Neutral Citation: [2013] IEHC 587

**THE HIGH COURT**

**COMPETITION**

**[2012 No. 47 J.R.]**

**[2012 No. 3 CMP]**

**BETWEEN**

**ISLAND FERRIES TEORANTA**

**APPLICANT**

**AND**

**GALWAY COUNTY COUNCIL**

**RESPONDENT**

**JUDGMENT of Mr. Justice Cooke delivered the 18th day of December 2013**

1. By order of the Court (Peart J.) of the 23rd January, 2012, the applicant was granted leave to apply for judicial review of a bye law made by the respondent imposing certain harbour charges at Kilronan Harbour on Inis Mór in the Aran Islands, Co. Galway. More particularly, leave was granted to the applicant to apply for a series of declaratory reliefs and an order of *certiorari* quashing Charge No.12 in Part 1 of the Second Schedule to the "Bye Laws for the Regulation of Cill Ronân Harbour and Cill Éinne Harbour" (the "Bye Laws") upon the grounds set forth in para. E of the Statement of Grounds dated the 23rd January, 2012. By order of the Court of the 2nd October, 2012, (Cooke J.) the proceedings were entered in the Competition List pursuant to O. 63B of the Rules of the Superior Courts.

**Background.**

2. The general factual background and context to the application are similar to that of a previous claim brought by the applicant and which was considered and determined in this Court's judgment of the 18th October, 2011, (2005 No. 3195P, *Island Ferries Teo. v. Minister for Communications, Marine and Natural Resources and Others*. [2011] IEH 388). (The "2005 Case".) It is therefore unnecessary for the Court to repeat the full description given in that judgment of the commercial operations of the applicant out of which the judicial review application arises. It is sufficient to recall that the plaintiff company is a long established business of the O'Brien family of Rossaveel in Co. Galway, which has for many years operated a passenger ferry service between the harbour at Rossaveel and the Aran Islands and particularly to the principal harbour at Kilronan. The company now operates four purpose-built passenger ferries which cater both for islanders and others crossing between the mainland and Inis Mór throughout the year and especially for the busy tourist trade during the summer months. In recent years the company has been the operator of the only passenger ferries between Rossaveel and Inis Mór, a competing operator have ceased to trade there in 2009. A number of smaller ferries have provided a service between Doolin in Co. Clare and the islands. In 2012 the applicant's ferries carried approximately 145,000 passengers on the Inis Mor route. In that period the passenger numbers from Doolin were estimated to be between 20,000 and 30,000.

3. In its judgment in the 2005 case given in October 2011, the Court held that harbour charges imposed by the defendant Minister under the Fishery Harbour Centres (Rates and Charges) Order 2003 (SI 493/2003) made under the Fishery Centres Acts 1968 – 1980 were unlawful. The Court accordingly quashed the particular charge in question namely, Charge No. 10(a) of Schedule 1 of that order as having been made *ultra vires* the provisions of the legislation in question.

4. The applicant company now brings a similar challenge to the legality of a charge of €0.80 per passenger using Kilronan harbour on disembarking from a passenger vessel entering the harbour. The charge in question is imposed as Charge No. 12 of Bye Laws made by the respondent Council on the 24th October, 2011, which came into effect on the 1st January, 2012.

**The legislation.**

5. The specific provision in the bye law which is challenged is expressed as Charge No. 12 – "Passenger Rates" in respect of which the "description of facility or service" in the first part of the second Schedule to the bye laws is as follows:

> "Use of harbour by passenger vessels: This charge will be payable monthly: €0.80 per passenger per entry.
>
> The charge will be €5 per passenger per annum in respect of multiple journey tickets (five return journeys or more). To avail of this reduction the vessel operator must provide satisfactory evidence to the harbour master of such multiple journey tickets sales on a monthly basis. In the absence of actual passenger numbers the permitted vessel passenger certificate complement will be charged on arrival."

6. The Second Schedule sets a series of other charges for a variety of vessels and uses of the harbour. These include both entry charges and annual composite charges based on vessel tonnages. Fishing vessels for example have an annual entry charge of €3.00 per gross tonne and a single entry charge of €0.50 per gross registered tonne. Merchant vessels including passenger vessels, tugs, barges have a composite harbour entry charge of € 3.00 per gross registered tonne and a single entry charge of €0.50 per tonne. One of the central elements in the complaints of the applicant is that so far as landing activities are concerned the Council fixed at nil per tonne, Charges Nos 5 and 6 being the charges for the use of the harbour for discharging cargo and the landing of fish.

7. Galway County Council is, of course, a local authority for the purposes of the Local Government Acts, but it is also entitled, as explained below, to avail of the charging powers of a "harbour company" under the Harbours Act 1996. Its administrative area includes the Kilronan harbour on Inis Mór and the bye-laws imposing the contested charge are made in exercise of its powers under Part 19 of the Local Government Act 2001 (as amended) and Part 2 of the Maritime Safety Act 2005, together with ss. 13, 89 and

the Sixth Schedule to the Harbours Act 1996 (as amended).

8. Section 13(1) of the Harbours Act 1996, provides that a harbour company "may impose charges (in this Act referred to as 'harbour charges') at such rate as are from time to time determined by it on . . . (c) the owner or master of the ship which carries passenger to or from a place within its harbour . . . and (d) a person for whom any service or facility is performed or provided by it or to whom it hires any equipment."

9. Subsection (2) of s. 13 provides that the master of a ship on which passengers are to be carried or are carried will furnish to the harbour company concerned a statement of the number of passengers and their classes as such passengers.

10. Section 89(3)(a) of the Harbours Act 1996 provides, *inter alia*, that:

> ". . . the power of a local authority to make bye-laws under Part VII of the Act of 1994 includes the power to make bye-laws, in relation to a harbour under its control or management –
>
> (i) for all the purposes that a company may make bye-laws under section 42 in relation to its harbour, and
>
> (ii) for the purpose of enabling it to impose charges in like circumstances to those in which a company may impose charges under section 13."
>
> (The references in that section to the Local Government Act 1994 are replaced by the corresponding provisions in Part 19 of the 2001 Act above. )

11. The Local Government Act 2001, in s. 199(1) provides that:

> ". . . A local authority may make a bye-law for or in relation to the use, operation, protection, regulation or management of any land, services, or any other matter provided by or under the control or management of the local authority, whether within or without its functional area or in relation to any connected matter."

12. In ss.(3) it is provided that: " Any bye-law may include such provisions as the local authority considers appropriate for its effective application, operation and enforcement and generally to achieve the purposes for which it is made, including - …(h) the payment of a fee or charge at a specified time by any pereson in respect of a specified matter governed by a bye-law;…"

13. The practical effect of these statutory arrangements is that in respect of a harbour within its local administrative area, a local authority such as the respondent has the same power to impose "harbour charges" as a harbour company under the Act of 1996 and can do so by adopting bye laws in exercise of its powers in that regard in Part 19 of the Local Government Act 2001. Thus, so far as statutory authority is concerned, Galway County Council would appear, on the face of it, to have the necessary authority to make bye laws which impose harbour charges at Kilronan harbour including charges on the owner or master of a ship carrying passengers to or from a place within its harbour and, in view of ss.(3)(h) of s. 199 of the Act of 2001, a fee or charge on any person in respect of any matter governed by a bye-law. The arrival and departure of vessels including passenger vessels in the harbour is clearly something governed by the bye-laws. (See for example *inter alia* Bye-laws 7 and 9.)

**The Grounds.**

14. The arguments advanced by the applicant in support of the claim to quash the relevant bye-law can be grouped into three broad grounds. First, it is claimed that the particular charge is *ultra vires* the above bye-law making powers because the amount charged and the way in which it has been fixed by reference to the diversity of uses of Kilronan Harbour is manifestly unreasonable, disproportionate and discriminatory. In effect, it is claimed that the *per capita* charge on the passengers carried by the applicant is manifestly excessive having regard to the costs properly recoverable by the County Council in respect of the uses of the harbour and the minimal use made by the applicant; that no proper assessment of a reasonable proportionality in recovering costs amongst the various harbour users was undertaken by the respondent before the decision was made; and that virtually the entirety of the costs of operating and maintaining the harbour have effectively been visited upon the operators of the passenger services and especially upon the applicant as the main passenger service provider. It is argued that the charge is *ultra vires* because it is not actually imposed upon the applicant's vessels for the use made by them of the harbour but is a tax upon individual passengers which can only be exacted, if at all, under paragraph of s. 13 (2) of the 1996 Act. The applicant has been unlawfully discriminated against by the respondent's failure to recover any material contribution to the operating costs from other users including the operator of the cargo service to Kilronan.

15. Secondly, it is claimed that the charge is invalid as an abuse by the County Council of its dominant position as the sole provider of harbour services at Kilronan, contrary to s. 5 of the Competition Act 2002. Thirdly, the applicant claims that that the charge is invalid in that it violates rights of the applicant protected by Articles 6, 15.2, 40.1, 40.3 and 43 of the Constitution.

**The Redevelopment of the Harbour.**

16. The introduction of the new harbour charges followed the completion of a major redevelopment of Kilronan Harbour in 2011 which had been carried out at a cost of €48.5 million. This expenditure had been funded by central government and not by the County Council. The respondent's concern was the financing of the resulting increased operating costs of the harbour.

17. Prior to the carrying out of the development the landing facilities for vessels at Kilrnonan had consisted of a single exposed pier. There was no inner harbour area. The evidence on behalf of the respondent was that the harbour area was dangerous and that it was falling into disrepair. All of the harbour activities including the transit of foot passengers coming and going, the movements of vehicles and livestock, the delivery, storage, loading and unloading of cargo and the jostling of awaiting drivers, all took place within a confined quayside space.

18. Over a period of ten years, demands had been made and proposals put forward for a redevelopment of the facilities and the creation of an appropriate and safer harbour area. The original initiative for the eventual development appears to have come from a representative group of all of the main interests on the island and brought together as the "Coiste Calafort". This grouping produced a report in 2001, setting out what were believed to be the needs of the various interests on the island including those of fishermen; those catering for tourist businesses and so forth. In addition to the deteriorated condition of the pier itself, it was considered that the facility had become wholly inadequate for the social and commercial needs of the community on Inis Mór. Moreover, it was considered unsafe because a variety of activities were taking place within the same narrow area of the single pier namely, the arrival, particularly during the summer months, of large numbers of foot passengers from the ferries who then had to walk the length of the pier where livestock movements might be taking place and where cargo was being unloaded from the island's cargo vessel or had been

left for collection. In addition, considerable congestion occurred because the jarveys touting for business for their pony and traps and the operators of mini buses crowded onto the same narrow space when the ferries arrived.

19. In in response to the representations of islanders and their representatives, in 2002 the County Council commissioned a report from the firm of Michael Punch and Partners which described the problems at the harbour in these terms:-

> "The current problem is that small fishing boats, passenger ferries and cargo vessels are all docking at the same pier and often at the same time. The increase in the number of tourists visiting Inis Mór each year also forces an increase in cargo deliveries. Island fisherman have acquired additional fishing vessels which cannot be berthed at Kilronan thereby requiring them to berth at Rossaveel on the mainland and then tranship by ferry to the island. All this means that every year additional pressure is being put on Kilronan pier. There is also significant concern over the structural integrity of the existing pier as it has experienced damage, severe weathering and corrosion in places which will, in time, lead to washout of the contained fill and undermining of the pier."

20. A further concern of the island community was that the families that operated some of the larger modern fishing vessels were migrating to the mainland because their vessels could not be berthed at Kilronan. Apart from some small and occasional supplies to local restaurants there had been no substantial fish landings at the harbour for many years. It was a priority for the islanders, therefore, to procure the construction of a proper harbour with sufficient deepwater berthage to accommodate such vessels or, at least, allow them to be berthed overnight or over weekends even if their catches were landed at Rossaveel.

21. In preparing their report, Punch and Partners undertook a public consultation process with three public meetings held in Kilronan and meetings with representatives of the Department of Arts, Heritage and Gaeltacht and with the County Council. As a result of their consultation and research a consensus on the particular needs for the new harbour were identified as follows:-

- Safe operation of harbour facilities and safe passage for ferry users through the harbour;

- Safe berthage for vessels using the harbour – ferries, cargo vessels and pleasure craft generally;

- Provision of a deep water berth to accommodate fishing vessels;

- The increase in cargo traffic required a separate quay facility for the cargo vessel;

- An alongside berth was required for the RNLI lifeboat;

- Ferry passenger facilities such as a waiting room, restaurant, ticket office and information/reception;

- Traffic on the pier was leading to overcrowding so a detached facility for buses, pony and traps and bicycles was required.

22. In 2008 the Department of Community, Rural and Gaeltacht Affairs commissioned a report from McClure Watters, Chartered Accountants, as a business appraisal of a possible redevelopment of the harbour. These consultants identified a series of six options as to how the development might be undertaken and gave approximate costings for the capital amounts involved and estimates of the subsequent operating costs of the new harbour. These ranged from the minimalist options Nos. 1 and 2 of doing nothing or confining the development to the refurbishment of the existing pier. At the other end of the scale, option 5 was the most expensive and involved the construction of a breakwater to the east of the existing pier; the refurbishment of that pier; the construction of a separate cargo quay; a pontoon for the RNLI lifeboat and separate car parking facilities for tour buses, cars and pony and traps away from the pier areas. The projected total cost of that option was just under €35 million with an estimated subsequent operating cost of €70,000 per annum.

23. The McClure report then evaluated these options by applying a series of criteria and weightings namely, ensuring safety of all users; enhancing visitor access to the islands; maintaining community cohesion and minimising the impact on local environment. The non-monetary weighting criteria resulted in Option 5 being ranked in first place. It was effectively on that basis that the main scope of the works identified in Option 5 formed the basis of the subsequent contract for implementation of the redevelopment plan and the work was carried out by a contractor to the respondent between 2008 and 2011.

**The Adoption of the Bye-laws**

24. Although there had been existing bye-laws prior to the bye-laws the subject matter of this action and those had provided for harbour charges for the variety of uses made of the existing harbour (including a per capita passenger entry charge of IR£ 1), none had ever been collected and the harbour had generated no material income for the County Council.

25. In advance of the anticipated handing over of the harbour to Galway County Council by the contractor in 2011, work had begun on putting together draft new bye-laws for the harbour. This work was done by Mr. Kevin Finn, Executive Engineer with the Council, and Mr. Evan Molloy, Senior Engineer. The former had participated in an informal grouping of engineers attached to local authorities which had responsibilities for harbours. This group had been working over a period of time on establishing what he described as a "generic set of harbour bye-laws". The efficient and safe use of any harbour necessitates bye-law provisions for a wide range of activities, operations and eventualities, many of which are common to all such harbours. In the course of that work the group had looked not only at the existing Kilronan bye-laws, at the new bye-laws proposed for Rossaveel, and at other bye-laws for harbours in the State but also at bye-laws used for harbours in the United Kingdom and Australia. It was on the basis of that work and drawing particularly upon the bye-laws that had been prepared for Rossaveal that by September 2010 a first draft of detailed bye-laws had been put together.

26. The adoption of such bye-laws is a reserved function of the full County Council but the legislative process involves consideration by two particular committees of the Council, the Connemara Electoral Area Committee (the CEA Committee) and the Roads and Transportation Strategic Policy Committee (the "RTSPC"). It is clear from the minutes of these committees and from the evidence of Mr. Finn and Mr. Molloy that the new bye-laws they proposed and particularly their initial proposals for charges on both passenger traffic and cargo landings were the subject of considerable debate and controversy especially for the councillors representing the Galway coastal areas including Rossaveel and the Aran Islands.

27. The process of refining and then consulting on the draft bye-laws and the proposed charges proceeded over the twelve months from September 2010 with various meetings of the Council committees, public meetings and meetings with councillors in response to queries from individual counsellors, particularly those involved in the Connemara electoral area.

28. A meeting of the CEA committee took place on the 6th September, 2010, at which Mr. Finn first presented the draft bye-laws. At that stage the work of the harbour was 85% complete and it was expected that the redevelopment would be handed over by the following year.

29. This was followed by a public meeting which took place on Inis Mór on the 14th September, 2010, attended by both Mr. Molloy and Mr. Finn at which the draft was discussed. It was apparently a lively meeting attended by a large number of representatives of the island residents and businesses. In evidence Mr. Molloy said that it was on this occasion that he was asked for an estimate of what the operating costs of the new harbour would be and he mentioned the approximate estimate of €200,000. Following this meeting the draft bye-laws went on public display. As a result of the consultation process and public display of the draft, 187 submissions had been received. These were then examined and collated under a series of headings.

30. A further meeting of the CEA committee took place on the 30th November, 2010, at which Mr. Molloy outlined the contents of the bye-laws and the traffic management plan and said it was his intention to put the proposals before the Council meeting in January 2011. He informed the committee that the proposed charges were necessary to maintain the infrastructure in a proper manner and he agreed to provide it with a breakdown of his estimated €200,000 budget before the next Council meeting.

31. In conjunction with the detailed drafting of the bye-laws, Mr. Finn and Mr. Molloy had made a preliminary estimate of the costs that would be incurred by the Council in managing, operating and maintaining the new harbour when taken into the Council's charge. In response to the councillors's request for a breakdown of the figure given in September/ November of €200,000, in a memorandum of 25th January, 2011, Mr. Finn presented Mr. Molloy with a rough estimate of between €150,000 to €200,000. He provided a rough breakdown of the higher of those two figures to cover:

> (1) the cost of the harbourmaster including salary, training, office expenses;
>
> (2) the operation of public lighting; and
>
> (3) estimated maintenance costs including such items as CCTV cameras, navigational aids, harbour cleaning and other County Council staff assigned to various activities at the harbour.

He concluded his memorandum:

> "These are estimated running costs and may fluctuate from year to year. However it is fair to say that at this stage the running costs may be €150,000 to €200,000 per annum but will likely be nearing the €200,000 per annum."

32. Later the same day, Mr. Molloy revised the breakdown of the total figure in the memorandum by, in particular, reducing the figure attributed to the harbourmaster's salary, office, etc., from €120,000 to €80,000 and adjusting some of the other figures including provision for a foreshore lease required for the area now occupied by the extended facilities, from Mr. Finn's estimate of €500 per annum to €10,000 per annum. He retained the same total figure of 200,000.

33. Both Mr. Molloy and Mr. Finn emphasised in evidence that these figures were necessarily rough estimates as the Council had not previously maintained any distinct, detailed costings of the operation of the old harbour. Mr. Molloy was also quite frank in admitting that he considered it prudent to present the proposals to the committees and then to the Council on the basis of the higher figure of €200,000. He knew from experience that it was always prudent to seek to get agreement of the Council on a higher figure because the Council would be happy to reduce it if it transpired to produce a surplus. If he had gone with the lower figures of €150,000 he felt it would be very difficult to persuade the Council to adopt an increase if the operating costs exceeded the figure.

34. Further meetings of the CEA committee were held on the 25th January, 22nd February and the 5th May, 2011, at which Mr. Molloy was present and where the draft bye-laws and the submissions received in respect of them were discussed at some length. A further presentation on the estimated operating costs was given at a CEA meeting on the 17th June, 2011. As a result of these discussions and the submissions received, as well as of representations made by individual councillors, amendments had been made to the draft and the revised version was presented at the meeting of the 27th June 2011.

35. It is clear that one of the chief preoccupations of those attending the public and committee meetings or taking part in the consultations was the likely impact of the proposed charges on the various uses and users of the new harbour. The councillors in particular were concerned at the impact of charges imposed on residents of the islands; on the regular users of the ferries (that is, on islanders going to and from the mainland for work, and frequent business visitors or officials as opposed to tourists,) and the proposed charges for landing of cargos. These concerns led to consideration being given to maintaining an existing allocation which had been made towards operating costs of the harbour by the Council from its own funds which had been approximately €70,000 to €80,000 per annum.

36. Further debate on the draft bye-laws and proposed charges took place at meetings of the CEA committee on the 2nd and 26th September. On the morning of the 26th September, the draft bye-laws were also considered by the RTSPC. At that meeting it was agreed not to put the draft before the full Council meeting to be held that afternoon, but to postpone adoption for a period of one month to enable further discussions to take place between the various interest groups and the officials. Council officials met with a number of delegations for such discussion on the 10th October, 2011 at which a representative of the applicant was present. Again, there appears to have been strong pressure for consideration to be given to avoiding recoupment of the full operating costs by means of harbour charges and in favour of some continued subsidy from Council funds.

37. The draft bye-laws finally came before a full meeting of the Council on the afternoon of the 24th October, 2011. That full Council meeting was preceded on the morning of that day by a meeting of each of the committees. At these meetings Mr. Molloy advised that if the Council was prepared to continue to allocate the sum of €70,000 per annum from its own funds, the annual operating costs to be met by charges would be reduced to approximately €130,000. At that stage the draft presented by Mr. Molloy had proposed charges of €1.20 for passengers; €1 per tonne for cargo landed and €1 per tonne for fish landing. (In fact there were virtually no such landings as already mentioned.) On the basis that the Council would agree to continue the annual allocation, a proposal emerged to reduce the proposed charges to the following amounts:

- 0.40c per local passenger return trip;
- 0.80c per tourist return trip;
- 0.50c per tonne of cargo landed;

- 0.50c per tonne of fish landed.

It was on the basis of these amendments adopted by the RTSPC on the morning of the 24th October, 2011, that the proposal went before the Council that afternoon.

38. The draft bye-laws and the charges were debated at length at the full Council meeting which took place in the presence of various delegations representing interested parties. Amongst those in attendance was Ms. Susan O'Brien of the applicant company. The bye-laws were apparently the subject of great controversy and according to Ms. O'Brien approximately 200 islanders had picketed the Council building for over six hours.

39. In those circumstances and in what appears to have been a heated debate, further amendments were put forward at the Council meeting. These included the removal of any charges for loading or landing cargoes and fish and a provision reducing the charge for regular users of the ferries. Accordingly, the bye-laws were adopted at the Council meeting with Charge No. 12 in the form now appearing as set out at paragraph 5 above.

40. In the light of the passage quoted below from the judgment in the case of *Kruse v. Johnson* it will be noted from the above summary that the process by which the impugned charge was adopted could never be said to have been casual, perfunctory or lacking in consideration. On the contrary, it was obviously the subject of lengthy deliberation, official advices, negotiation, consultation, proposal and counter-proposal before being finally adopted.

**The Ultra Vires Ground.**
41. As summarised above in paragraph 14, the reliefs claimed in this proceeding are based upon three broad grounds. The first of those is that the contested charge is *ultra vires* the bye-law making powers of the County Council. In the course of oral argument counsel for the applicant largely agreed with the Court's characterisation of this ground as involving two limbs, namely (a) that the amount of the charge was manifestly unreasonable as such because it imposed a dramatic increase in the harbour dues charged to one particular user and bore no reasonable relationship to the value of the services which the respondents provided to the applicants for use of the harbour: and (b) that the charge is unreasonable and unlawful because it is disproportionate and discriminatory in that the County Council has chosen to recoup a major part of the harbour operating costs from one user of the harbour only, in order to avoid imposing any reasonably commensurate charge on other significant users and particularly on the operator of the cargo ferry to the island.

**The applicable Legal Principles.**
42. The general principles of law which fall to be applied to this ground are not in dispute and counsel for the applicant has relied explicitly upon this Court's exposé of the relevant law contained in its judgment of the 18th October, 2011, in the Rossaveel case. Counsel for the respondent has not sought to argue that the approach to legal principle set out in that judgment is mistaken or incomplete although it should be noted that the judgment in question is currently under appeal to the Supreme Court. Counsel emphasised strongly that the factual circumstances in Kilronan and the powers exercisable by Galway County Council were materially different to those which were the subject matter of the Rossaveel case.

43. It is therefore unnecessary to set out in any detail the legal principles which fall to be applied by this Court when considering submissions as to the alleged invalidity of an exercise of a delegated law making function of this nature upon grounds of *ultra vires*. It is sufficient to recall that at paras. 46 – 52 of that judgment, the Court had pointed out that a public authority can act *ultra vires* in the exercise of a delegated power in a variety of ways. These include imposing a burden or obligation which goes beyond the scope of what is authorised by the enabling statute when correctly construed. It includes also, however, the circumstances adverted to in the quotation from the judgment of Henchy J. in *Cassidy v. Minister for Industry* [1978] I.R. 297 quoted in para. 51 of the earlier judgment, namely where the effect of the exercise of the power is so manifestly arbitrary, unjust or partial as to lead to the conclusion that "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*".

44. In view of the legislative process by which these bye-laws came to be adopted, it is useful to add a passage from the well-known judgment of Lord Russell C.J. in the leading English case of *Kruse v Johnson* [1898] 2 QB at p.99 where, distinguishing between typical bye-laws of railway or dock companies carrying on business for profit and those of public representative bodies entrusted with delegated power from Parliament to make by-laws, he said of the former:

> "In this class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said 'benevolently' interepreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction."

While not ruling out the possibility that there will be cases in which it would be the duty of the Court to condemn bye-laws as invalid because unreasonable he added:-

> "But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involve such oppressive to gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires'*. But is in this sense and in this sense only, as I conceive, that the question of unreasonableness can be properly regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the invalidity of bye-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity to judicial opinion, and they laid down no principle or definite standard by which reasonableness or unreasonableness may be tested."

45. Accordingly, the question to be asked in considering this particular ground is whether, having regard to the effects or consequences relied upon by the applicant, it must be said that the Oireachtas could never have intended when enacting the

provisions referred to in paragraphs. 6 – 9 above that Galway County Council should have authority to make a bye-law imposing a charge of this kind? As explained later in this judgment, it is crucial to that assessment in this case to focus on the precise nature and effect of what the respondent has sought to do in adopting Charge No. 12.

**Procedure and Evidence**

46. The proceeding was commenced as an application for judicial review and subsequently entered in the Competition List. By direction of the Court under O. 63B of the Rules of the Superior Courts, the matter was not remitted to plenary hearing but was heard upon the basis of the affidavits filed on either side including the various expert reports and these were treated as statements of the evidence of those witnesses who were then cross-examined and re-examined.

47. On behalf of the applicant the main evidence as to the factual background and the impact of the charge upon the company was given by Susan O'Brien, a director and the general manager of the company and by Paddy O'Brien, her father, a director of the company and, in effect, its founding principal since he took over the operation of the service to the Islands from his father in the 1970s.

48. The main evidence of fact in relation to the operations in the harbour and the planning and carrying out of the redevelopment works described above was given by Evan Molloy, Senior Engineer of the County Council and his colleague Kevin Finn an Engineer with the Council. Evidence was also given by Patrick McDonagh, the Harbourmaster at Kilronan who described the day-to-day operations at Kilronan, the difficulties experienced at the harbour prior to the redevelopment and the changes that had come about for the use and operation of the harbour since the redevelopment.

49. A number of experts gave evidence on either side and furnished reports. For the applicant, Denis Hannon, an accountant and financial consultant with DHKN Chartered Accountants furnished a report dated the 4th April, 2013, dealing with the finances of the company and the implications of the new charge for its trade and profitability. Mr. Kevin Heery a director of Business Development Partnership, a management consultancy providing advices on business management and business development furnished a report dated the 9th April, 2013, together with a supplementary report dated the 3rd July, 2013 in answer to some of the expert evidence of the respondent. Mr. Moore-McDowell an economist and director of the Economics Consultancy ECU Limited furnished a report dated the 9th April, 2013, commenting upon economic aspects of the manner in which the charges had been formulated, but dealing particularly with the alleged abuse of a dominant position on the part of the respondent.

50. On behalf of Galway County Council, expert evidence was given by Deirdre Carwood, Accountant of KPMG Forensic as to the sound accounting basis for the calculation of the passenger harbour charge and by Patrick Massey, an economics expert, director of Compecon Ltd who furnished a report dated 24th May 2013. He dealt mainly with the issues raised in relation to the alleged infringement of s. 5 of the Act of 2002.

51. The evidence given on behalf of the applicant by Paddy O'Brien and his daughter Susan O'Brien was directed mainly at describing the unfairness and disproportion of the new passenger charge and the discriminatory impact it would have on the finances of the applicant company and the viability of their business. They criticised the exorbitant expense of the redevelopment; maintained that much of the work was unnecessary and in any event of very little benefit to the applicant as a harbour user. They laid considerable emphasis upon the limited use made of the harbour facilities at Kilronan by the company and accordingly the disproportion of exacting such a substantial annual revenue from it as a user of the harbour. The actual use by the ferries is confined to the arrival at the berth and the short period they are berthed at the quay to disembark passengers before leaving again. They do not require or use any water, waste, electricity or related utilities. They do not use any storage facilities, buildings or car parking areas nor do they require the assistance of any harbour staff for berthing or navigation. They have no offices or ticket kiosk or other passenger related services in Kilronan.

52. Mr. O'Brien also emphasised the considerable difficulty he said the company experienced in using Kilronan. Since the redevelopment they were still using the same 40m. berth for both of their vessels – "double banking" - as had been the situation prior to the redevelopment. The O'Briens also insisted that their service was probably one of the most important contributions towards tourism on the islands and to all of the businesses that benefit from the tourist trade. Excluding islanders, the applicant company brought approximately 140,000 tourists to Kilronan in a typical year. In 2011 for example they had brought 145.600 passengers to Kilronan of whom 127,200 were tourist visitors. Their accountant Mr Heery estimated that over a ten year period their service had contributed a sum in the region of €300m. to the economy of the islands. They also pointed to the very extensive advertising which their company carried out to attract visitors to their service and thus to the islands in competition with other important tourist attractions in the region such as the Cliffs of Moher.

53. The new charges would dramatically increase the annual operating costs of the applicant company by a sum in excess of €100,000 if the number of passengers remained as it had been in recent years. This was a cost the company would be unable to bear and if passed on to the customers would undoubtedly result in customers being lost to other tours and attractions with which they are in competition. Mr. O'Brien claimed that the ferry service to the islands was only barely viable and for the other two islands was supported by public service contract funds. As mentioned above one operator had ceased trading. Tourism is now the mainstay of the economy of the island and Mr. O'Brien estimated that the livelihoods of 70% of the workforce on Inis Mór was dependent on the tourist industry, the greater part of which is brought to the islands by the applicant. The company employed 33 staff all the year round rising to 47-50 during the summer months and provided livelihoods to 10 staff with Lally Coaches, the bus company which provides the link from Galway City to Rossaveel.

54. Notwithstanding the improvements brought about in the harbour by the redevelopment, they insisted that only very limited services were provided to or used by the applicant company and its passengers. This contrasted with the important new facilities provided for the cargo operator which now has its own berthing area with ample facilities for loading and unloading cargo away from the areas crossed by the passengers to and from the ferry and other users of the harbour.

55. Whilst acknowledging that the redevelopment had improved conditions in the harbour although at what was described as exorbitant expense, Ms. O'Brien insisted that the principal benefits accrued to other users including the islanders, trawler men returning to Inis Mór and particularly the operator of the cargo vessel. Apart from the separation of passengers walking the length of the quay from the vehicular traffic now relocated to the parking area and the hard stand for the cargo vessel, no significant new benefit accrued to the applicant.

56. She rejected the assertion made on behalf of the Council that the company had benefited from assigned berths for the ferries. That might be the case at Rossaveel, but there is no guaranteed berth for a ferry at Kilronan in the way in which, for example, the cargo operator has a dedicated berth. She also took issue with the claim on behalf the Council that there had been a significant increase in the cost of upkeep and maintenance of the harbour and in providing services and facilities since the redevelopment had

taken place. Essentially the maintenance and operation of the harbour was unchanged.

57. Notwithstanding these criticisms however, there is no doubt but that the redevelopment works at the harbour and surrounding areas have brought about an important improvement in the conditions and facilities at the harbour. In spite of the complaints and misgivings expressed by Mr. O'Brien and Ms. O'Brien as to their relevance or utility to the applicant company, it is clear that major works have been carried out. A large area of the foreshore has been reclaimed for the purpose of creating car parking and traffic marshalling facilities which are used by minibuses and jarveys meeting arriving passengers. The existing pier has been widened providing additional berthage. A 550m breakwater has been built and extensive dredging of the harbour and entrance channel has improved access. A new cargo berthing area has been constructed with the result that there is now a separation of foot passenger traffic from vehicular traffic and the loading and unloading movements at the cargo berth. In the result, safety conditions for all harbour users have been significantly improved and the photographic evidence pre and post the redevelopment clearly shows that the harbour has now a general appearance of orderliness and efficiency previously absent.

58. It is also clear that in recent years so far as traffic in the harbour is concerned, the passengers arriving on the applicant's and other ferries has been the dominant harbour use. The larger trawlers have migrated to the Rossaveel harbour or elsewhere because of the facilities there and fish landings have effectively ceased. Smaller vessels have tended to use the harbour at Cill Éinne but the Harbour Master expressed the hope that the improved access and water depth might bring them back. There is some use of the harbour particularly during summer months by leisure draft, but it seems to be sporadic except when particular festivals, regattas or similar events are taking place.

**Finding of the Court.**

59. It will be clear from the above summary of the very extensive evidence that was given on either side that there are large areas of disagreement between the parties and their witnesses on various aspects of the finances involved on both sides in the case. These included: the necessity for the particular redevelopment undertaken by the Council in the harbour; the reasonableness or otherwise of the expenditure thereby incurred; who benefits from the various facilities now provided there. More particularly, the applicant company disputes the amounts said to be involved in the cost of operating the harbour and the unbalanced way in which the range of charges in the Second Schedule to the bye-law are applied to the various users and explicitly biased against the passenger ferry service. The applicant also disputed the extent to which the facilities are actually used by it or of benefit to it and maintained that there is no reasonable relationship between the amount being imposed upon the company in the passenger entry charge and the value of the services provided - such as they are. Wide-ranging cross examinations were conducted on either the side the immediate relevance of which to the issues in the case was not always immediately obvious to the Court.

60. On the applicant's side much cross-examination was directed at questioning the true operating cost of the harbour; at the necessity for all of the redevelopment works and at the respective cost and value to different users of the various services provided by the harbour. The financial statements were examined in detail and the charges for public lighting, navigational aids, various salaries, the cost of the foreshore lease and so on were, amongst many others, debated at length. On the respondent's side much time was taken up with questioning the finances and profitability of the applicant company and its ability to absorb the charge. Its relationships with sister companies and transactions in respect of properties in Rossaveel were explored. Various exercises were undertaken in attempts to measure or evaluate the percentages of harbour uses which could be attributed to the different users and the proportions of operating costs which it would be appropriate to allocate to them.

61. In the view of the Court, however, it is not necessary in this case to reach any definitive conclusions on most of the questions thus raised. As indicated in paragraph 45 of this judgment, the question which the Court is required to decide, is whether Charge No. 12 in the Schedule to the bye-law when considered in the context of the range of charges fixed in that Schedule, the circumstances of the harbour and the responsibilities of the respondent, has been shown to be so manifestly arbitrary, unjust or partial as to require it to be set aside as unreasonable in law and therefore falling outside the scope of the delegated powers available to the respondent.

62. On one view of the matter it is perhaps not surprising that the applicant company and the O'Brien family feel aggrieved at the apparent way in which they may seem to have been targeted by the councillors to bear the main burden of contributing to the operating costs of the new harbour. It is understandable that they may feel particularly let down by the local representatives who they impliedly characterise as self-serving in having acquiesced in the demands of special interests of the delegations present at the Council meeting described above, when the bye-law was adopted and the original more broadly based charges proposed by the officials were amended in the manner described.

63. The bye-law making power is, however, a reserved function of the members of the County Council who are entitled, as is implicit in the passage quoted from Lord Russell C.J. at paragraph 44 above, as elected representatives, to base their judgment as to the appropriateness of such a measure upon their understanding of how a balance is best struck between such competing interests.

64. It is of fundamental importance therefore to be clear as to the legislative intent and substantive effect of the impugned charge. In the judgment of the Court the fundamental flaw in the argument advanced under this heading on behalf of the applicant is that it characterises Charge No. 12 as a fee or harbour due imposed upon the applicant company as the ferry operator and then seeks to base its claim that it is manifestly unreasonable upon a comparison of the aggregate annual new operating cost of over €100,000 to be borne by the company notwithstanding its limited use of the harbour, with the other charges on other operators or for other uses listed in the Schedule. In the judgment of the Court, the correct approach in examining whether Charge No. 12 was adopted ultra vires the powers of the respondent as manifestly unreasonable, is to consider whether or not a fee of €0.80c per head on individual passengers disembarking is grossly unfair, disproportionate or excessive in the circumstances.

65. As pointed out above, the bye-laws have been adopted explicitly on the basis of s. 199 of the Local Government Act 2001 and s. 13 of the Harbours Act 1996. Although the text does not identify for each bye-law which particular power is relied upon, subsection (3) of the former Act provides in part:

> "Any bye-law may include such provisions as the local authority considers appropriate for its effective application, operation and enforcement and generally to achieve the purposes for which it is made, including –
>
> . . .
>
> (h) the payment of a fee or charge at a specified time by any person in respect of any specified matter governed by a bye-law. . . ."

66. Clearly, therefore, it is within the competence of the respondent to charge passengers a fee for entering its harbour and making use of its facilities even if that consists only of walking the length of its pier to pick up a tour bus or pony and trap in its car park.

Although Charge No. 12 refers to "use of harbour by passenger vessels" the actual charge is a charge of €0.80c per passenger. Mr. Molloy in evidence expressly confirmed that the objective of the charge was to generate income from the use of the harbour by individual passengers. At paragraph 38 of his second affidavit, he said:

> "The rates and charges were designed around the concept of generating income for the ongoing maintenance and operation of the harbour on a non- profit basis. The charges were designed to be apportioned between all users of the harbour based on their usage of the harbour. This is why the entry charges are the same for all the cargo and merchant vessels. A levy on passengers is not a financial burden on Island Ferries or any other passenger ferry company. There may be some administration costs involved in passing on passenger numbers to the Council so that invoices can be generated for payment by the passenger ferry companies, but this is a levy and not a financial burden to be carried by the ferry companies. I say and believe that the administrative burden on Island Ferries in recording passenger numbers is small as these records have to be kept for the Department of Heritage and the Gaeltacht as part of its public service contract and also as a condition of its ferry licence."

67. While Charge No. 12, "Passenger Rates" is framed as being for "use of harbour by passenger vessels" the reality is that the County Council has imposed a per capita fee or tax on individual passengers disembarking at the harbour, but arranged to have it collected through the agency of the ferry operators. It is clear both from the way in which Charge No. 12 distinguishes between multiple journey tickets and the single entry rate of €0.80c that the fiscal objective of the respondent has been to generate a stream of income from visitors to the island almost all of whom come from outside the region and even the country, while at the same time avoiding the imposition of such a charge upon island residents and others from the locality having regular business on the island.

68. Accordingly, in the judgment of the Court, the reasonableness and proportionality of Charge No. 12 in these circumstances must be judged from the perspective of an imposition of €0.80c on individual passengers the vast majority of whom are once-off visitors to the island. Unless the company decides for commercial reasons not to pass on that amount by way of price increase, the practical impact on the company is an administrative one and that burden is by and large already borne by it in the records it is obliged to keep and administer for the Rossaveel harbour.

69. It is also clear from the description of the debate and the consultations and negotiations which preceded the adoption of the bye-laws that the councillors, as legislators, were particularly concerned to avoid imposing additional financial burdens on residents and businesses on the island. This was obviously the basis upon which the decisions were taken not to include a charge for the loading and unloading of cargos from the merchant vessel and to confine the contribution towards operating costs from that vessel to the annual gross tonnage charge. As was explained by the witnesses on behalf of the respondent, it was recognised that most of such cargos consisted of fuels, foodstuffs, equipment and materials brought in for households and the small businesses dependent upon the tourist trade. It was feared that any such charges based upon the volume of cargo landed would be passed on to those households and businesses and thereby affect the sustainability of the island community. Similarly, there was concern about the original proposal to include a charge per tonne for landings of fish. Given the manner in which that activity had almost disappeared from the island and that trawlers were based at Rossaveel as a designated fisheries harbour, the revenue from such a charge would have been miniscule and would only have served to act as a deterrent to any resumption of that trade. It could not be said that these were not relevant and valid concerns which it was legitimate for the local legislators to take into account in assessing what the appropriate terms of the bye-law should be.

70. In the judgment of the Court, therefore, the apparent discrepancy emphasised by the applicant between the treatment of the passenger ferries on the one hand and the other principal uses of the harbour by vessels namely the cargo vessel and the fishing vessels, cannot be said to be "arbitrary" in the sense of capricious or a decision taken without any reasonable cause or justification.

71. While it is also understandable that the witnesses for the applicant should seek to place great emphasis upon the minimal use made by the passenger ferries of the harbour facilities and what they see as the disproportionate contribution they are asked to make in the amount of the passenger ferry charge as compared with the value of the services they actually receive, that is not, in the view of the Court, in itself a basis for characterising Charge No. 12 as being manifestly unfair or unreasonable. It is important to bear in mind that the respondent is a local authority and as such, has a very wide range of responsibilities and interests under the Local Government Acts and other statutes under which it performs its statutory functions. Quite apart from its normal functions in respect of roads, planning, water, environment, libraries and so forth, and as its own Development Plan illustrates, Galway County Council has, for example, extensive duties and obligations not only in promoting tourism and other employments and safeguarding community affairs throughout its administrative area, it has special responsibilities to have regard to the sustainability of the Aran Island communities and their linguistic and cultural heritage. Under s.69 of the Local Government Act 2001 the respondent in performing all of its functions is required to have regard to a series of factors or considerations. These include the policies and objectives of Government or of any Government Minister which affects or relates to its functions; the needs for high standards of environmental and heritage protection and the promotion of sustainable development; and the need to promote "social inclusion".

72. While the particular charge under examination here is one imposed in respect of the use of a particular harbour by passenger vessels, it is, in the view of the Court, perfectly legitimate (and perhaps mandatory) for the Council as legislator to approach the decision to be made and the balancing of interests to be struck, by taking into consideration its other statutory interests and responsibilities. In that regard it is entitled to appraise the benefits to be gained by investing in such works as the Kilronan Harbour redevelopment by reference to the cumulative interests of all such objectives and responsibilities. It is pursuing and is entitled in law to pursue, a wide range of objectives arising from such statutory responsibilities and it is entitled to assess the value benefits which accrue by reference to the overall results. It is not constrained to abide by a strictly utilitarian evaluation of the fee imposed and the cost of providing the service used by the operator charged. In the case of the operation of Kilronan Harbour it is entitled to take into consideration not only the economic value of the facilities to those making the immediate use of them but also the more remote or indirect but real communal benefits that can be expected to flow to the island community, its households, businesses and their general sustainability. Contrary to the argument made on behalf of the applicant, the Council as legislator is not confined to achieving any particular equation between the charges being imposed and the value or cost of services being provided to individual users as such, provided that the actual amount of a specific charge is not so manifestly disproportionate or excessive as to render it objectively oppressive or economically irrational. Viewed, as it must in the judgment of the Court be viewed, as an €0.80 fee asked of individual visitors which the applicant is not obliged to bear in full or at all, it cannot be considered to be beyond the scope and intention of the respondent's delegated bye-law power.

73. Furthermore and in any event, it is unrealistic for the applicant's witnesses to suggest that the passenger ferry business has no interest in and derives no benefit from the general improvement in the conditions and facilities at Kilronan Harbour as a result of the redevelopment. As the applicant's witnesses repeatedly emphasised, the mainstay of their business is that of tourist passengers visiting the islands over the summer months. Most of those passengers are making a one day trip to the island and returning in the evening. It is clear from the evidence and from the company's own publicity that the business is very much dependent upon

promoting the trip to the island and the day spent there as an attractive and novel cultural and tourist experience. It is not unreasonable to suggest, therefore, that everything that contributes to the ease of making that trip and the enjoyment of the occasion is to the benefit of the applicant's business. It is clear, as already mentioned, from the photographs taken of the harbour before and after the redevelopment, that Kilronan Harbour is, from the point of view of foot passengers disembarking on arrival on the island for the first time now a safer, more orderly and generally more attractive place. Thus, apart from the benefits to the vessels from the breakwater, the dredging and improved navigational aids, the passengers receive the practical benefits of the improved quay side, the newly built shelter and the pubic toilets and those general benefits accrue to the applicant company as enhancing the marketability of its primary destination.

74. In the judgment of the Court, therefore, even if the applicant's evidence in relation to its minimal use of the harbour facilities and the alleged lack of proportionality between the value of the services it receives and the cost charged to it in the passenger levy is accepted as it stands and the criticisms and objections on the part of the respondent are discounted, the threshold has not been reached at which could be said that Charge No. 12 in the Schedule is manifestly unfair, disproportionate or unreasonable. As already pointed out, what the County Council has sought to do is to generate a stream of revenue by way of contribution to the annual operating costs of the harbour by affixing a very modest per capita fee of €0.80c on individual passengers arriving, most of whom will make the trip only once. From the way in which the charge had been framed, it is clear that it is the intention of the respondent that the charge would be passed on to the passengers by the ferry operators and whether or not that is done in whole or in part is a matter for the commercial judgment of the operator concerned. In this particular case the applicant company is not precluded from doing so by the terms of a public service contract. (In that regard the Court is satisfied in any event that notwithstanding the areas of dispute between the expert witnesses, the operating costs of the harbour are clearly well in excess of the estimated revenue from the No. 12 Charge payable be the applicant.)

75. It is for these reasons that the Court has considered that many of the issues that have been the subject of argument and cross-examination in this case as to the correct calculation of the operating costs of the harbour, the cost or value of the facilities or services actually used and the profitability of the applicant are largely irrelevant. In the judgment of the Court the adoption of Charge No.12 in the Second Schedule to the Bye-laws has not been shown to be invalid as *ultra vires* the delegated statutory powers of the respondent upon which they are based.

**The Alleged Abuse of Dominance.**

76. The ground raised under this heading is essentially the same as that advanced by the applicant in the 2005 case in relation to the harbour at Rossaveel. It is claimed that the harbour at Kilronan is an "essential facility" being the only access to Inis Mór for passenger ferries and that the County Council is accordingly an undertaking for the purposes of the Competition Act 2002, which occupies a dominant position as the sole provider of harbour services for such a market on the Island. In particularising the form the alleged abuse takes, paragraph 39 of the statement of grounds repeats all nineteen particulars contained in paragraph 36 in respect of the *ultra vires* ground. In essence, however, it is submitted that the imposition of the charge constitutes an unfair price for the services provided; it bears no reasonable relation to the value or cost of providing the services and has been imposed without any attempt to calculate the value of the services availed of by the applicant and are thus excessive, disproportionate, discriminatory and unreasonable. In written and oral submissions, counsel for the applicant relied heavily upon the analysis and findings of this Court in the Rossaveel case and particularly emphasised the proposition that it was only because of the monopoly or dominant position held by the County Council at Kilronan harbour that it was in a position to extract this level of revenue from the operators of the passenger ferries and to do so notwithstanding the absence of any economic relationship between the amount charged and the service provided.

**Finding of the Court**

77. It is probably correct to suggest that in the particular circumstances the respondent does come within the definition of "undertaking" in s. 1 of the Act of 2002 in that it is a corporate entity which is engaged at Kilronan harbour, in providing a range of harbour services to different users and it does so for "gain" in that it imposes charges for them. It is also probably correct to consider that the harbour is an "essential facility" in the sense in which that term has been considered in the jurisprudence of the European Courts under Article 102 TFEU. For largely the same reasons that applied at Rossaveel, Kilronan harbour is the only means of disembarking large numbers of foot passengers on Inis Mór and this is so whether they come from Rossaveel, Doolin or Galway City. Moreover, the only other harbour on the island is also operated by the County Council. It follows, therefore, that for the purposes of s. 5 of the Act of 2002, it can properly be said that the respondent occupies a dominant position at Kilronan in the provision of harbour services including those provided to passenger ferry operators. Indeed, in the statement of opposition the respondent concedes that it is an "undertaking" in these circumstances; that that it occupies a dominant position in relation to the provision of harbour facilities at Kilronan and that the harbour is an "essential facility".

78. In the judgment of the Court, however, the situation at Kilronan harbour is materially different from that at Rossaveel with the consequence that even if the above ingredients of s. 5 can be said to be present, the conduct of the respondent in adopting Charge No. 12 cannot constitute an abuse of its dominant position. The reasons for this conclusion are effectively the same as those given above for concluding that the adoption of Charge No. 12 was not *ultra vires* the statutory powers of the respondent.

79. As already pointed out, the fundamental object and effect of adopting the charge has not been the achievement on the part of the respondent of any particular commercial advantage involving a distortion of the competition in a particular market or the use of the respondents dominant power in one area in order to extract some commercial advantage in an adjacent area or market on which it operates. Although the County Council is technically an "undertaking" in these circumstances and is providing a range of services in return for payment of fees and such services are capable of being provided by private sector, commercial harbour companies, Galway County Council is here providing them in discharge of the wide range of public- interest functions and responsibilities it has as a local authority towards the communities and businesses within its administrative area and those of the islands in particular.

80. Secondly, as already pointed out above, the correct view of Charge No. 12 is that it is a modest fee of €0.80c per head charged to visitors to the islands and is not imposed as an operating cost on the ferry businesses except to the extent that the latter chooses to treat it as such. There is, accordingly, a clear objective justification for the introduction of Charge No. 12 having regard to the functions and responsibilities in relation to Inis Mór that the County Council is obliged to discharge and the harbour costs which it is required to cover at least in part. In the judgment of the Court, viewed as such a *per capita* fee, the charge could not be said objectively to constitute an unfair or excessive amount. Moreover, it is not applied in a discriminatory fashion given that it is charged to passengers arriving on all ferries including passengers visiting the islands when a cruise ship calls. Mr Molloy confirmed that the same charge would be applied to passengers arriving on any new service from Galway City and to passengers from a proposed seaplane service that may operate to the harbour in the future. It is true that there is differential treatment amongst classes of passengers to the extent that resident islanders and others having business which requires them to visit the island regularly can avail of the "multiple journey ticket" option. Again, having regard to the obligation of the respondent to take account of the need to safeguard sustainable community life and livelihoods on the island, it could not be said that such a differentiation was unreasonable

and without objective justification.

81. It is also relevant to bear in mind that although it may be correct to characterise the respondent as occupying a dominant position as operator of the harbour, it is questionable, in the view of the Court, whether it is in a position to fix these charges for harbour services in disregard of any countervailing restraint. Having committed itself to the higher operating costs resulting from the redevelopment of the harbour and chosen to obtain one of the principal contributions to those costs from the passenger traffic of visitors, the County Council will be constrained not to impose charges at excessively high levels for the very reasons given by the applicant,s witnesses. The number of visitors making the trip to the island each year is susceptible of considerable fluctuation and if harbour charges have to be passed on to the customers of ferry operators, the loss of trade to other attractions emphasised by Mr. O'Brien and his daughter will in turn impact upon the revenues of the harbour. Indeed the sensitivity of the various activities in the harbour to the adverse impact of new or higher charges is very evident in the debates and consultations that took place leading to the adoption of the bye-laws. It was partly to avoid the full impact of raising the total amount of revenue needed to cover likely operating costs that persuaded the councillors to agree to the compromise of continuing the pre-existing contribution of €70,000 per annum from other funds.

82. For all of these reasons the Court is satisfied that the adoption of Charge No. 12 in these circumstances was not without objective justification and could not be characterised accordingly as an abuse of a dominant position.

**Articles 40.3 and 43 of the Constitution**
83. The third ground relied upon by the applicant in asserting the invalidity of Charge No. 12, is that it infringed the provisions of the Constitution. At paragraph 38 of the statement of grounds infringements of Article 6, 15.2, 40.1, 40.3 and 43 of the Constitution were invoked. To the extent that this ground was pursued in the written submissions and legal argument, it was confined to an assertion that the imposition of the charged infringed the applicants' property rights and right to carry on a business. It was submitted that the imposition of the charge in the particular circumstances constituted an unjust attack on the rights of the applicant company and went beyond what might be permissible as a proportionate, fair or rational interference with such rights.

**Findings of the Court**
84. The answer to the claim under this ground is to be found in a passage cited by counsel for the applicant from the judgment of Costello P. in *Daly v. Revenue Commissioners* [1995] 3 I.R. 1:

> "When . . . an applicant claims that his constitutionally protected right to private property referred to in Article 40.3.2 has been infringed and that the State has failed in the obligation imposed on it by that Article to protect his property rights, he has to show that those rights have been subject to an unjust attack'. He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test."

85. In the judgment of the Court, Charge No. 12, as explained above, constitutes no attack, unjust to otherwise, on the property rights or business activities of the applicant company. It is a fee to be collected from individual passengers passing through the harbour from passenger ferries. Its amount is modest. It has not been imposed as a necessary operating cost on the business of the applicant company. Unless the company chooses for its own commercial reasons not to pass the amount on to its customers, its only impact on the company is an administrative one. In that regard, it is no more an unjust attack upon that business than an obligation to make periodic value added tax for other fiscal returns. Clearly, the conduct of a passenger ferry business is impossible without the availability of a harbour. Operating a harbour incurs costs. The recoupment of part of those costs from those making the major use of the harbour services could not, in the view of the Court, be said to constitute an "unjust attack" upon the businesses of the operators in question.

**Concluding Observations**
86. For all of the reasons set out above, the Court will refuse the reliefs sought in this application. Having regard however, to the fact that extensive reliance has been placed in this case upon the judgment given by the Court in the Rossaveel case on the 18th October, 2011, it might appear somewhat contradictory that the Court is reaching a directly opposite result in the present case, notwithstanding the similarity of circumstances and the fact that the case is brought by the same applicant in respect of harbour fees charged to the same vessels at the other end of the same round trip. It may be helpful therefore to summarise why the Court considers that the consequences in law of the two claims are entirely different.

87. First, the respondent is a different statutory entity and has imposed its harbour charge in exercise of a completely different delegated power. The respondent Minister in the *Rossaveel* case was exercising powers under the Fisheries Harbour Centres Act 1968 and related legislation. One of the consequences of that legislation was that Rossaveel was one of a small number of harbours designated for the special purpose of promoting and serving the needs of the fishing industry. Thus, unlike Kilronan as a harbour available for a wide range of uses in the general public interest, Rossaveel had a primary and statutory function as a fishery harbour and was thus required to promote the needs and objectives of those operators who caught fish, landed fish and then sold and processed those landings. One of the distinguishing features of the exercise of the Minister's power in that case was the divergent commercial objectives that were being pursued and particularly the fact that, as indicated at para. 60 of the judgment, the new charge was not fixed as a fair and reasonable price for the use made of the harbour facilities by the ferry operator or even by the passengers, but was designed to generate funds in order to eliminate deficits that had been incurred in the overall management and commercial operation of all the fishery harbours taken together.

88. A further and important consideration in the Rossaveel case was the fact that the new charge involved not only a very substantial increase for the applicant company between the years 2003 and 2005, but it was imposed in circumstances where the contractual obligations of the applicant to another agency of the State precluded the company passing on the fee to its customers.

89. It was a further a feature of the Rossaveel case that the Minister's power was one to fix rates for each of the designated fishery harbours and to do so by reference to the particular conditions and uses of the facilities made in each. Instead, a common set of charges had been applied to all harbours and Rossaveel was the only one of those with significant passenger traffic.

90. As indicated in paragraphs. 63 – 64 of the earlier judgment, there was also an ambiguity in the formulation of the charge in question as to whether it was a price for the use made by the ferry vessels or by the passengers. This gave rise to a material distortion and discriminating effect in the way in which the charge was applied to vessels with complements above or below 100.

91. So far as concerned the abuse of dominance alleged, there was a further factor of discriminatory treatment in the Rossaveel charge which is absent from the present case and an element of actual distortion of competition between the applicant company and other ferry operators depending upon the sizes of vessels used and their passenger complements. Furthermore, there was a factor of cross-subsidisation held to be imposed on the one class of commercial users (the passenger ferries) in favour of another (the fishery

users). As the Minister had as his primary commercial duty to promote the commercial interests of the latter, his dominant position enabled him to extract an advantage by way of cross subsidy from the passenger charge in favour of the unrelated commercial activity of the fishery users.

92. Accordingly, these reasons as set out in more detail in this judgment and correspondingly in the earlier judgment in the Rossaveel case, are the basis upon which the Court has found in favour of the respondent in this case and not in favour of the applicant.