(b) of Regulation (EC) No 3699/93 and, if appropriate, with the aid provided for in Title III of that Regulation.*
>
> *Article 3*
>
> *Owners of a fishing vessel flying the Spanish, French, Irish or United Kingdom flag, which have used one or more drift nets intended for the capture of the species listed in Annex VIII to Regulation (EC) No 894/97 in 1995, 1996 or 1997, may obtain for those vessels:*
>
> *(a) a compensatory payment of an amount up to the maximum listed in Annex I to this Decision, for the permanent cessation of all fishing activity before 1 January 2002; this payment:*
>
> *(i) may be cumulated with aid for the permanent cessation of fishing activities provided for in Article 8 of Regulation (EC) No 3699/93;*

(ii) may be granted only if the vessel concerned is more than 10 years old;

(b) a compensatory payment of an amount up to the maximum listed in Annex I to this Decision, in the case of permanent conversion to another fishing activity before 1 January 2002; this payment may be cumulated with aid for the modernisation of the vessel provided for in Article 10 of Regulation (EC) No 3699/93 which would be granted in 1998 or in 1999, under the conditions for derogation laid down in Annex II to this Decision. The amount of this payment shall be deducted pro rata temporis from any aid for permanent transfer to a third country or for setting up joint enterprises under Articles 8 and 9 of Regulation (EC) No 3699/93 granted for the same vessel within the following five years.

Article 4

1. Member States shall restrict benefit of the measures laid down in Articles 2 and 3 to fishermen and owners of vessels who prove that they will actually suffer loss as a result of the ban on fishing referred to in Article 1(1).

2. When establishing the actual individual amount of the payments provided for in Articles 2 and 3, Member States shall take particular account of:

(a) the actual extent of use by the beneficiaries (fishermen and owners of vessels), during the reference period, of the drift nets covered by the ban referred to in Article 1(1);

(b) the cost of conversion;

(c) the age of the vessels.

Article 5

1. The public financial contribution, including that of the Community, to measures pursuant to this Decision shall cover all eligible costs up to the maximum amounts laid down in Articles 2 and 3.

2. The Community contribution may amount to a maximum of 50 % of eligible costs incurred by the Member States. It may not exceed the funding limits for the Member States concerned under the 1994 to 1999 Structural Fund programmes (Community support frameworks, operational programmes and single programming documents for Structural Fund Objectives 1 and 5a).

3. Save as otherwise provided in this Decision, the payments provided for in Articles 2 and 3 shall be subject to the conditions governing the programmes referred to in paragraph 2; they must therefore be the subject of legally binding commitments in the Member States concerned for which the requisite finance must be specifically committed no later than 31 December 1999. The final date for booking expenditure on these measures shall be 31 December 2001."

Annex 1 of the Decision contained the following table:

MAXIMUM PAYMENTS FOR VESSELS (ECU)

Tonnage class

GT (1)

Compensatory payment for the permanent cessation

of all fishing activity

(Article 3(a))

Compensatory payment for permanent

conversion to another fishing activity

(Article 3(b))

< 5 26 000 16 000

5 < 10 70 000 60 000

10 < 20 104 000 94 000

20 < 40 120 000 110 000

40 < 50 156 000 146 000

50 < 60 190 000 180 000

60 < 70 225 000 215 000

70 < 80 260 000 250 000

>80 295 000 285 000

(1) If the tonnage in GT is unavailable, an estimated value will be determined in accordance with Council Regulation (EEC) No

2930/86 of 22 September 1986 defining characteristics for fishing vessels (OJ L 274, 25. 9. 1986, p. 1), as last amended by

Regulation (EC) No 3259/94 (OJ L 339, 29. 12. 1994, p. 11), and with Commission Decisions 95/84/EC of 20 March 1995

(OJ L 67, 25. 3. 1995, p. 33) and 97/259/EC of 1 April 1997 (OJ L 104, 22. 4. 1997, p. 28).

¬¬¬¬

7. At the time of the making of the Decision, Ireland made a unilateral declaration (the "Unilateral Declaration") in the following terms:-

> *"Noting that Ireland does not have uncommitted structural funds at its disposal with which to implement the terms of the Council Decision, the Irish delegation reserves the right to seek to have provision for the funding of such measures included in the relevant Regulations under the next round of structural funds (2000-2006)".*

The background to the making of the Unilateral Declaration is explained below. It is of limited importance in these proceedings, since neither the plaintiffs nor the defendants place significant reliance upon the same. However, the plaintiffs maintain that they had no knowledge of the Unilateral Declaration at the time that it was made and that it was deliberately concealed from the plaintiffs by the defendants at the time of the adoption of the Decision. This is denied by the defendants. The plaintiffs pleas in this regard are also addressed below.

8. Ireland elected not to draw up a conversion plan for approval by the Commission. Recital 7 of the Decision which makes it clear that the drawing up of such a plan is optional, was an amended version of an earlier draft of the Decision which, had it been passed in the earlier format, would have made it mandatory for Member States to draw up such plans. The amendment of this provision, from mandatory to optional, came about as a result of lobbying on the part of the defendants in September/October of 1998. The defendants maintain that this amendment was necessary because, in their view, Ireland would be unable to avail of the compensatory measures provided for by the Decision. This was because by this time all of Ireland's structural funds were already committed and it therefore would not be possible for Ireland to fund the compensatory measures envisaged by the Decision having regard not only to the terms of the Decision itself, but also to the EU Rules on State Aid. I.e. Ireland could not even consider funding the compensatory measures itself out of its own resources, because that would have been contrary to the EU prohibition on State Aid. All of that being the case, the defendants considered that there would be no point in preparing a conversion plan which was incapable of implementation.

9. For their part, the plaintiffs maintain that the lobbying conducted by the defendants to bring about the amendment to the Decision, such as to make the preparation of a conversion plan optional, constituted a volte-face on the part of the first named defendant ("the Minister") on his promise that the plaintiffs would receive compensation because of the impact of the drift net ban upon their livelihoods, and that it rendered the Decision a "dead letter" as far as the plaintiffs were concerned. They also claim that they were unaware of the defendants' successful efforts to influence the final text of the Decision until receipt of discovery from the defendants, on 4th November 2007.

The Proceedings

10. These proceedings were not issued on behalf of the plaintiffs until 12th December, 2007. The tardiness on the part of the plaintiffs in issuing the proceedings is explained, at least in part measure, by reason of the fact that the solicitor that they originally instructed, as far back as August of 1998, failed to issue proceedings on their behalf and subsequently ceased practice as a solicitor. The delay in the issue of the proceedings has given rise to a plea on the part of the defendants that the proceedings are statute barred and/or should be struck out on grounds of inordinate and unconscionable delay and/or laches. I will address these issues later in the judgment. The pleadings in general are quite lengthy, running in total to some one hundred and eighty six pages. I summarise below the main features of the plenary summons, statement of claim the defence and the reply to the defence. I will address other pleadings as needs be.

The Plenary Summons

11. In the plenary summons, the plaintiffs claim:-

> *"(a) A declaration that the defendants herein have failed to defend and vindicate the right of the plaintiffs;*
>
> *(b) A declaration that the plaintiffs herein are entitled to and have a legitimate expectation, to compensation, pursuant to and arising from the obligations of the State as a member of the European Union;*
>
> > *(i) Whether arising from the introduction of a ban on fishing for tuna pursuant to EC Regulation No. 1239/98 and the preliminary draft EC Council and Commission Joint Declaration given in Luxembourg on the 8th day of June, 1998 as to flanking compensation measures and/or*
> >
> > *(ii) On the basis of the representations and undertakings connected to the said EC Regulation No. 1239/98 and the preliminary draft EC Council and Commission Joint Declaration given in Luxembourg on the 8th day of June, 1998, by or on behalf of the defendants to the plaintiffs;*
>
> *(c) A declaration that the defendants have failed to fulfil their obligations and representations to compensate the plaintiffs as agreed at the EC Council Meeting of Fisheries Ministers on the 8th day of June, 1998 and at the time of the agreement of Council Regulation 1239/98 and a preliminary draft Council and Commission Joint Declaration as to the flanking supporting compensation measures (which said Declaration was attached to the Minutes of the said Ministers' Meeting);*
>
> *(d) A declaration that the acts of the first named defendant, his advisors and consultants, in raising an impediment to the recovery of compensation by the plaintiffs is null, void and of no force and effect;*
>
> *(e) A declaration that the second named defendant should make available to the first named defendant the funds ordered by this Honourable Court to be paid to the plaintiffs herein;*
>
> *(f) An order directing the first and second named defendants herein to compensate the plaintiffs, and each of them for*

their losses, including the loss of their income consequent on the ban of fishing for Albacore Tuna from 1st January, 2002.

(g) An order granting to each of the plaintiffs herein, such damages as are deemed appropriate to remedy the breach of their rights;

(h) Such further or other orders, declarations and directions as shall appear to this Honourable Court to be necessary or appropriate in the circumstances of these proceedings herein;

(i) And the costs of the proceedings herein."

The Statement of Claim

12. A statement of claim was delivered on behalf of the plaintiffs on 3rd February, 2010. The plaintiffs claim that the defendants were at all times fully aware of the concerns of the plaintiffs in relation to the proposed drift net ban. In particular, the plaintiffs assert that the defendant was aware that the ban would cause significant loss of income to the plaintiffs. They claim that the Minister represented to them that the Commission was prepared to adopt appropriate flanking or compensatory measures. It is pleaded that on 8th June, 1998, the Minister specifically stated, promised and represented to the plaintiffs and their representatives that good and substantial compensation would accrue to each qualifying boat and fisherman. The plaintiffs claim that this added to a substantive legitimate expectation to compensation and other flanking measures upon introduction of the drift net ban. They claim that the defendants represented to them that the Joint Declaration, the Regulation and the Decision would together provide a secure basis upon which the Irish Tuna Fleet, both owners and fishermen could prepare for the future. The plaintiffs claim that they were deprived of the benefits of the Decision because of representations made by the defendants to the Commission to amend the text of the Decision the effect of which was to make it optional for Member States to draw up a conversion plan as provided for in the Decision. It is alleged that these amendments were secured in circumstances where the defendants had decided not to draw up a conversion scheme and not to compensate the plaintiffs. Accordingly, it is claimed that legislation which would have provided for an entitlement to compensation was denied to the plaintiffs in a manner that infringed their entitlements both in community law and in national law. This, it is claimed, occurred solely as a consequence of the actions of the defendants.

13. It is claimed that the defendants breached the requirements of Article 34 of the EC Treaty and in particular the requirement that a common organisation shall exclude any discrimination as between producers or consumers within the community.

14. The plaintiffs claim that in failing to implement a conversion plan (including a compensation plan) for the purposes of the Decision, the defendants have acted in breach of duty, including statutory duty and the duty imposed in community law on the defendants as follows:-

(a) failing to respect the legitimate expectations of the plaintiffs in community law including their substantive legitimate expectations;

(b) failing to respect the legitimate expectations of the plaintiffs in national law including a substantive legitimate expectation;

(c) failing to respect the plaintiffs' rights, entitlements and expectations further to the statements, promises and undertakings of the first named defendant and the Joint Declaration;

(d) failing to inform the plaintiffs as to the amendments made at the request of the defendants to the draft Commission proposal for the Decision, with the express intention of defeating and rendering nugatory the legitimate expectations, rights and entitlements of the plaintiffs to the benefit of conversion plans (including compensation) as provided for in the Decision;

(e) causing, allowing and/or permitting the draft Council Decision to be amended so that no conversion plan needed to be drawn up to compensate and alleviate the known hardships that the plaintiffs and fishermen and fishing boat owners would suffer by reason of the Regulation;

(f) failing to act in accordance with the principle of community solidarity as provided for in Article 10 of the consolidated version of the Treaty establishing the European Community;

(g) failing to respect the principle of equality in community law;

(h) failing to act in accordance with the principle of non-discrimination between producers in a common organisation as otherwise required by Article 34 of the EC Treaty;

(i) failing to preserve equity between the fishermen and fishing vessel owners of all of the Member States concerned;

(j) failing to emphasise and underscore the repeated assurances and representations which the plaintiffs had received from the State Authorities including the first named defendant regarding their position following the Decision of the Council to prohibit drift netting for tuna.

15. The plaintiffs also claim special damages, detailed particulars of which were furnished in replies to particulars dated 5th November, 2012, whereby the plaintiffs claimed special damages in excess of €17 million. These special damages were in each case claimed under a number of headings, such as loss of profits, bank interest and capital expenditure costs. However, at the commencement of the trial, these claims were withdrawn and the plaintiffs confined their claims to the compensation provided for by the Decision, and specifically each plaintiff claims the sum of €285,000, being the maximum amount payable under the Decision in respect of the carrying out of works to a vessel having a gross tonnage greater than 80 tonnes, for the purpose of conversion to another fishing activity.

The Defence

16. In the defence it is stated that although the first named defendant was aware, from representations made by industry representatives, of concerns of the plaintiffs regarding the proposed changes to the fishing regime for tuna, the defendant puts the plaintiffs on proof that the defendant was fully aware of the plaintiffs' anxieties regarding the proposed restriction and prohibition or

the alleged adverse consequences of same on the plaintiffs' undertakings.

17. While the defendants puts the plaintiffs on full proof that the Council/Commission stated that compensation would be provided to the plaintiffs, the defendants plead ands accept that earlier in 1998, the first named defendant had been hopeful of obtaining additional funding to allow for compensation. The defendants admit that the legislation of the EU and domestic legislation enacted in implementation thereof prohibited the plaintiffs from driftnet fishing for tuna as from 31st December 2001.

18. The defendants also admit that the first named defendant informed the plaintiffs of the terms of the Regulation and of the agreement to postpone the implementation of the ban on tuna fishing with driftnets until 31st December 2001, and of the possibility of funding for research. It is acknowledged in the defence that the Minister worked "intensely" with the fishing industry in the months following the adoption of the Regulation to "ensure the industry prepared for its own future."

19. It is admitted that the State did not have the funds to provide for flanking measures as any funds to be made available in that regard by virtue of the Decision were required to be provided from limited and/or already allocated resources, i.e. structural funds which in Ireland's case were already fully allocated.

20. The defendants plead that the proceedings are statute barred. It is also pleaded that the plaintiffs are guilty of prolonged, inordinate and inexcusable delay both in the institution and progression of the proceedings, as a consequence of which the defendants claim they have suffered prejudice. The defendants plead that the plaintiffs' proceedings are contrary to the interests of justice and infringe the defendants' rights under the Constitution and the European Convention on Human Rights to a fair hearing within a reasonable period of time.

21. It is pleaded that insofar as the plaintiffs seek to impugn legislation of the EU and/or the actions of the Institutions of the EU, that such claims are not justiciable. The defendants deny that they undertook to draw up detailed plans or send them to the Commission for the purpose of providing compensation to the plaintiffs. It is pleaded that the first named defendant was aware that in the case of Ireland, the State did not have available any unallocated structural funds to pay for compensatory measures and that Ireland had been unable to obtain any new funding from the Commission to fund compensatory measures and that the Joint Declaration did not state Ireland's position. The defendants claim that the plaintiffs were aware, at all material times, that Ireland had not given any promise or commitment to any person to draw up plans in order to compensate the plaintiffs and that Ireland would not have been in a position to avail of that process unless additional funding became available from the EU.

22. If the Decision failed to respect the rights and entitlements of the plaintiffs, the defendants deny that they are liable for same. The defendants deny that the Decision was amended after its adoption at their request. It is accepted however that the State made proposals in respect of matters to be dealt with by the Decision, but it is pleaded that such proposals were made in the context of the State's membership of the EU and in the interests of the State and the common good The defendants plead that such proposals resulted from the policy adopted by the executive and are not justiciable before the Court. The defendants deny that the Decision provided that fishermen and fishing vessel owners were entitled to compensation and/or conversion grants provided for in the Decision. It is claimed that the Decision permitted member states to provide compensation if they were in a position to do so.

23. It is denied that the Minister represented that the plaintiffs would secure substantial compensation when the driftnet ban was imposed. It is also denied that the Joint Declaration purported to guarantee to the plaintiffs compensation and/or that the defendants would prepare a conversion plan. It is also denied that any adverse consequences flowed directly as a consequence of the amendment made at the request of the defendants to the Commission's draft proposal for the Council Decision.

24. The defendants deny that the Minister failed to act to the best of his ability to address concerns advanced on behalf of the plaintiff. The defendants plead the Minister sought at all material times funding from the EU to facilitate flanking measures. It is denied that on 8th June 1998, the Minister stated, promised or represented to the plaintiffs that good and substantial compensation would accrue to them. Although earlier in 1998, the Minister had stated that he hoped additional funding would be made available by the Commission, the defendants deny that the State ever represented to the plaintiffs that any compensation would be paid by the State to any fishermen. The defendants plead that the plaintiffs knew at all material times that any compensation which might be paid, would have to be paid from additional funding from the EU's budget, which never materialised.

25. It is expressly denied that the Minister said or did anything or made any representation such as could have given rise to a legitimate expectation in respect of compensation. Insofar as any representations were made, it is claimed that such amounted to no more than an affirmation of desire and concern on the part of the Minister to obtain compensation for the plaintiffs. It is pleaded that the plaintiffs knew that such were the circumstances in which the Minister made the alleged statements and that no funding was forthcoming from the EU. It is denied that any representation was made by the first defendant that the plaintiffs personally would receive compensation. It is denied that the first defendant represented to the plaintiffs that he had secured a compensation package.

26. It is also denied that as a result of the Decision that the plaintiffs were deprived of any benefit to which they would have otherwise been entitled. It is denied that the alleged or any proposal made by or on behalf of the executive to the institutions of the EU breached the principle of equality. It is also denied the defendants have breached the requirements of Article 34 of the "EC Treaty". The defendants deny that they at any time concealed any particular matter from the plaintiffs. The defendants deny that by failing to implement a conversion or compensation plan pursuant to the Decision that the defendants acted in breach of duty. It is also denied that there was any obligation to inform he plaintiffs of the involvement of the Minister in the travaux preparatoires leading to the adoption by the Council of any particular Decision. It is denied that any such proposal was made with the express intention of defeating or rendering nugatory any alleged entitlements of the plaintiffs, but that such representations were made in the exercise of the executive to make submissions in the national interest regarding a proposal for legislation to be enacted by an institution of the EU. It is denied that the defendants caused or allowed the Council of Ministers to enact any piece of legislation.

27. It is denied that the plaintiffs have suffered any loss or that they are entitled to compensation under the Decision. The defendants plead that the Court would be acting contrary to public policy and or in breach of EU law in making provision for the payment of damages or compensation as same would amount to State aid, in a manner not contemplated by the legislation of the EU.

Reply to Defence

28. On 14th December, 2011 a reply to the defendants' defence was delivered on behalf of the plaintiffs. The plaintiffs join issue with the defendants on their defence, save to the extent that the defence contains or implies admissions.

29. The plaintiffs plead that the defendants are estopped from pleading that the plaintiffs have been guilty of inordinate and inexcusable delay in the conduct of the proceedings, and further rely upon s. 71 of the Statute of Limitations 1957, in each case on

the basis that the defendants concealed from the plaintiffs the submissions made by the defendants to the Commission's proposal for what became the Decision, and further concealed the Unilateral Declaration from the plaintiffs.

30. The defendants plead that the Unilateral Declaration reflected the representations and assurances of the first named defendant to the plaintiffs and the legitimate expectations of the plaintiffs to compensation by reason of the coming into the operation of the drift net ban on 1st January, 2002.

31. It is denied that the representations of the first named defendant on 8th June, 1998, constituted no more than an affirmation of the desire and concern on the part of the first named defendant to obtain such compensation and/or such measures as were feasible in all the circumstances, as pleaded in the defence. The plaintiffs deny that they were ever informed that the compensation represented to them was conditional upon European Union funds being available and that such funds were subsequently not forthcoming. The plaintiffs plead that their true complaint relates to the expectations and promises made by the first named defendant on 8th June, 1998 in Luxembourg and to the manner in which the fishing undertakings responsible for the development and establishment of the Irish Tuna Albacore fishery have been cast adrift by the defendants having previously established and brought to fruition the said valuable Irish fishery. The plaintiffs deny that any loss that they suffered is a loss from the acts of the Institutions of the European Communities. They deny that the representations made by the first named defendant to the Commission in relation to the terms of the Decision were made in the national interest.

32. It is pleaded that at no time did the first named defendant withdraw, in language unmistakeable and clear and directed to the plaintiffs, the representations and assurances made on 8th June, 1998.

33. The plaintiffs plead that the adverse consequences flowing from the Regulation and the Decision are justiciable before this Court through the prism provided by domestic legislation enacted by the defendants in consequence of the Regulation, specifically orders made by the first named defendant pursuant to powers provided for in the Fisheries (Consolidation) Act 1959, as amended. It is denied that the true complaint of the plaintiff relates to the terms of the Decision and that any complaint in regard thereto is not justiciable before the Court.

34. The plaintiffs' claims may be grouped under two headings. Firstly, a claim that by reason of representations made to them by the first named defendant they at all times had and continue to have a legitimate expectation to receive compensation from the defendants, within the parameters of the Decision, by reason of the impact upon their livelihoods of the drift net ban. They claim that by taking steps to make the adoption of a conversion plan optional, and thereafter failing to adopt such a plan, the defendants deprived them of the compensation to which they would otherwise have been entitled, and which it was represented to them by the first named defendant they would receive. Secondly the plaintiffs claim that the steps taken by the defendants to amend the final text of the Decision and the manner in which the defendants made representations to the Commission in this regard (which representations the plaintiffs claim were made without notice to them and contrary to fair procedures) constitute a failure by the defendants to defend and vindicate the rights of the plaintiffs, and the plaintiffs seek a declaration to this effect. I will first address the issue of the representations which the plaintiffs claim were made to them and upon which they ground their claim to a legitimate expectation to compensation, and will thereafter address their claim for a declaration that the defendants failed to defend and vindicate their rights.

The Alleged Representations

35. All of the plaintiffs gave evidence at trial, or in the case of the fourth named plaintiff, evidence was given on its behalf by the sixth named plaintiff whose boat named "The Resolution 2" was in part owned by him personally and in part by the fourth named plaintiff. While the thirteenth named plaintiff did not give evidence, his son Alan Carleton did give evidence. According to the evidence there were three occasions on which the plaintiffs claim that the Minister made the representations upon which they rely for the purpose of their proceedings, although only one of these occasions, the 8th of June 1998 is pleaded. Be that as it may, the first occasion on which it is alleged that representations were made was on 11th May, 1998 upon the ceremonial opening of the new harbour master's office in Dingle. According to Mr. Hennessy, the third named plaintiff, the Minister attended on this occasion with one of his department officials namely Dr. Cecil Beamish, as well as other officials. Of the other plaintiffs, Mr. Thomas Kennedy, Mr. Michael Murphy, Mr. Paul Flannery and Mr. Vincent Browne all gave evidence that they attended this occasion. Mr. Hennessy said that the meeting with the Minister lasted approximately ten to twelve minutes during which time the fishermen present expressed their opposition to the proposed ban on drift net fishing. Mr. Hennessy stated that the Minister replied that it looked like Ireland would be outvoted on the issue, but the Minister added that a good compensation package would be provided. Mr. Kennedy, the first named plaintiff who commenced tuna fishing in 1995 and who was chairman of an informal body known as the Irish Tuna Association ("the ITA") (formed expressly to achieve the twin aims of continuing to fish tuna and of opposing the introduction of the ban) gave evidence to a very similar effect i.e. the Minister was pessimistic that the ban would be introduced, and that while he would continue to oppose its introduction, if it was introduced, there would be a compensation package.

36. Mr. Murphy, the second named plaintiff, said that he could not recall very much about the meeting. He recalled the Minister saying that the Department was doing its best to oppose the ban. He could not recall the Minister mentioning compensation one way or another. He said that he thought this meeting lasted about twenty minutes. Mr. Flannery, the seventh named plaintiff, said that the group wanted to impress upon the Minister the need to oppose the introduction of the drift net ban, rather than a wish to be compensated in the event that the ban was introduced. However, the Minister said that if a ban was introduced, there would be compensation for those affected. Mr. Browne, the fifth named plaintiff, gave similar evidence. No indication was given as to what the compensation would be for i.e. payment for loss of income, loss of fishing opportunity or expenses incurred in converting vessels to other methods of fishing.

37. As to the evidence of the defendants concerning this occasion, the Minister at the time, Dr. Woods was not called in evidence. The explanation given for this is that it would be "inappropriate". It was not suggested that the Minister was incapable or unavailable. No issue was made about this at the time, but it is somewhat regrettable that he was not called to give evidence. While in general terms one can readily understand why it is inappropriate to call a Minister to give evidence in proceedings to which he/she is at party only by reason of the office which he/she occupies, this case revolves very significantly around comments attributed by the plaintiffs to the Minister personally on not one, but on three occasions. If the Minister was available to give evidence, then he should have been called to deal with the plaintiffs allegations.

38. In any case, Dr. Cecil Beamish, currently Assistant Secretary General of the Department of Agriculture and the Marine was called in evidence. Dr. Beamish was a Principal Officer in the Department from 1996 onwards and was involved in dealing with issues associated with the drift net ban during the late 1990s. Although a number of the plaintiffs said that Dr. Beamish was at the meeting in Dingle in 1998, in his evidence he said that he had no recollection of attending that meeting. None of the other witnesses who gave evidence on behalf of the defendants were in attendance at the meeting in Dingle.

39. Those of the plaintiffs who were at the Dingle meeting in 1998, said that the Minister encouraged the industry to support opposition to the proposed ban. He encouraged them specifically to attend the meeting of the Council of Ministers scheduled to take place in Luxembourg on 8th June 1998, in order to make their presence felt and so that the Council of Ministers would be aware of the depth of opposition to the proposed measure in Ireland. Of the plaintiffs, Michael Hennessy, Thomas Kennedy, Michael Murphy, Cornelius Minihane, Vincent Browne and Donal Healy travelled to Luxembourg. Mr. Alan Carleton, son of the last named plaintiff also travelled. They were accompanied by a Mr. Lorcan Ó Cinnéide (a consultant to the fishing industry from Dingle, who gave assistance to the plaintiffs at around this time in relation to the proposed drift net ban) a Mr. Ricky O'Catháin (owner of a fish factory in Dingle), and a Mr. Jason Whooley then Chief Executive Officer of the Irish South and West Fisherman's Organisation ("the IS&WFO") up until 2007 ,and who subsequently became Chief Executive Officer of An Bord Iascaigh Mhara, all of whom also gave evidence in the proceedings. Also in Luxembourg was Mr. Mark Lochrin, Chief Executive Officer or the Irish Fishermen's Protection Organisation ("IFPO") (now retired) who also gave evidence.

40. On the evening before the meeting of the Council of Ministers i.e. 7th June 1998, the plaintiffs who travelled, together with Mr. Ó Cinnéide and Mr. Whooley, claim that they met with the Minister in a hotel room in Luxembourg. According to Mr. Vincent Browne this meeting went on for about an hour to an hour and half. Mr. Hennessy said that at this meeting the Minister informed those present that it was likely that the drift net ban would be introduced. Mr. Hennessy said that he said to the Minister that the plaintiffs had invested in their boats and that they wanted to stay fishing and the Minister responded by saying that, if the ban was introduced they would be "well compensated" and "there will be a good compensation package put in place". He also mentioned the possibility of funding in respect of a scheme for fishing white fish. The evidence of the other plaintiffs who claimed to have been present on 7th June 1998 was broadly speaking the same as that of Mr. Hennessy.

41. The following day the party attended the hotel in Luxembourg at which the Council of Ministers were meeting. The meeting went on all day and long into the night. Mr. Hennessy said that eventually they were informed by Mr. Joe Ryan, a departmental official, that the ban was to be introduced. The Minister eventually emerged, at about 1 a.m. and confirmed that this was so but also stated that he had succeeded in getting a moratorium on the ban of four years (or more accurately four more seasons, starting with Summer of 1998) and an agreement for "good compensation". Mr. Hennessy said that the Minister was unable to give any details as to the compensation package. Mr. Kennedy, in his evidence, also said that the Minister a stated there would be a good compensation package when the ban became operative. However, he said that the reference to compensation was vague. He said that the compensation that he wanted was compensation for the loss of the fishery.

42. The evidence of all of the remaining plaintiffs who were present after the Council of Ministers meeting in Luxembourg on 8th June 1998 was, broadly speaking, the same as the evidence of Mr. Hennessey and Mr. Kennedy. It is unnecessary to set out here what each of the witnesses said specifically. However, there are some interesting and informative nuances provided by the evidence of some of the other witnesses.

43. Mr. Ó Cinnéide said that on 8th June, he asked the Minister specifically what he had in mind in respect of compensation compensation, but the Minister was unable to provide any details. Mr. Alan Carleton in his evidence said that he recalled this exchange between Mr. Ó Cinnéide and the Minister. Mr. Whooley says that he recalled the issue of compensation being raised, but did not know who mentioned it. He confirmed that the Minister said that there would be compensation, but added:

> *"I have no idea specifically other than that it was, I think, probably a reasonable attempt by the State to pacify what was a very concerned group of individuals."*

44. Mr. Mark Lochrin, the Chief Executive of the IFPO was also present when the Minister emerged from the meeting of the Council of Ministers on 8th June. He gave evidence and said that he had no recollection of these exchanges.

45. Mr. Donal Healy said that the Minister confirmed that the ban on driftnet fishing had been imposed but would not come into effect for another four years. He said that the Minister did say there would be a good compensation package. Under cross-examination, Mr. Healy said:- "He [the Minister] said "I got you four years. When the fishery is finished you will get a good compensation package." Mr. Healy said that Mr. O'Cinnéide pressed the Minister for a figure, but the Minister could not provide a figure because he said there would have to "be some meetings held" and there would "have to be negotiations done" between the different bodies. This lead to the following further exchange between counsel for the defendants and Mr. Healy:

> Counsel: *"You said the Minister mentioned compensation. Mr. Lorcan O'Cinnéide asked for specifics or some specific information?"*
>
> Mr. Healy: *"Yes, could he give him figures he said."*
>
> Counsel: *"And from your recollection the Minister said no, there would have to be more discussions with the Commission, more negotiations with the Commission--"*
>
> Mr. Healy:" *That is correct."*

Mr. Healy said that he was in close proximity and heard what he said directly.

46. In his evidence, Mr. Whooley stated that the hotel in which the plaintiffs were staying was some distance from the Council building where the Council of Ministers were meeting. He said that when the plaintiffs arrived at the building by bus, they were met by a Greenpeace protest outside the building. He said that during the day, the plaintiffs were "drip fed" into the building by the officials. At one stage, the plaintiffs were encouraged to go home because the meeting was going on so long. When the Minister emerged from the meeting of the Council of Ministers, the picture of the scene painted by Mr. Whooley and others was one of the Minister and his officials entering a crowded lobby where the plaintiffs were anxiously awaiting news of the outcome. Mr. Whooley described the atmosphere as "fraught". Whatever the Minister may have said on this occasion, that was the background against which he said it.

47. As noted above, the Minister himself did not give evidence. However, officials in the Minister's department who were heavily engaged in all matters of fisheries policy, including the State's opposition to the Regulation, did give evidence. These included Dr. Beamish, who recalled what he described as a "stand up" meeting in the foyer of the Council building, but did not recall the content of the discussion between the Minister and the plaintiffs. Mr. Joseph Ryan, who now works with the Revenue Commissioners, but at the time was working in the Department of Marine, Sea Fisheries Administration Division, gave evidence to say that he was not in Luxembourg in June 1998. In fact he said he never attended a Council of Fisheries Minister's meeting in Luxembourg. This was to counter evidence given by four of the plaintiffs who expressly identified Mr. Ryan as being present in Luxembourg and who they said was keeping them up to date on developments.

48. Ms. Sara White, who was Assistant Secretary in the Department of Marine and Natural Resources gave evidence that she was in Luxembourg and was present when the Minister met with the plaintiffs after the meeting of the Council of Ministers. She said that the Minister did not make any promises (as to compensation). She said that if he had done so, she would have intervened to correct him. She said that she was not known for standing idly by in such situations. She said that the Minister was actively engaged in his brief and very well informed on all the issues surrounding the proposed Regulation. He would have been aware by this time that such compensation measures as were under consideration were only going to be available to countries that at the time had available to them unallocated structural funds. Her evidence in this regard was corroborated both by Dr. Beamish and also by Ms. Josephine Kelly, who in 1998 was assistant principal in sea fisheries policy in the Department of Agriculture, Fisheries and Food. It was clear from the evidence of Dr. Beamish, Ms White and Ms. Kelly that from March 1998 onwards, the only compensation under discussion was compensation to convert vessels to other means of fishing, and that such compensation would only be made available through the use of unallocated structural funds, of which Ireland had none. Ireland alone in the EU was in this position ,and while the defendants continued to lobby and negotiate for additional funds, ultimately they were unsuccessful, save that they achieved agreement for the provision of funding for a "white fish" scheme, as well as for trials for other methods of tuna fishing. Ms. White said that the Minister was aware of all of this, not just because of his briefings from his officials, but because of his own direct involvement in negotiations. Indeed the Minister had travelled to Bonn in the weeks before 8th June 1998 to meet his German counterpart in the hope that Germany might be persuaded not to restrict funds available for compensation to existing unallocated structural funds. By the time of the meeting of the Council of Ministers on 8th June, 1998, drafts of both the Regulation and the Joint Declaration had been prepared. Since no additional funding was agreed at the meeting of the Council of Ministers, in Ms. White's view it is inconceivable that the Minister would have made any promises as to compensation outside of the scope of what was under consideration, and at that stage it was absolutely clear that what was under consideration would not be available the Irish tuna industry.

49. All of the above is subject to one qualification. Under cross examination, Dr. Beamish was asked about the reference in a report in the Examiner on 9th June 1998, on the events in Luxembourg of the day before, in which it was stated that the Minister had, three months previously, promised IR£25m compensation in the event of a ban being imposed. Dr. Beamish confirmed that there had been talk earlier in the year of a "more generous compensation package", but that had ceased as the year went by. He did not know however if the Minister had made any specific representations about compensation during that period.

50. On the morning after the meeting of the Council of Ministers, i.e. on 9th June, 1998, and following the meeting of the plaintiffs with the Minister, Mr. Ó Cinnéide gave a number of radio interviews. The transcript of one of these interviews was introduced into evidence at trial. During the course of this interview, Mr. Ó Cinnéide stated categorically that there was no provision for compensation to fishermen as a consequence of the driftnet ban. He explained to the Court that the reason he said this was that he and all those he represented were very shocked by the introduction of the ban; they wanted to focus on overturning the ban, and he did not wish to distract the public, whom he was addressing in the course of this interview, with a suggestion that everything would be all right if only compensatory measures were put in place. In the course of the radio interview, Mr. Ó Cinnéide said:-

> *"The fact of the matter is, that there is nothing, absolutely nothing in this deal, by way of compensation. There is a vague commitment to examining what would be required but there is nothing on the table."*

51. There was also handed into Court, newspaper reports from 9th June. While these are of no evidential value as to what the Minister may or may not have said, they do demonstrate what was being said to the nation at the time, even though not one of the plaintiffs admitted to having read or heard of any of the following reports:-

(i) The Irish Times

> *"EU Fisheries Ministers last night banned the use of driftnets to catch tuna from January 2002, responding to widespread environmentalists' concerns for dolphins and other species caught and killed in the nets.*
>
> *The decision comes as a blow to the Minister for the Marine, Dr. Woods, who opposed the ban, arguing that Irish fishermen do not represent a significant threat to dolphins. He won only the most unspecific promise of compensation from structural funds.*
>
> *…*
>
> *Dr. Woods admitted that the decision was a setback, but claimed that in pushing the phase-out period back from two to four years against a majority in the Council, Ireland had had a significant negotiating success which would allow it access to the next tranche of structural funds from 2000. Ireland's current allocation has been used up. The Minister said he was confident that the four years would give the industry the time to adapt to alternative fishing methods and transfer the technology required to the fleet. That process would be assisted by research money that, he said, the commission had promised to make available."*

(ii) The Irish Independent

> *"Ireland lost tuna fishing rights worth £4m per year last night and was left fighting for EU compensation already promised by Marine Minister, Dr. Michael Woods…*
>
> *… The Marine Minister said he had been given an indication that some extra EU fishery research funds would be made available but that any other compensation would still have to be negotiated with Brussels.*
>
> *He conceded that a pledge of extra EU money, 'commensurate with the value of the Irish catch' which he had signalled after talks last March, had not been forthcoming so far.*
>
> *"That is our task now, to achieve that…but I am confident this valuable fishery can survive."*

(iii) The Examiner

> *"After almost twelve hours of negotiations, Marine Minister Michael Woods emerged defeated and empty handed on the £25m compensation he promised …*

… Three months ago Mr. Woods promised at least, £25m in EU funding to cushion the blow. But any compensation will have to come out of the next round of Ireland's heavily depleted structural funding …

… The deal, involving a three and a half year phase out period and vague promises on retraining on new equipment, but no new money, brought cold comfort for the vessel owners."

52. Before considering whether the first named defendant made the representations he is alleged to have made, and whether or not they could give rise to a legitimate expectation in law on the part of the plaintiffs, I should mention that in the course of his evidence, Mr. Hennessy said that in September of 1998 he received a copy of a letter bearing the "IFPO" stamp, which was a letter from a Mr. Guy Vernaeve, a representative of a French fisheries organisation (the "Vernaeve letter"). This letter summarised the kind of compensation measures that were under consideration by the Commission at the time, and which were ultimately adopted by the Council in the Decision. By reference to this, Mr. Hennessy said that he expected to receive compensation in the sum of €285,000.00 when the drift net ban came into effect. Mr. Hennessy produced this document in evidence. Notwithstanding an order for discovery which would have required the plaintiffs to discover this document, it was not discovered by the plaintiffs. Mr. Hennessy was unclear in his recall as to whether or not he had made this document available to his solicitors in response to the discovery order. He thought he might have given it to his solicitor, or to Mr. Kennedy, who was coordinating these proceedings on behalf of all plaintiffs, but he could not explain why the affidavit of discovery sworn by Mr. Kennedy stated that the plaintiffs had no documents in their possession to discover. Mr. Hennessy said that he thought he would receive the sum of €285,000.00 in order to convert his boat for pelagic fishing, an alternative method of fishing for tuna which involves the use of two boats to trawl a net. Notwithstanding the contents of the Vernaeve letter, Mr. Hennessy denied any knowledge of the Commission proposal for a decision for social flanking measures, or the Decision itself, until commencement of the trial. He said he did not think he would have to convert his vessel before receiving compensation. The Vernaeve letter indicated that the Decision, which was then in draft form only, would require individual projects to be approved by national authorities at latest by 31st December, 1999.

53. In the course of his evidence, Mr. Kennedy confirmed that he too had received a copy of the Vernaeve letter in or about September of 1998, from the IFPO. He said that originally the compensation he thought he would receive on account of the drift net ban was compensation for the loss of the fishery, but that was until he saw the Vernaeve letter. Then he realised the compensation recoverable would be limited by the scheme referred to in the Vernaeve letter, which in his case would mean the cost of converting his vessel, subject to a limit of €285,000. He confirmed that he did not seek payment of this compensation from the defendants before instructing solicitors. He was asked why, if he expected that he was going to receive compensation for converting his vessel, he did not first contact the department about applying for the same. He gave no satisfactory answer to this question. Other plaintiffs , in response to the same question said that their dealings with the department had been unsatisfactory, and there would have been no point in contacting the department, but the evidence established that the plaintiffs were well experienced in dealing with the department and in fact obtained substantial grant aid from the department to modernise, upgrade and in some cases replace their vessels during the years 1999-2002 approximately- the very period they might have been expected to request the compensation they seek in these proceedings. I deal with this in more detail below, but in the case of Mr. Kennedy, between 1999 and 2002 he received grant aid of approximately €890,000. Mr. Kennedy also confirmed that he is continuing to fish tuna, successfully, having converted his boat for this purpose in or about 2002, at a cost of €500,000. Mr. Kennedy was not asked to explain how it came to be that he had failed to make discovery of the Vernaeve letter when swearing an affidavit of discovery on behalf of the plaintiffs. His failure to make discovery of the letter is all the more surprising given that in his affidavit of discovery he said that he had no documents at all in his possession relevant to discovery, so it is not as if it was lost in a swathe of other documents.

54. I mention the Vernaeve letter for two reasons. Firstly, Mr. Kennedy confirmed in his evidence that he was co-ordinating these proceedings on behalf of all plaintiffs, so it is reasonable to assume that they all had knowledge of it, or at least what it said, from the time Mr. Kennedy had it in his possession, even though of the other plaintiffs, apart from Mr. Hennessy, only Mr Browne definitely recalled the letter. Mr Alan Carleton too recalled it, although whether either he or Mr. Browne actually saw the letter is unclear. But in any case the Vernaeve letter is the basis upon which Mr Hennessy and Mr. Kennedy claim that they had an expectation of receiving compensation in the sum of €285,000 in order to convert their vessels. The remaining plaintiffs were unsure as to where this figure came from, even though they are all claiming this amount. However, Mr. Kennedy explained that at a meeting of the plaintiffs about seven or eight years ago, all of the plaintiffs decided to claim this sum as they had nothing else upon which to base their claim, and did not have receipts for works or other evidence of that kind upon which to base their claims. Mr Graham agreed with this version of events as given by Mr. Kennedy. Secondly, the Vernaeve letter was consistent with the Decision, and made it plain that in order to receive compensation for converting a vessel to alternative methods of tuna fishing, conversion projects would have to be approved by competent national authorities at latest by 31st December 1999. It also clear from the Vernaeve letter that the scheme for compensation was a community scheme, in respect of which community funding was to be provided, with the community contribution capped at no more than 50% of eligible expenditure, and that it was subject to member states' funding limits under the 1994 to 1999 structural fund programmes. The letter also states that member states would be obliged to draw up conversion plans, within the scope of the FIFG, (which is the financial instrument for fisheries guidance, the mechanism through which structural funds are provided to the fishing industry) reflecting the Commission proposal as of September 1998.

Legitimate Expectation?

55. From the above, it is apparent that the plaintiffs claim that on three different occasions they were promised by the Minister that, in the event of the introduction of a drift net ban, they would receive compensation. Only one of those occasions, 8th June 1998, is referred to in the pleadings. This is in spite of a very detailed notice for particulars being raised by the solicitors for the defendants, to which replies given clearly state that the representations relied upon by the plaintiffs were made on 8th June 1998. This was also the only date referred to in the statement of claim. In any case on none of those occasions is it alleged that there was anything specific as to the measure of compensation, what it was for or how it would be calculated. Some of the plaintiffs simply said that they expected compensation for the loss of the fishery. But at trial they all confined their claim to a claim for the compensation within the parameters of the Decision. Each one of them is seeking the maximum amount payable under that scheme for the costs of converting a vessel in excess of 80 tonnes, i.e. €285,000.

56. It might usefully be borne in mind that the ban on drift net fishing did not amount to a ban on fishing tuna, but merely the method by which that fishing is conducted. To this day, two of the plaintiffs, Mr. Kennedy and Mr. Minihane, gave evidence that they fish together (pelagically) for tuna at profits equivalent to those that they previously enjoyed. Mr. Healy gave evidence that there are currently about fifty tuna fish licenses in issue. He said that there are approximately forty vessels or twenty pairs "doing pelagic". In June of 1998, there were about twenty Irish vessels engaged in tuna fishing. So it is clear that there is no question that the fishery was going to be "lost" or that that has happened since 2002. On the plaintiffs' own evidence, it is not even clear that it has become less profitable. However, the evidence did establish that vessels would require modification, at some cost, in order to fish pelagically. The scheme introduced by the Decision was designed to, *inter alia*, compensate, at least in part measure, for some of that cost, but it was clearly never intended to compensate for the loss of the fishery, or even income lost by reason of the driftnet ban.

57. The scheme for compensation provided for in the Decision was flagged by the Joint Declaration. However, not one of the plaintiffs other than Mr. Neil Minihane admitted to any knowledge of the Joint Declaration. Of the other plaintiffs who were asked about it (of which there were seven), all seven disclaimed any knowledge of the Joint Declaration. They said simply that they expected compensation once they were obliged to cease drift net fishing on 1st January, 2002. Notwithstanding this position, and somewhat paradoxically, as mentioned above, a number of them gave evidence that their expectation was to receive the compensation provided for by the Decision, of which they all also disclaimed knowledge. It is difficult to see how they could have had an expectation of receiving this compensation, by reason of the representations which they claim the Minister made to them, in circumstances where (a) they disavowed any knowledge of the Joint Declaration and the Decision and (b) on their own evidence, the Minister's assurance of compensation was vague and in no way related to the Decision. Of course Mr. Hennessy and Mr. Kennedy said they were expecting to receive the compensation referred to in the Vernaeve letter, which was substantially the same as that provided for in the Decision.

58. The starting point in considering of all of this, and the issue of fact which this Court must decide, is whether the Minister made any representations at all to the plaintiffs that they would receive compensation, following the coming into effect of the drift net ban? On balance, having considered the evidence of all witnesses I consider it very likely that the Minister made reference to compensation in his discussions with those of the plaintiffs that he met on 11th May, 7th June and 8th June 1998. Dr. Beamish agrees that there had been some talk of compensation earlier in the year. While attitudes in other member states to the issue of compensation had hardened between March and May, it was still under discussion, and even after the adoption of the Regulation Ireland was still arguing that it might be paid from the next round of structural funds. There was also discussion around the availability of funds for experimental trials and a white fish scheme, which funding was eventually provided. Given all of this background, and the necessarily political nature of the Minister's encounters with the plaintiffs, I think it quite likely that he said to the plaintiffs that compensation would be provided. To hold otherwise would be to reject the evidence of no less than seven of the plaintiffs who at different times said they heard the Minister make a promise of compensation, as well as the evidence of Mr. O'Cinneide and Mr. Whooley, in circumstances where the Minister himself was not called to give evidence, and the witnesses called by the defendants could only speculate on the issue, based on the Minister's detailed knowledge of matters concerning the drift net ban. While I do believe the evidence of Ms. White that she did not hear the Minister make any reference to compensation on 8th June, 1998, given the environment in which the Minister met with the plaintiffs, it could not be certain that she would have heard all of his conversation with the plaintiffs. However, I do not accept that the Minister said there would be "generous" or "substantial" compensation as some plaintiffs claimed. This would be highly unlikely in the circumstances, and is flatly contradicted by the interview given by Mr. O'Cinneide the following day on Morning Ireland, no matter how he tries to contextualise his remarks in that interview. It is also somewhat at odds with the evidence of Mr. Healy who stated that the Minister made it clear that the issue was still under negotiation although Mr. Healy did say that the Minister said there would be a "good compensation package" after four years. Most importantly of all however, I think it is clear that whatever the Minister said as regards compensation was couched in the most general and unspecific of terms.

59. The background against which and the context within which the Minister referred to compensation is very relevant. Firstly, all references to compensation were made against the backdrop that it was the Council of Ministers of the European Union, and not the Irish State that was introducing a drift net ban. It would have been apparent to the plaintiffs that any compensation to which the Minister was referring was whatever compensation could be agreed in Europe and would become available through the European Union, and not through the organs of the State, because the plaintiffs knew that the Minister was negotiating with the Commission and the Council of Ministers. It was therefore clear, and in my opinion understood by the plaintiffs, that the Minister was representing to the plaintiffs that they would receive such compensation as could be negotiated with the institutions of the European Union. Mr. Healy acknowledged as much in his evidence, and in concluding his evidence on this point he stated: "All [sic] was on the table was a blank paper". This is also borne out by the fact that the plaintiffs are claiming the very compensation permitted by the Decision.

60. Secondly, the context in which the Minister met with the plaintiffs and their representatives on each occasion is also relevant. When in Dingle, the Minister was there for the purpose of opening the new harbourmaster's facilities. Such discussion as he may have had with the plaintiffs about the proposed drift net ban was brief and probably unplanned. While at that stage the prospects of securing a compensation package from Europe (of which Ireland could avail) were looking somewhat bleak, the Minister probably still held out the hope that compensation available to the Irish tuna fishermen could be agreed.

61. The meeting with the various plaintiffs who attended in Luxembourg on the 7th of June was a much longer meeting. All of the plaintiffs were very clear that their focus at this meeting was to impress upon the Minister the need to oppose vigorously the introduction of the drift net ban, and not on compensation. It is clear, even on the plaintiff's case that any reference to compensation which the Minister may have made at this meeting was of a general and non specific character as in Dingle. The "meeting" of 8th June 1998 after the meeting of the Council of Ministers was not a meeting in any normal sense of the word and is not described as such by the plaintiffs. It was an encounter in a fraught atmosphere between the Minister and those of the plaintiffs present. It was in the early hours of the morning and the Minister was reporting on the outcome of the Council of Ministers meeting. Whatever the Minister may have said about compensation was no more than an effort to placate the plaintiffs. This is clear from the evidence of both Mr. Whooley and Mr. O'Cinnéide, who made comments of a similar nature as regards the Minister's representations on 8th June 1998. Mr. O'Cinnéide said that the Minister was "trying to mollify us" and Mr. Whooley said that the Minister was trying to "pacify" the fishermen. The atmosphere after the Council of Ministers meeting on 8th June, as described by the witnesses was clearly somewhat heated. Mr. Whooley used the word "fraught" to describe it. There can hardly be any doubt but that the Minister would have been trying to put the best gloss that he could on the outcome of the Council of Ministers' meeting. Also, he had secured a commitment that €2.54 million or 2.54ECU (the evidence was slightly unclear as to the exact amount or applicable currency) would be made available to conduct experimental fishing for alternative methods of fishing for tuna as well as funding for a white fish scheme of which tuna fishermen could avail. And this funding did later become available, although the experimental trials fund was availed of by only one of the plaintiffs.

62. The conclusion that I have come to following consideration of all of the evidence summarised above, is that following the adoption of the Regulation the plaintiffs' expectancy as regards compensation was limited to such compensatory measures as might become available through whatever measures would be agreed and finalised later in the year with the Commission and thereafter adopted by the Council of Ministers. Indeed, that is the compensation claimed by the plaintiffs in these proceedings. I am in no doubt at all that the plaintiffs were aware that such measures were to be provided for by the Commission and also subject to funding from Europe i.e. it was never held out to the plaintiffs that the defendants would devise and fund a scheme for compensation and nor did the plaintiffs think that this was the case. It is fair to say that the plaintiffs maintain that the Minister simply promised them compensation without qualification. However, the plaintiffs, all experienced fishermen, were operating in a highly regulated environment, one that was and is regulated by the EU and not the State. It is simply not credible that in the circumstances at the time the plaintiffs could have believed that the Minister was promising them compensation at the expense of the State in respect of a measure being introduced by the European Union. They must have known that in representing that they would get compensation, the Minister was saying no more than that they would get whatever could be agreed in Europe.

63. If proof were needed of this conclusion on 24th August, 1998, the solicitor then acting on behalf of the plaintiffs namely Mr. Greg Casey of Bandon, Co. Cork, wrote on behalf of the plaintiffs to the first named defendant. He wrote in the following terms:-

> *"My clients are concerned about a report which appeared in World Fish Report on 13th August, 1998 concerning proposals to be made by the European Commission on 10th September, 1998 for the setting of levels of maximum compensation for those owners, crewmen and vessels directly affected by the proposed absolute ban on drift netting.*
>
> *I enclose herewith a copy of a letter which I have sent today to the European Commission offices at Molesworth Street seeking further information on the Commission proposals so that my clients and all others directly and indirectly affected by such ban can make submissions in relation to the proposed compensation package. From what is reported in World Fish Report, it seems that the levels of compensation being discussed by the Commission are wholly inadequate and I think that I can safely say that my clients would welcome an opportunity to meet with you and your officials to discuss such proposals and to make submissions in relation to the same at the earliest available opportunity."*

The office of the first named defendant acknowledged this letter, but it appears that nothing further transpired as a result of that correspondence. However, this letter demonstrates that the plaintiffs' solicitor at the time (whatever about the plaintiffs themselves) was aware of the measures under consideration by the Commission – not the defendants – as regards compensation. It is also of interest to note that this letter makes no reference at all to promises made by the Minister to the plaintiffs. This letter makes clear that whatever expectations the plaintiffs had at the time were within the context of a scheme being formulated by the Commission.

64. The *World Fish Report* of 13th August 1998 referred to in Mr. Casey's letter summarised the compensation provisions that were ultimately put into place by the Decision. The *World Fish Report* concluded with the following two paragraphs:-

> *"The funding will be payable from existing Member State allocations under structural funds, such as the Financial Instrument for Fishery Guidance (FIFG), which are half EU funded. Member States would also be responsible for reporting annually on the take up of the compensation.*
>
> *If the proposals put forward by the Commission in mid-September [sic], the Austrian presidency is expected to push for agreement by EU fisheries Ministers at the 22nd October Council, although the issue of finding the resources is likely to be the trickiest point of negotiation."*

65. As mentioned at above, both Mr. Hennessy and Mr. Kennedy acknowledged in their evidence that since September of 1998, they had been in possession of the Vernaeve letter. At the end of this letter was the following paragraph:-

> *"The community contribution may run to a maximum of 50% of eligible costs incurred by Member States. It may not exceed the funding limits for the Member States concerned under the 1994 to 1999 structural fund programs. The individual projects must be approved the [sic] competent national authorities at the latest by 31st December, 1999 and the payments must be made, at the latest, by 31st December, 2001."*

The Vernaeve letter makes it clear that the compensation package was one being devised at European level and not domestically, and it also reflects the limitations on funding, as well as time limits that were ultimately reflected in the Decision.

66. It should also be observed that only one of the plaintiffs gave any evidence as to reliance on the anticipated compensation. Mr. Kieran O'Driscoll put into evidence a copy of a letter that he sent to Ms. Emily O'Reilly, Ombudsman, on 1st November, 2006, in which he stated that he had invested €2 million in a boat in order to diversify out of tuna fishing into a support service for the aqua-culture industry. He said that in this letter he "would not have gone down this route if we had realised compensation would not be forthcoming". He also asks the Ombudsman to investigate where the "proposed €6 million compensation for Ireland went and why we in Castletownbere never received a penny". He concludes by saying in the letter that "we in good faith did "the right thing" and diversified at huge cost and worry and never received acknowledgment or support as promised".

67. But perhaps the most revealing evidence as to the plaintiffs' expectations as regards compensation is that not one of them, at any time contacted the Department looking for compensation, even at the end of the transitionary period. All of the plaintiffs who were questioned about this said simply that after 9th June, 1998, they went back to fishing expecting that, when drift net fishing came to an end, they would receive compensation. Even if this is credible, it might reasonably have been expected that if they were truly expecting compensation, they would first contact the Department about the compensation package and the procedures required to obtain the same, before instructing a solicitor to issue proceedings on their behalf. But they did not do so. Instead they instructed their then solicitor, Mr. Casey who, on 4th July 2002, wrote on behalf of the plaintiffs to the Minister's successor demanding that he put in place a compensation scheme for the loss of the fishery to the plaintiffs .

68. As mentioned above, those of the plaintiffs that were asked about this said simply that their experiences in dealing with the Department were not good and they felt that it would be a waste of time to take that route. But that is simply not credible. Apart from being hard working and successful fishermen, the plaintiffs were also experienced businessmen. In the years 2000 and 2001 ten of the thirteen plaintiffs applied for and received substantial (and in some cases very substantial) grant aid in order to purchase new vessels or to upgrade (with particular reference to safety) existing vessels. I have set out particulars of this aid in paragraph 77 below. Since one of the plaintiffs is a skipper and not the owner of a vessel that figure is more accurately expressed as ten out of twelve of the plaintiffs. Clearly those plaintiffs at least found it possible to engage satisfactorily with the Department and within almost exactly the same period that they might have been expected to request payment of or at least make inquiries about compensation from the Department, if they really believed it was due.

Conclusion on Legitimate Expectation

69. Do the representations as found by me to have been made by the Minister on 8th June, 2008 to the plaintiffs give rise to a legitimate expectation on the part of the plaintiffs to receive the compensation claimed from the defendants in these proceedings? In my view, they do not and this is so for a number of reasons. Firstly, as I have said above, whatever representations the Minister made late in the evening of 8th June, 1998 or early in the morning of the following day, must be seen in the context in which they were made. They were made at the end of a very long day of intensive discussions about the adoption of the Regulation. They were not made in a formal setting; on the contrary they were made in a hotel foyer to an ad hoc group who had attended in Luxembourg to make plain their opposition to the proposed measure. Almost certainly, the atmosphere was highly charged. Any remarks that the Minister made were purely political in character and in the words of two of those who gave evidence, designed to "mollify" or "pacify" those present. Similarly, any references to compensation made by the Minister on 11th May and 7th June of 1998, were no more than general reassurances given against the backdrop of the impending ban, and were implicitly subject to whatever could be secured from Europe. Any representations as to compensation, whenever made by the Minister, were clearly not intended to create any binding

commitment on the part of the defendants.

70. Nor, in any event, could the Minister have so bound the defendants. He knew, and, I believe, the plaintiffs knew, that any compensatory measures required sanction and funding at European level. Quite simply, it was not within the Minister's gift to make any commitments that could form the basis of a claim grounded upon the doctrine of legitimate expectation.

71. In the case of *Cromane Seafoods Ltd. v. Minister for Agriculture, Fisheries and Food* [2016] IESC 6, the Supreme Court unanimously dismissed the plaintiffs' claim to the extent that it was grounded on legitimate expectation. In that case, the plaintiff suffered damages because the defendant had delayed the reopening of the plaintiff's mussel sea fishery in order to carry out tests and exclude environmental risks to Castlemaine Harbour, which had been designated as an area of special protection ("SPA") for birds. The defendants were required to do this in order to comply with the Habitats Directive (Council Directive 92/43/EEC), but the difficulty was that the plaintiff had already been granted a mussel seed authorisation by the defendant, which licensed the plaintiff to carry on the activities in the harbour. In the expectation it would be able to do so, the plaintiff had also invested in a new vessel. A number of years previously, the defendant, following the designation of the harbour as a SPA had stated that it was "not envisaged that designation will restrict the current usage pattern of … fishing, water sports, sailing or game hunting or their use for shell fish culture".

72. In his judgment, Charleton J. had this say:-

> *"As Fennelly J remarks in Glencar Explorations Limited v. Mayo County Council (No 2) at 162, the doctrine of legitimate expectation is related to that of promissory estoppel as it applies in matters of contract. Essentially, for promissory estoppel to apply, there must be a 'clear and unequivocal promise or assurance which is intended to affect the legal relations' between parties to a transaction which is understood as such, and before it is withdrawn the party to whom the representation is made, acts upon it in such a way that 'it would be inequitable to permit the first party to withdraw the promise', that is to act inconsistently with it; McGhee (Ed), Snell's Equity, 32nd Ed., (London, 2010). While estoppel by convention can arise through acting upon 'an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other' this is not a warrant for jumping to conclusions. The common bases upon which the parties act must, on objective assessment be 'unambiguous and unequivocal'; Peel (Ed), Treitel's The Law of Contract 13th Ed. (London, 2011) at 3.094. There is nothing in the decision of this Court in Courtney v. McCarthy [2008] 2 I.R. 376 to suggest any other test. Moving from private law into the field of a private expectation set up in consequence of a statement by a public authority, the harmony between legitimate expectation and promissory estoppel, or estoppel by convention, should be maintained. In no case is there any warrant for analysing any expectation as legitimate where it is not based upon an unambiguous and unequivocal declaration."*

73. The plaintiffs argue that there was an unambiguous and unequivocal declaration on the part of the Minister; they were to receive compensation. However, as stated above, whatever representations were made must be seen in the light of the contexts in which they were given. They were political in character and designed to pacify. They were clearly understood to be referring to whatever compensation scheme was introduced at European level. In that regard, it was also clear that on 8th June 1998 nothing had yet been agreed by the Council of Ministers and all that it committed to on that date was to put in place measures as soon as possible to alleviate the effects of the drift net ban. The vagueness of the Minister's representation as to compensation was borne out by the evidence of a number of the witnesses, including Mr. O'Cinnéide, Mr. Healy, Mr. Carleton and Mr. Whooley. The passage of Charleton J. in *Cromane* cited above also makes it clear that reliance remains a significant factor in the context of a claim for legitimate expectation. As stated above, only one of the plaintiffs gave any evidence as to reliance, namely Mr. O'Driscoll. But his reliance was misplaced because the compensation provided for by the Decision did not include compensation for the purchase of a new vessel.

74. In *Glencar Exploration plc. v. Mayo County Council* [2002] 1 I.R. 84 Fennelly J. outlined the three prong test necessary to establish a legitimate expectation which has been adopted and applied, with some modification, ever since. This is as follows:-

> *"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. It must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected."*

75. Even if the Minister had made a representation which met the first two limbs of the test identified by Fennelly J., the question would arise as to whether it would be unjust to permit the Minister to resile from it. In this case, I do not consider it would be unjust. The plaintiffs were clearly treated unfairly by the Commission and the Council of Ministers in the scheme for compensation that was promulgated by the Decision. This is so because in order to avail of the scheme, a Member State had to have unallocated structural funds. The evidence of the defendants established that of the countries affected, only Ireland did not have unallocated structural funds. That it did not have such funds available is a credit to the manner and efficiency in which this State treats structural funds. But by linking the compensation package provided for in the Decision to unallocated structural funds, the Commission and the Council created what can only be described as an inequitable distinction between the plaintiffs on the one hand and their colleagues in other jurisdictions, which did have unallocated structural funds, on the other. Through no fault of their own and through no fault of the defendants, the State was ineligible to avail of the Decision, unless it was open to the State to fund itself the compensatory measures permitted by the Decision. I will return to this point.

76. It is very clear from the evidence given on behalf of the defendants by Dr. Beamish, Ms. White and Ms. Kelly that the defendants did everything possible to avoid such an outcome. There was optimism in March 1998, that a compensation package of which the plaintiffs could avail would be forthcoming. But attitudes hardened between March and June of 1998 and it was made very clear that other Member States were not prepared to admit to measures which would involve the provision of additional funding – compensation would have to come from within existing allocated structural funds, of which Ireland had none to spare.

77. The defendants did however have some success. They secured funding for trials into other methods of tuna fishing, of which just one of the plaintiffs availed. They secured funding for a white fish scheme, which was also open to the plaintiffs (the value of which

on the evidence was unclear, but the purpose of which was to assist in the development and sustainability of the white fish fleet, which included the plaintiffs, nationally). Most significantly of all however, they secured an extension of the transitionary period (before which the ban would become operative) from two to four years. This gave the plaintiffs an additional four full seasons of tuna fishing. This should be viewed against the background that most of the plaintiffs had only been fishing for tuna for four or five years, as well as the fact that other member states argued that the ban should become operative after two seasons.

78. Moreover, the defendants assisted ten of the plaintiffs in securing grant aid either for the acquisition of new vessels or for the upgrading of existing vessels at around the time or in the years shortly after the drift net ban came into effect. The summary of grants received are identified in the table below:

Owner Total

Donal Healy €8,695

Gerard Minihane €690,309

John Graham €525,619

John O'Donnell €16,586

Kieran O'Driscoll €7,842

Kopanes Fishing Co €2,000

Michael Hennessy €0

Michael Murphy €14,519

Neil Minihane €695,028

O'Mathuna (Baid) Teo €28,953

Paul Flannery €16,703

Peter & Alan Carlton €775,707

Tom Kennedy €894,945

Vincent Browne €0

Total €3,676,906

It is fair to say that these grants were for different purposes than those envisaged by the Decision, and that the plaintiffs might have secured this grant aid in any event. But in so far as this aid was to assist the plaintiffs in upgrading ,modernising or replacing their vessels, it is likely to have been of assistance to those of the plaintiffs who wished to continue tuna fishing , in their tuna fishing activities, as well as in fishing for other species. For all of these reasons I am of the view that even if the Minister had made a representation which might otherwise form the basis for a legitimate expectation, it would not be unjust to permit him to resile from it.

79. In conclusion, on this issue, the plaintiffs have failed to establish that they have a legitimate expectation to receive compensation by reason of the drift net ban because:-

(i) Whatever representations were made to them by the Minister, were made on each occasion in an informal setting and were never intended to form a commitment on the part of the Minister or the other defendants. They amounted to no more than a statement of belief on the part of the Minister that compensation would be made available through the European institutions and were made by the Minister in the hope, if not in the expectation, that State might yet succeed in its efforts to persuade other Member States to make funding available outside the "envelope" of existing structural funds;

(ii) Such representation as was made on 8th June, 1998, (the only representation actually pleaded by the plaintiffs), was clearly made in a fraught environment and in an effort to placate the plaintiffs. Moreover, at that stage, the Minister still probably harboured hopes, however remote, that funding for compensatory/social flanking measures would be provided by Europe;

(iii) It was at all times clear that any compensatory measures referred to by the Minister were dependent upon funding from Europe, which did not ultimately become available;

(iv) Such representations as were made by the Minister, on all these occasions referred to by the plaintiffs in their evidence, were vague and bore no relationship to the compensatory measures provided for by the Decision;

(v) There was no reliance placed upon the representations of the Minister save that about which Mr. O'Driscoll gave evidence. I have already indicated that this reliance was misplaced. While detrimental reliance may not always be required to ground successfully a claim for legitimate expectation, it is clear from the passage of Charleton J. in *Cromane Seafoods Ltd.*, cited above, that the Supreme Court is of the view that *"the harmony between legitimate expectation and promissory estoppel, or estoppel by convention, should be maintained".*

(vi) Having regard to the evidence given by the witnesses on behalf of the defendants as to the huge efforts of the defendants to achieve at all times the best outcomes for the Irish fishing industry in general and the plaintiffs in particular, it would not be unjust to permit the defendants to resile from such representations as may have been made by the Minister.

(vii) Finally, even if the representations that were made by the Minister met all of the requirements for a successful claim of legitimate expectation, there would remain the fundamental problem that such representations could not be legally binding upon the defendants in circumstances where (a) they would amount to a commitment to expend the resources of the State in circumstances where the Minister did not have the authority of the Government or the Oireachtas to do so and (b) it would be contrary to the EU prohibition on

the provision of state aid, unless sanctioned by the European Commission.

Legitimate expectation in EU law
80. It is submitted on behalf of the plaintiffs that legitimate expectation applies as a general principle of EU law. While this may well be so, this only avails the plaintiffs in the event that they establish, in the first instance, a legitimate expectation under national law. In such event, the recognition of the concept under EU law could possibly be used as an argument to support an order for compensation to be made to the plaintiffs, notwithstanding EU rules on state aid, but none of this arises in circumstances where I have found that the plaintiffs do not have a legitimate expectation to receive compensation from the defendants.

Claim that Defendants have failed to defend and vindicate the rights of the Plaintiffs.
81. The plaintiffs claim that in bringing about an amendment to the terms of the Decision, thereby rendering optional rather than mandatory the preparation of a conversion plan for the purposes of availing of the Decision, the defendants have failed to defend and vindicate the rights of the plaintiffs. In advancing a claim for a declaration to this effect, the plaintiffs rely on the authority of *Dellway Investments Limited v NAMA [*2011]4 IR 1. Before considering the submissions of the parties in this regard, it is desirable to consider in some detail the response of the defendants to the proposed drift net ban, and the reasons why the defendants made the submissions that they did as regards the precise wording of the Decision.

Response of Ireland to proposed Drift Net Ban
82. The initial response of the defendants to the proposed drift net ban by the defendants is best found in a memorandum prepared by Ms. Kelly dated 9th February, 1998, in which she described the proposal put forward by the United Kingdom Presidency of the Council of Ministers for a compromise proposal on the drift net ban. She summarised the main points at the time as being as follows:

- After 31st December, 1999 a ban on the use of drift nets in the Albacore Tuna fishery;
- Vessels which fished using drift nets in either 1996 or 1997 may be authorised by the flag Member State to fish in 1998 and 1999; the Commission was to be supplied with a list of authorised vessels;
- New and more stringent control measures will apply to the vessels operating during 1998 and 1999;
- Drift netting for salmon and sea trout is not affected in any way by this proposal (the existing rules apply);
- A special exemption is given for drift netting for salmon in the Baltic, nets of up to 21km may be used.

83. Ms. Kelly goes on to set out the positions adopted by Member States to the proposals at that point in time. Only Ireland and France were opposed to the proposal. Her memorandum states that: "it is important to make the detail of the proposal as variable as possible for us. We can seek concessions in the following provisions". She then goes on to outline suggested positions to be adopted by Ireland in relation to the various proposed measures. These include:-

(i) Extend the transition period from two years to six years;

(ii) Extend eligibility for vessels to those vessels that participated in the fishery to include the years 1994 and 1995. [Otherwise, the proposal that was then under discussion i.e. to refer to the years 1996 and 1997 only would limit the number of Irish vessels to five or six]; and

(iii) Obtain additional EU funds for compensatory measures.

Ms. Kelly noted that Ireland's existing structural funds (which in the context of fisheries are provided through the Financial Instrument for Fisheries Guidance "FIFG") were fully committed. She noted: "however, there is always the danger that no additional funds will be forthcoming from Brussels and we will have to foot the bill from the Exchequer". She also noted however, that at the time the United Kingdom Presidency indicated that it would be prepared to recommend to the Commission that it supports some form of aid to fishermen affected by the ban.

84. In her evidence, Ms. Kelly stated that the position of the other Member States appeared to harden between March and June. She stated that other Member States were unwilling to show sympathy for the Irish position and to support an alternative approach to the source of funding.

85. In his evidence, Dr. Cecil Beamish who was at the time a principal officer in the Department of Agriculture, Fisheries and Food stated that the meeting of the Council of Ministers in March of 1998, made it clear that any compensation for those affected by the drift net ban would have come from within existing structural funds. In a memorandum of this meeting prepared by Ms. Kelly, it is recorded that the Department emphasised that all its existing funds whether through FIFG or under another initiative known as PESCA were already allocated. The Department stated at this meeting that it was estimated that the cost of a programme to convert vessels to alternative fisheries or other methods of fishing for tuna was estimated at in the region of 12 million ECU, and the Department was seeking 100% EU funding for the same. At this meeting however the Commission stated that it did not have any funds at its disposal that it could allocate to Ireland.

86. In its response, the Department asked the Commission if unused funding in other Member States could be allocated to Ireland. The Commission stated that while this may be legally possible, it was politically very difficult.

87. Another option put forward by the Department at this meeting was that funding could be provided under the next round of structural funds, yet to be agreed, for the years 2000-2006. The response of the Commission to all of this was that it would be necessary to look for a novel approach to solve Ireland's budgetary problems, but that at that time it could not see any solution. In a memorandum dated 20th March, 1998 to Ms. White, reporting on a meeting with his French counterpart, a Mr. Toussain, Dr. Beamish notes that for both France and Ireland, the objective of a reconversion plan was to ensure that each had an economically viable Albacore Tuna fleet at the end of the plan. This is again recorded in an internal memorandum in which it is stated:-

> *"While Ireland is and will continue to oppose the ban a negotiation strategy is being structured to cope with agreement in principle to progress the dossier at Council. In that situation the key Irish requirements are a reasonable transition period (longer than the current end 1999 proposal) and an EU funded reconversion programme which would ensure that we are able to have a viable tuna fishery in the future. It is unacceptable to Ireland to be forced into a situation that our fleet cannot benefit from the tuna fishery (because they are only geared and trained for drift netting) and they have to revert to traditional quota fisheries which are already fully utilised. The fishery is of particular importance to the West*

Cork/South Kerry white fish ports and can account for up to 50% of the value of their landings in July-September period."

This memorandum also records that at a bilateral meeting with the Commission, Ireland had already strongly opposed the ban, but indicated that if it is to be introduced, it would have to be accompanied by an EU funded reconversion plan to allow Ireland to maintain a viable tuna fleet.

88. It is clear from the evidence of Ms. White, Dr. Beamish and Ms. Kelly, as well as documentation available from the period, that the defendants were very alert to the difficulties that the proposed ban would pose for the Irish tuna fishing industry, and for the plaintiffs in particular. The defendants adopted a strategy of opposing the ban but were supported in this regard by France alone. The defendants actively sought measures to alleviate the adverse consequences of the ban including an extension of the transitionary period from two years to six years, an increase in the years to be reckoned when determining those who could avail of the fishery during the transitionary period and financial compensation to enable those concerned to convert their vessels so as to be able to get out of tuna fishing altogether, or to be able to do it through other means. Ultimately, the defendant had substantial successes in relation to the first two of these objectives. The transitionary period was extended from two seasons to four. The year 1995 was added to the years reckonable for ongoing participation in the fishery during the transitionary period. This had the effect of increasing the number of vessels that were able to participate in the fishery from five or six vessels to eighteen vessels, accounting for the vast bulk of the Irish tuna fish catch.

89. But there was only a very modest success as regards funding, and that was an agreement whereby funding would be provided for experimental trials for alternative methods of tuna fishing, in the sum of €2.5million approximately. This was provided otherwise than through structural funds. The Council of Ministers steadfastly resisted the provision of any additional funding outside of existing structural funds. Since Ireland had no unallocated structural funds at its disposal, the defendants formed the view that it would not be possible for Ireland to avail of the compensatory or social flanking measures that were eventually settled upon in Autumn of 1998, and reflected in the Decision.

State Funding of Compensation?

90. In the course of cross-examination of Dr. Beamish and Ms. White, it was suggested to them that if no funding was available through structural funds to enable the plaintiffs' to avail of the Decision, there was no reason why the defendants could not choose to fund the compensatory/social flanking measures directly from the exchequer. Insofar as such payments might be considered State aid, and therefore require permission from the Commission by way of derogation from the EU rules concerning State aid, that derogation was already provided for through the terms of both the Regulation and the Decision. The defendants emphatically rejected this suggestion. Ms. White said that it was inconceivable that the Commission would have allowed the State to make payments out of the exchequer and that it was clear from the terms of the Joint Declaration and the Decision that the measures provided for by the Decision could only be funded from unallocated structural funds. Moreover, she said that the Minister could not make a unilateral commitment in relation to expenditure of State funds and that other consents for such a measure would be required domestically: these included the sanction of the Department of Finance, the sanction of the Secretary General of the Department, as accounting officer of the same, and the Office of the Attorney General. Ms. White said that if the State wished to make a submission to the Commission that it would fund the compensatory measures/social flanking measures provided for by the Decision solely out of State funds then these permissions would have been required in the first place. The expenditure would have involved up to €5 million of tax payers money and apart from that, in the view of Ms. White there was no point in even setting about obtaining such permissions domestically because in her own words "the Decision was a Council decision". She said it was:

> "entirely predicated on the premise that it was about using structural funds, i.e. community aid with an element of exchequer aid. The Regulation in June, the Council Decision in December, indeed the Joint Declaration in June…. is very clearly about this is a derogation under FIFG. It is about community support for this. … nowhere at any point was there discussion about unilateral exchequer funding, the whole lot, which would have actually been a State aid…".

91. Dr. Beamish also confirms that this was the view of the Department at the time. He made the point that if the defendants had produced a conversion plan for the purposes of the Decision, it would have been misleading to fishermen because the defendants could not have delivered compensation to them by reason of the absence of available structural funds. Both Dr. Beamish and Ms. White also made the point that existing structural funds could not be diverted. They were already committed to purposes and projects that had already been approved by the Commission. It was put to Dr. Beamish that ten years later when a salmon drift net ban was put in place, Irish salmon fishermen received a compensation package of €25 million directly from the State that was retrospectively approved by the Commission. Dr. Beamish confirmed that this was so, but distinguished that on the basis that the salmon drift net issue was more discretely an Irish issue because the salmon were being caught for the most part in Irish waters and therefore the scheme did not raise issues about distortion of competition between member states. Dr. Beamish also made the general point that every year decisions are made that have an adverse impact in one sector or another for those involved in fisheries, and no compensation measures are put in place.

92. As regards the next round of structural funds, for the years 2000 – 2006, it was put to Ms. White that the defendants made no effort to secure funding in that round of structural funds with a view to enabling the plaintiffs to secure the compensatory measures provided for by the Decision, as might have been expected in view of the Unilateral Declaration. It was put to Ms. White that tuna drift net social flanking measures "slipped through cracks". In response, Ms. White denied that this was so and stated that in her view this issue "became part of the bigger effort which included the 18-20 fishermen who after all spent most of the year fishing white fish, to ensure that we could get through the package for white fish fleet modernisation". Ms. White described the difficulties in fishing generally at this time and in particular that Germany, which assumed presidency of the Council of Ministers after the UK was attempting to secure very significant reductions in fishing fleets throughout the community. Other countries, including France, Spain and Italy were focused on ensuring that this did not happen and in securing measures to upgrade and modernise their fleets, with particular emphasis on safety. Ms. White said that the interests of the white fish fishermen (whose numbers included the plaintiffs) were at by this time the prime concern in terms of the need for financial supports. She stated:-

> *"when in terms of the war over structural funds and fishery funds, we were fighting on behalf of all the white fishermen, not just one subset. Because at the end of day, tuna fishermen who, as I say, were not exclusively tuna fishermen would then be positioned to avail of [whatever supports were available] whether it was decommissioning or renewal grants and that some of them certainly did. I know that's not necessarily the point. There would have been enabled to apply for modernisation support and so on and so forth under the new operational programme from 2000 and 2006."*

93. It was then put specifically to Ms. White that in failing to prepare a conversion plan and to avail of the compensatory measures provided for by the Decision, Ireland did so knowing that it would have a discriminatory effect on the Irish tuna fleet of eighteen, in that no fishermen, i.e. the plaintiffs, would secure compensation which the tuna fleet owners and fisherman of other states would

receive. Ms. White's reply is worth quoting in full:

> *"the State – excuse me – did not fail to opt in in December 1999, the Decision was passed in December 1999. [the reference here to December 1999 is in error – it should have been 1998]. There was no question of opting in or out. The State found itself in a position where at that point and throughout the following year it did not have the structural funds which were required under the terms of the Decision, did not have the structural fund allocation, the wherewithal to take it up. That was not in any shape or form an effort to discriminate against Irish tuna fishermen at all, far from it. Our efforts continued to be focussed as they had all year to maximising whatever could be done in terms of (a), transforming the fishery into a viable fishery that wasn't a drift net fishery, which is what has transpired, and working in every way to assist the white fish fleet of which the tuna fisherman were part. The fact that under this specific measure we could not assist, the Minister and Ireland working with France got four more years, got four years of that fishery which is of itself of considerably monetary value. That was a big prize in a very difficult set of circumstances. He got the research funding from a completely separate budget line but we got it. We accessed it and over the dead body of Spain we were able to use it to test pelagic trawls. So I absolutely refute that the State in any way set out to be or was at any point discriminatory against tuna fisherman. If anyone precluded Ireland and Irish fishermen from availing of this it was the European Commission in its failure, its total failure to deliver on early enough promises that solutions would be found and at the end of the day no such accommodation was forthcoming. So if expectation was created, Counsel, it was created by the European Commission and it was an expectation on Ireland Inc's behalf. The Commission did not deliver. We left no stone unturned in our efforts to bring about a different outcome and many of the elements of what was needed to be brought out, as I say, the duration of the fishery, the successful transfer to other technologies, that came to pass."*

94. As to the Unilateral Declaration, Ms White explained in evidence that such declarations are commonplace in European Union business. Member States may make such declarations by way of protest at a particular measure or to lay down a marker as to their likely position on an issue in the future. The making of the Unilateral Declaration was never intended to place any obligation of the plaintiffs to seek funding out of the next round of structural funds, but merely to signal that the State reserved its entitlement to do so.

Amendment of draft Decision

95. It is not disputed by the defendants that, by reason of their intervention, recital 7 and Article 1 of the draft Decision were amended to the intent that Member States would not be obliged to draw up a conversion plan. Recital 7 in its original draft form stated that:- "whereas the Member States concerned must draw up conversion plans for this purpose" and this was amended to state: "whereas the Member States who wish to avail themselves of this specific measures proposed must draw up conversion plans for this purpose."

96. Article 1 of the Decision, in draft form stated: -

> *"in connection with the ban on fishing with drift nets laid down by Regulation (EC) No. 894/97 as amended by Regulation (EC) No. 1239/98, the Member States concerned shall draw up a conversion plan and communicate it to the Commission."*

In its final form, Article 1 stated:-

> *"in connection with the ban on fishing with drift nets laid down by Regulation (EC) No. 894/97, Member States availing themselves of the specific measure provided for in para. 2 shall draw up a conversion plan and communicate it to the Commission".*

97. Evidence in relation to these amendments was given by Mr. Ciaran Grace, who at the time was the marine attaché in the Irish representation in Brussels to the European Union. As such, he was in charge of sea fishing, maritime transport and ship building issues and his role was to represent Irish policy to the European institutions and other Member States. In the course of 1998 he attended working groups concerning the proposed ban on drift netting for tuna.

98. Mr. Grace was in Brussels in September 1998, when the Commission made a proposal as regards the terms of the Decision. Mr. Grace noted that the draft prepared by the Commission created an obligation to prepare a conversion plan. He also noted that the draft stated that the measures proposed by the Decision could only be funded by unallocated structural funds. He was aware that Ireland did not have unallocated structural funds with which to fund compensatory/social flanking measures and he felt that the creation of an obligation to prepare a conversion plan was inconsistent with the fact that structural funds were not going to be available to Ireland. He took legal advice on the issue, and the upshot of it all was that Ireland suggested the amendments described above, which were accepted by the Commission, in order to avoid Ireland being required to draw up a plan which it could not implement, by reason of the unavailability of structural funds. This evidence was collaborated by all of the other witnesses for the defendants namely Dr. Beamish, Ms. White and Ms. Kelly.

99. Mr. Grace also commented that it is almost invariably the case that the first draft of a proposed Decision from the Commission is subjected to amendments at the request of Member States. As such, the process engaged in by Ireland in securing these amendments is part of the normal day to day business of the Commission and Member States in the drafting and finalisation of Decisions.

Communication between the defendants and the fishing industry

100. Since it is of some relevance to the submissions of the plaintiffs, it is useful to consider some of the communications between the plaintiffs and/or their representative bodies and the defendants as regards the drift net ban and the issue of compensation. On 18th February, 1998, Ms. Kelly records in a short handwritten note that she spoke to industry representatives and updated them on the drift net proposal. In her evidence, she clarified who those representatives might be. She said that they would include the IFPO and the IS&WFO. She explained that the Department dealt with producer organisation and industry representatives. Producer organisations such as the IFPO and the IS&WFO, of which there were three, are recognised bodies at EU level and must comply with certain rules in order to obtain such recognition.

101. The ITA was not a recognised body at EU level, but nonetheless the Department had contact with the ITA and included in the documentations opened to the Court was a minute of a meeting of 13th July 1998, between the ITA, Bord Iascaigh Mhara and the Department. Present at this meeting were Mr. Donal O'Driscoll, brother of the 9th named plaintiff, Mr. Whooley, Mr. Ó Cinnéide, a Mr. Owens of the IFPO, Dr. Beamish and others. The purpose of the meeting was to address three issues: the level of participation in the 1998 tuna fishery (in the context of identifying vessels to be granted permits to continue fishing for tuna until the end of 2001), the

management of arrangements for implementation of the Regulation and the proposed tuna diversification trials. The ITA made the point at the meeting it was unlikely that tuna fishermen would be interested in the trials because the money available for participation in the trials was considerably less than the money that could be made by the members in simply continuing to fish (by drift net) for tuna in the remaining years. Compensation was not discussed at this meeting and Dr. Beamish gave evidence that the reason for this was that the industry knew compensation was not going to be available.

102. The Department also maintained communications with the fishing industry through a group known as the Sea Fisheries Liaison Group. Minutes of a meeting of 29th September 1998, show that Mr. Lochrin and Mr. Owens were in attendance for the IFPO, and Mr. O'Driscoll and Mr. Whooley on behalf of the IS&WFO. Attending on behalf of the Department were Ms. White, Dr. Beamish and Mr. Ryan. As regards compensation the minutes report:

> *"it was a matter for Members States whether or not they choose to implement the Decision. The cost of implementing the Decision would have to be borne from existing national structural funds allocations. The Decision would apply to those who have to stop drift netting for tuna; stop fishing for tuna altogether or cease all economic activity due to the drift net ban. It will only apply to the current round of structural funds.*
>
> *The IFPO and IS&WFO asked if there was provision in the original draft of the proposal for a once off payment from state finances if all the EU funds are committed. The Department said it was unaware of such a provision; and that this Regulation would be a framework Regulation.*
>
> *The IS and WFO asked what specific measures are planned. The Department indicated that there were no unused structural funds with which to implement the Decision. Matching funding is being provided for the EU supported tuna diversification trials."*

103. As regards the next round of structural funds i.e. for years 2000 – 2006 the Department is recorded as stating:

> *"… that everything is still in a state of flux, and that Ireland has still everything to play for. The main concern is to get in early with fisheries bids, and to ensure that the State prioritise throughout the national negotiating process."*

104. There was another meeting of the sea fisheries liaison group on 20th January 1999. Mr. Lochrin and Mr. Owens were again in attendance on behalf of the IFPO, and Mr. Whooley and Mr. O'Driscoll on behalf IS&WFO. Under the heading drift net compensation, the minutes record:

> *"the IS&WFO asked if there was deadline by which Member States must have accepted applications for drift net compensation for fishermen so as not to disqualify them from any possible aid.*
>
> *The Department explained that the Regulation on tuna diversification only related to the current round of structural of funds, and as there were no funds available to Ireland in the current round to implement the provisions then the question of a date for applications did not apply."*

105. When giving evidence, Mr. Lochrin was asked if he would have communicated this information to his members at the time and he said that he believed he would have done so.

106. On 14th April 2000, in the Silver Springs Hotel, Cork, there was a meeting between Departmental officials and those involved in the industry, including seven of the plaintiffs, as well as Mr. Whooley, Mr Lochrin and Mr. Donal O'Driscoll, brother of the ninth named plaintiff. This meeting was convened by the Department. Minutes of the meeting, prepared by Mr. Lochrin, disclosed that seven items were discussed including the issue of compensation for drift net fishermen. Those of the plaintiffs who attended stated in evidence that they were only interested in attending to ensure that they would continue to receive permits to fish tuna for the forthcoming season. They said that when that issue was dealt with, they left the meeting. It was their evidence therefore that they were not present for the discussion on compensation, which they claim he did not know was planned or on the agenda. One of them said in his evidence that other fishermen, who were not going to receive permits (because they had not fished tuna in the 1995 – 1997 seasons), also left the meeting. Since there were only 25 people at this meeting, it seems very unlikely that those of the plaintiffs in attendance (seven) or more could have left this meeting without being noticed.

107. However, Mr. Lochrin said in his evidence that he did not notice a large number of those present or indeed any of those present leaving this meeting. He confirmed that he prepared the minutes of the meeting which were adduced in evidence. These minutes conclude with the following paragraph under the heading "Compensation":

> *"The IS and WFO made much of R. 314/98 Article 3, but there was never an allocation of funds in the case of Ireland to support this measure and, after 31st December 1999 there cannot be. In theory there is the possibility of getting it built into the national plan and the new round of structural funds (2000-2006) but that is really a long shot; the attitude of the State is that it has committed all it is going to on this head through the experimental fishing programme. This is not to say that those who have been excluded from the fishery don't have a valid claim; it just means they are going to have fight for it. The department was giving nothing away."*

108. Mr. Lochrin confirmed that as far as he understood it at that time and indeed for some time before, there was going to be no compensation payable to Irish tuna fisherman by reason of the Regulation. He said that he emerged from the meeting in Silversprings Hotel convinced that there would be no compensation and that the paragraph referred to above was intended to express the resolute opposition of the department to payment of compensation. To this I would add that I found the evidence of the plaintiffs who were at this meeting to be unconvincing as to the timing of their departure. I believe that some or all of them remained to the end of the meeting and that they were fully aware from this date, at the very latest, that compensation was not going to be available to them.

Submissions of parties on application for declaratory relief.

109. It is the plaintiff's submission that, by lobbying the European Commission to amend the text of the draft Decision so that the Decision as ultimately adopted left it to member states to decide whether or not to adopt a conversion plan, the defendants nullified the benefits of the Albacore Tuna Fishery which was largely created by the plaintiffs' efforts in the 1990s, without ever informing the plaintiffs that they would not get compensation as had been promised to them by the first named defendant and as was reflected (it is submitted) in the terms of the Joint Declaration. The plaintiffs rely upon the letter of their then solicitors, Casey & Co., to the defendants on 24th August, 1998 in which Messrs. Casey & Co. made representations on behalf of the plaintiffs in relation to the issue of compensation. While the defendants acknowledged that correspondence, at no time did they give a substantive reply to the same and in particular it is submitted that at no time did they inform the plaintiffs that compensation would not be payable, contrary

to the promises made by the first named defendant.

110. Moreover, it is submitted that the defendants, in all of their negotiations as regards the drift net ban, and in subsequently lobbying the Commission in relation to the terms of the Decision, were exercising the powers of the State under Article 28.2 of Bunreacht na hÉireann, and that the exercise of such powers is at all times subject to the provisions of the same. It is submitted that the exercise by the defendants of these powers is subject to the principle of fair procedures as articulated by the Supreme Court in *Dellway Investments Ltd. v. NAMA* [2011] 4 IR 1, and also in the case *of East Donegal Cooperative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317. It is submitted that the plaintiffs had a vested interest in the adoption of a conversion plan and that the actions of the defendant in securing an amendment to the terms of the Decision, without informing the plaintiffs of this at any time, was contrary to fair procedures having regard to their interest in the same. It is further submitted that the failure of the defendants to adopt a conversion plan gave rise to a discrimination between producers in member states of the EU, Contrary to Article 40 of the Treaty of the functioning of the European Union, which states, *inter alia*:

> *"The common organisation shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Union."*

This is in contrast to the Unilateral Declaration which, the plaintiffs submit, respected the principle of non discrimination as between producers in member states.

Submissions of defendants
111. The first point made on behalf of the defendants on this issue is that the plaintiffs are not seeking the grant of a declaration as to a right enjoyed by them, but rather they seek a declaration as to a matter of fact. The defendants refer to the English authority of Gouriet v. Union of Post Office Workers [1978] A.C. 435 in which case Lord Diplock stated, at p. 501:

> *"The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some relief as well can now be forgotten. It is clearly established that he need not.Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."*

112. The defendants also rely upon the decision of Laffoy J. in *Shortt v. Royal Liver Assurance Ltd* [2009] 20 E.L.R. 240 wherein Laffoy J. adopted the following dicta of Blayney J. in *Ahern v. Minister for Industry and Commerce* (No. 2) [1991] 1 I.R. 462:

> *"In State (Abenglen Properties Ltd.) v. Corporation of Dublin [1984] I.R. 381, Walsh J. said in his judgment at page 397:-*
>
> > *'If I am correct in this, then an order for certiorari quashing the decision made by the respondents would be of no benefit to Abenglen. While the Court could make such an order in the present case, the court in its discretion could refuse to do so where that would not confer any benefit upon Abenglen'.*
>
> *I am satisfied that in the present case the order sought would not confer any benefit on the applicant. He claims that it would in that, if Mr. Bennett's decision remains on his personal file, it will affect his career prospects. I am not at all convinced that this is so …. So the presence of this decision on his file will not prejudice him in any way and accordingly would not confer any benefit on him."*

113. Reliance is also placed by the defendant on the more recent decision of Keane J. in the case of *Da Silva v. RAC Eire & Ors* [2016] IEHC 152 wherein he observed, at paragraph 136:

> *"In each of the three sets of proceedings before the Court, the plaintiffs seek two declarations: first, a declaration that 'the defendants failed to comply with the contractual entitlements of each of the plaintiffs pursuant to the contract of employment between each of the plaintiffs and the defendants'; and second, a declaration that 'the defendants relied on fraudulent records of hours worked in calculating wages due to each of the plaintiffs.' In my view, the first declaration sought is superfluous and the second is simply a proposition of fact that does not purport to determine any issue of right as between the parties. Accordingly, in the exercise of the Court's discretion, I do not propose to make the first declaration sought and, as a matter of law, I do not propose to make the second."*

114. In summary therefore what the defendants argue is that the Court does not have a jurisdiction to grant a declaration of the kind sought in this case, which is a declaration as to a matter of fact. Secondly, even if the Court does have such a jurisdiction, such a declaration could be of no benefit to the plaintiffs, and should not therefore be granted. In addition, the defendants also make the point that the plaintiffs' claim for declaratory relief is predicated on the proposition that they have a legitimate expectation to compensation, and if no such right is established, then they can have no entitlement to declaratory relief.

Decision on the claim for declaratory relief
115. While the plaintiffs' claim for declaratory relief is certainly a creative one, it is in my view without any solid foundation. Undoubtedly, the plaintiffs had a vested interest, as they claim, in the terms of the Decision. But the problem with the Decision was not the fact that the preparation of a conversion plan was made optional at the behest of the defendants, but rather that the funding of compensatory measures was clearly required to be drawn from unallocated structural funds, of which this State had none. Against that background, it makes perfect sense for the defendants to seek to avoid having to draw up a conversion plan which could not be implemented and would merely serve to create expectations which could not be fulfilled.

116. It is true that the defendants did not explore with the Commission the possibility of funding itself the social flanking measures provided for by the Decision, either in whole or in part. According to Ms. White the defendants did not do so because this would have also have been considered a waste of time as it would have involved the provision of state aid by the State to the plaintiffs, contrary to the EU prohibition on state aid. Where this might be technically correct, the Decision was itself a derogation from the usual rules on state aid, and once that principle had been established by the Decision, it is difficult to see how the Commission could have had any difficulty in granting such an application, had it been made by the State at the time. Moreover, the Decision made it clear that 50% of the funding cost of the social flanking measures would in any event have to be borne by individual member states. But whether the view expressed by Ms. White is right or wrong, the defendants were quite entitled to take this approach, for the reasons articulated by Kearns P. in the case of *Doherty v. Government of Ireland and A.G.* [2011] 2 I.R. 222 in which he stated:

> *"Thus controversies surrounding purely political issues or the extent to which the revenue or borrowing powers of the State are exercised or the purposes for which funds are spent are entirely outside the proper role of the court. Thus, in O'Reilly v. Limerick Corporation [1989] I.L.R.M. 181, the question as to whether the Oireachtas had adequately provided for disadvantaged groups via its taxation policies was deemed to be non-justiciable.*
>
> *Similarly, in international relations and the conduct of foreign affairs, the courts have invariably taken the view that controversies which may arise are non-justiciable at the behest of individual citizens as the provisions of Articles 29.1 to Article 29.3 relate only to relations between states and confer no rights upon individuals (See Horgan. v An Taoiseach [2003] 2 I.R. 468)."*

117. I am also of the view that the defendants are correct in their submission that the plaintiffs' claim for declaratory relief is predicated upon establishing their claim for legitimate expectation. Since I have already held that the plaintiffs had no entitlement to a legitimate expectation to compensation, then it must follow that there was no right to defend or vindicate and for that simple reason alone this relief should be refused. Moreover, if the plaintiffs did establish such an entitlement, declaratory relief would be superfluous and unnecessary. For these reasons therefore I consider that this relief must also be refused.

118. Arguably therefore it may have been unnecessary to set out in the detail that I did above the response of the defendants to the proposed drift net ban and the very robust response of the defendants on behalf of the plaintiffs in particular and the industry in general to the proposed ban. However, I considered it important to record as a matter of fact (and I have done so in what could only be considered a very outline summary) the great efforts made by the defendants firstly to resist the drift net ban altogether, and secondly to secure appropriate compensation and other ameliorating measures in the interests of the plaintiffs. The facts clearly established that far from failing to defend and vindicate the rights of the plaintiffs, the defendants could have done no more in the face of opposition from all other countries in the European Union excepting France only. Furthermore, the defendants secured some significant concessions which operated to the significant benefit of the plaintiffs and which also helped to retain a viable tuna fishery long into the future. The defendants were at the same time engaged in resisting other measures which would also have had a detrimental effect upon the plaintiffs and the white fish industry generally in the State and in the scheme of things had to be mindful of that bigger picture when dealing with this discrete issue, most especially in deciding whether or not to seek retrospective funding for social flanking measures out of the 2000-2006 round of structural funds as suggested by the Unilateral Declaration. Ultimately the defendants decided against seeking funding by this route, because they considered that their efforts on behalf of the fishing industry as a whole were better spent in pursuing other objectives, and this is a policy decision exclusively within the preserve of the defendants.

119. While the defendants may be open to some criticism for not responding formally to a letter of Casey & Co., the then solicitors for the plaintiff, of 24th August, 1998, the failure to do so could not in any way be regarded as a failure to afford the plaintiffs' fair procedures, of any kind, not to mention of the kind that gave rise to declaratory relief in *Dellway*. Not only that, it is apparent from the summary of the communications between the parties that I have set out above, and the conclusions I have drawn from those communications, that there was no attempt on the part of the defendants to mislead the plaintiffs in any way and the defendants could quite reasonably have formed the view that the plaintiffs were fully aware that compensation was not going to be forthcoming.

120. While it is difficult not to feel some considerable sympathy for the plaintiffs to the extent that they were clearly treated differently to their colleague producers in other member states of the European Union, and quite possibly suffered discrimination contrary to Article 40 of the TFEU, if such be the case the fault for that lay with the institutions of the European Union and not with the defendants or the Irish State. For all these reasons therefore the plaintiffs' claim for declaratory relief must be refused.

Statute of Limitations Plea

121. As noted at the outset, the defendants have pleaded that these proceedings are statute-barred and in the alternative they have pleaded that there has been such an inordinate and unconscionable delay on the part of the plaintiffs in bringing forward and progressing these proceedings, such that they should be struck out. In view of my conclusions above it may not be, strictly speaking, necessary to reach any separate conclusion as regards this plea, but in the interests of completeness it is better that I do so.

122. In their reply to a notice for particulars of the plaintiffs dated 14th February 2012, and a letter seeking further and better particulars dated 27th June 2012, the defendants plead:

> *"the plaintiffs ought to have instituted proceedings within six years of the date of the relevant Council Decision 1997/27/EC, as set out above, and in circumstances where the plaintiffs failed to do so, the plaintiffs' claim is statute-barred pursuant to the provisions of s. 11 of the Statute of Limitations Act,1957(as amended).*
>
> *Further or in the alternative, should the plaintiffs assert that their alleged cause or causes of action accrued subsequent to that date, such assertion is denied. Should same be established, the said cause or causes of action became barred in accordance with the aforesaid provisions once six years had elapsed following such accrual."*

123. In their submissions in relation to this plea, Counsel on behalf of the plaintiffs submit that the cause of action of the plaintiffs accrued on 1st January 2002, when the compensation that the plaintiffs claim they were promised did not materialise. Since the proceedings were instituted on 12th December 2007, it follows that proceedings are not statute-barred. The plaintiffs' contend that they were never informed that the defendants would not act upon the Decision or that the representations which they allege were made by the Minister to them on the 8th June 1998, no longer applied.

124. It is further submitted on behalf of the plaintiffs that no right of action accrued on 17th December 1998, as there was no entitlement of the plaintiffs to obtain the benefit of the compensatory payments provided for in the Decision. This was so because the defendants had brought about amendments that precluded the plaintiffs from benefiting from the Decision and furthermore the defendants concealed the amendments that they sought to the terms of the Decision from the plaintiffs. It is submitted that this concealment is concealed fraud within the special meaning of s. 71 (1) (b) of the Statute of Limitations Act 1957.

125. The starting point in any consideration of this issue is to consider the date or dates upon which the plaintiffs' cause of action accrued. If the plaintiffs cause of action is *prima facie* statute-barred by reference to the latest date upon which the cause of action accrued then it becomes necessary to consider whether or not the action can be saved by the application of s. 71(1)(b) of the Statute of Limitations.

126. The earliest date in which it may be said that the cause of action accrued is the date on which the plaintiffs allege that the first named defendant made a representation that compensation would be paid to them i.e. 8th June 1998. However, that clearly cannot be the date on which the cause of action accrued simply because at that stage even the defendants retained some hope that the

Decision, when adopted, would establish a scheme which would avail the plaintiffs. The cause of action could not accrue at least until it became finally apparent that compensation would not be payable. Notwithstanding the defendants submissions to the Commission as regards the text of the Decision (so as to provide that the preparation of a conversion plan would be optional for Member States) the only date upon which it can be said that it was certain that funding of the compensatory/social flanking measures was subject to unallocated structural funds being available is the date of the adoption of the Decision i.e. 17th December 1998. By that time it was absolutely clear to the defendants, if not to the plaintiffs (at least on their case) that the State would not be preparing a conversion plan unless it could negotiate an agreement for the funding of the same through the next round of structural funds. Even if the defendants at that time continued to have some residual hope that that might yet be achieved (and on the evidence I do not believe the defendants did harbour any such hopes) that door was firmly closed on 31st December 1999, by reason of Article 5(3) of the Decision which required any measures in respect of which compensation was to be paid to be the subject of legally binding commitments in the Member States concerned no later 31st December 1999. That date, it seems to me, must be considered to be the latest date of accrual of the plaintiffs' cause of action because from that date onwards, it was no longer possible for the defendants to prepare a conversion plan and for the plaintiffs to avail of the same. While the plaintiffs argue that it was only following upon the expiration of the transitionary period i.e. 31st December 2001, that they became aware that they would not be receiving compensation (and, therefore, that is the date upon which the cause of action accrued), this is not correct for two reasons. Firstly, as a matter of fact I have already found that the plaintiffs were aware from much earlier that they would not be receiving compensation, and that this was so at the very latest by the time of the conclusion of the meeting in the Silversprings hotel in Cork on 14th April 2000. Secondly, as a matter of law it is well established that a cause of action accrues when "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court, has occurred." See the *Minister for Justice and Law Reform v. Devine,* Feeney J. [2012] IEHC 159 pages 21 and 22. While arguments can be made that the cause of action accrued earlier than 31st December 1999, that is the latest date upon which it accrued simply because the Decision by the defendants not to prepare a conversion plan had beyond any doubt been taken by that time and could not be reversed.

127. It follows from this that unless the proceedings can be saved through the application of s. 71(1)(b) of the Statute of Limitations Act, 1957, then they are statute-barred, because they are subject to a limitation period of six years from the date that the cause of action accrued. This section states:-

> *"Where, in the case of an action for which a period of limitation is fixed by this Act, either –*
>
> > *(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
> >
> > *(b) the right of action is concealed by the fraud of any such person,*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."*

128. Before considering the principles applicable as regards the application of s. 71 (1)(b) of the Act 1957, it is necessary to consider precisely how it is relied upon by the plaintiffs in these proceedings, and the state of knowledge of the plaintiffs at different times. In simple terms, the plaintiffs claim that they did not know that the defendants had caused an amendment to be made to the text of the draft decision until many years after these events occurred. They became aware of this following upon the making of discovery by the defendants, on 4th November 2007. It is clear that if this is taken to be the relevant date for the purpose of the Statute of Limitations, the proceedings are not statute barred. Their plea is to the effect that the plaintiffs did not know, and had no way of knowing, that it was not the intention of the defendants to prepare a conversion plan and avail of the Decision by reason of acts of concealment on the part of the defendants. It was only when, much later, they became aware of the input of the defendants into the text of the Decision that they became aware of when the defendants decided that the State would not be putting forward a conversion plan pursuant to the Decision, and that compensation would not be available to the plaintiffs.

129. In advancing this plea, the plaintiffs rely upon the decision of the Court of Appeal in *O'Dwyer v. Daughters of Charity of St. Vincent de Paul* [2015] IECA 226. It is argued that the conduct of the defendants concealed facts from the plaintiff which, if known, would have given rise to a cause of action on the part of the plaintiffs. In response to this, the defendants argue that in order to avail of s. 71(1)(b) of the Act of 1957 there must be conduct which was both concealed and wrongful and which would have given rise to a cause of action or facts which would found a cause of action. The defendants refer to the following passage of Hogan J. in *O'Dwyer*:-

> *"In the light of the authorities, it is clear, therefore, that for s. 71(1)(b) of the Act of 1957 to apply, there must be concealment either of wrongful conduct which gives rise to the cause of action or a failure by the defendant or his agent to disclose facts known only to the defendant which, if disclosed, would found a cause of action such that it would be inequitable to permit the defendant to rely upon the Statute of Limitations."*

130. The defendants submit that the actions of the first named defendant and/or the State insofar as they related to proposals for legislation to be enacted by the institutions of the European Union are not justiciable before the Court. Such proposals as were made were made by the first named defendant and/or the State in the exercise of the executive power of the State in the context of its membership of the European Union and in particular such proposals were made in the interests of the State and the common good. Insofar as the proposals that were made resulted from policy adopted by the executive, the same are not justiciable before the Court as, firstly, they constitute an act of the executive within the proper boundaries of the performance of the executive of its function and, secondly, such executive action arose in the exercise of the sovereign power of the State to make submissions to the institutions of the European Union regarding legislation.

131. It is clear from the evidence given by the witnesses for the defendants that the State made submissions on the draft proposal for a decision on social flanking measures in September/October 1998 in good faith and in order to avoid the State having imposed upon it an obligation to prepare a conversion plan which it would be unable to implement by reason of the fact that the State did not have available to it unallocated structural funds. This was a perfectly reasonable course of action for the defendants to take. Apart from the obvious waste of valuable administrative time in preparing a plan which the State could not implement, the very act of preparing such a plan would, as Dr. Beamish pointed out in his evidence, have been misleading. Indeed, it might well have generated an expectation upon which the State could not lawfully deliver. It was entirely within the prerogative of the State to make the representations that it did. I agree with the submissions of the defendant that such actions could not constitute wrongful conduct giving rise to a cause of action, firstly because they were not wrongful in themselves, and secondly because in any event they are not justiciable before this Court and could not therefore found a cause of action, for the reasons articulated by Kearns P. in *Doherty* (see paragraph 116 above). However, even if I am incorrect in these conclusions it makes little difference. It was not necessary for

the plaintiffs to be aware that the State had caused an amendment to the draft proposal that made the adoption of a conversion plan optional. The essence of the plaintiffs' complaint is that the defendants did not adopt a conversion plan as provided for by the Decision. On the plaintiffs' case the defendants should have done so and it is the failure on the part of the defendants to do so that has deprived the plaintiffs their compensation. Since the Decision was made on 17th December, 1998, and since expenditure had to be booked no later than 31st December, 1999, the date of accrual of the plaintiffs' cause of action fell within that period. Accordingly, it follows that the plaintiffs' claim is statute barred, since proceedings were not issued until 12th December 2007. In view of my conclusion in this regard, it is unnecessary to consider the further arguments advanced on behalf of the defendants that the proceedings should be struck out on grounds of inordinate and inexcusable delay.

132. In view of the conclusions reached above, it follows that the proceedings must be dismissed.