Neutral Citation: [2015] IEHC 97

THE HIGH COURT

JUDICIAL REVIEW

[2014/15 JR]

BETWEEN

CYRIL BERRY, PETER BURKE, DAVID BYRNE, BRIAN DOLAN, PATRICK GALVIN, FERGAL GRIFFIN, FINTAN GRIFFIN AND MARK SINNOTT

APPLICANT

AND

SHANNON FOYNES PORT COMPANY

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered the 9th day of February 2015

1. This is an application for an Order of Mandamus directing the respondent to refer to a person nominated pursuant to section 59 of the Harbours Act 1996, a dispute between the parties relating to the pilotage charges imposed by the respondent as and from the 1st January 2014.

2. Background
The eight applicants are pilots licensed by the Shannon Foynes Port Company. They provide pilotage services to ships in the Shannon Estuary. There are several large ports within the Shannon Estuary including Cappa Jetty, the ESB Moneypoint Terminal, Tarbert Island Oil Jetty, Foynes Harbour, Aughinish Marine Terminal, which serves the Alumina Plant, Dernish Aviation Oil Terminal at Shannon Airport and Limerick Docks. The latter are some 42 miles upstream from the entrance to the harbour area. Prior to 2014 there were different charges for the different ports in the pilotage area. These, according to the applicants, had been historically determined. In determining pilotage charges prior to 2014 the relative differences between these ports remained unchanged. According to the applicants that historical structure was altered without agreement in January 2014.

3. The applicants are self-employed pilots licensed to provide pilotage services to shipping entering the Shannon Foynes port area in accordance with an agreement made in 2002 with the Shannon Foynes Port Company pursuant to section 59 of the Harbours Act 1996. In the various items of correspondence exhibited in the course of these proceedings the pilots are referred to, and refer to themselves, as being self-employed. The nature of their duties and the manner of their payment also indicates a self-employed status. The Court, for the purposes of this application, is satisfied that the applicants are in fact self-employed.

4. Pilotage is compulsory in the Shannon Estuary. The Shannon Foynes Port Company sets the rate for pilotage pursuant to section 64 of the Harbours Act 1996. It collects the pilotage charges from shipping entering the harbour and distributes that among the licensed pilots, less the agreed administration costs, in accordance with the pilotage agreement.

5. The applicants are dissatisfied with the process according to which the pilotage charges for 2014 were determined. They contend that from the inception of the Pilotage Agreement in 2002, pilotage charges have been agreed annually between the pilots and the Company's Harbour Master. They maintain that in coming to that agreement the relative difference in charges for the different ports in the estuary remained unchanged, these having been historically determined. They contend that the charges imposed for 2014 amount to a restructuring of pilotage charges in the pilotage district at a considerable loss to the pilots and further contend that such a significant alteration could not be effected without their agreement. The remedy which they invoke to address this perceived wrong is an Order of Mandamus directing the respondent to refer to a person nominated pursuant to section 59 of the Harbours Act 1996, the question as to whether clause 4 of the Pilotage Agreement (which sets the basis for pilotage charges) ought to be amended to include a term enabling the Port Company, on a once off basis, to vary the pilotage charges on criteria other than gross tonnage as heretofore. They propose a particular term for arbitration which would ensure that a pilot's income would not be reduced by more than 7.5%. In the alternative, they seek such further or alternative Order of Mandamus for a referral pursuant to section 59 of the Harbours Act 1996, as the Court may deem appropriate. Leave to apply for an Order of Mandamus was granted *ex parte* by Peart J on 13th January 2014.

6. In its grounds of opposition filed on 14th March 2014, the respondent denied that pilotage charges had been agreed annually between the parties but accepted that it had engaged in consultation with the pilots in respect of pilotage charges. The respondent maintains that pursuant to section 64 of the Act it is not merely entitled, but is obliged to determine the rates of pilotage in its district and that since the function is statutorily assigned to the respondent, pilotage charges could not form part of any pilotage agreement as that would amount to an abrogation of its duty and an unlawful fettering of its statutory discretion. The respondent further maintained that section 59, properly construed, has no application to the current disagreement.

Whether mandamus lies in this particular case depends on the construction of the Harbours Act 1996 and in particular section 59 thereof.

7. The 1996 Act
The long title of the Harbours Act of 1996 provides that it is:

> *an act to make further and better provision in relation to the management, control, operation and development of certain harbours, to enable the Minister for the Marine, with the consent of the Minister for Finance, to establish companies in respect of certain harbours for that purpose and to define the functions of companies so established, to enable the Minister for the Marine to make, by order, provision as aforesaid in respect of certain other harbours, to revise the law relating to pilotage and to provide for the conferral of functions in relation to pilotage on certain companies aforesaid, to enable certain harbours and property to be transferred to local authorities, to amend the*

Fishery Harbours Centres Act, 1968 and certain other enactments to provide for the dissolution of harbour authorities and pilotage authorities to repeal the Harbours Act 1946-1976, the Pilotage Act, 1913 and certain other enactments and to provide for matters connected with the matters aforesaid.

The legislation followed a report by the Commercial Harbours Review group, in which all stakeholders participated, which report was presented to the Minister for the Marine in July 1992. The legislation was designed to provide for the setting up of state commercial companies to manage and operate ports which were previously managed by the harbour authorities in accordance with the Harbours Act 1946. The new companies are registered under the Companies Act and the State is the sole shareholder in each company. The new legislation was designed to ensure that ports would be able to operate as truly commercial and self sufficient enterprises free from undue control by the State. The reorganisation of the commercial sea ports together with a continuation of EU aid for port development was intended to give the ports the flexibility they would need to operate as truly commercial enterprises. As part of this process, the Act revised the law relating to pilotage. Pilotage is dealt with in Part IV of the Act and it contains twenty five sections being sections 55-80 of the Act. Section 55 is the interpretive section for Part IV. Section 56 of the Act imposes a duty on the company to organise and ensure the provision of pilotage services. A company can discharge this function by either employing pilots as members of their staff or alternatively by licensing pilots to perform acts of pilotage. Section 56(2) provided discretion to a company who opted to employ pilots, to pay compensation to a formerly licensed pilot in respect of financial loss (if any) that, in the company's opinion, resulted from its decision to opt for employed pilots. Section 57 determines the limits of a pilotage district. Section 58 provides for the grant and renewal by port companies of pilots' licenses and provided for the continuation in force of a pilots' licence granted by the former pilotage authority and which was in force immediately before the new legislation became effective.

8. In the event that a company opted to have a system of licensed pilots as opposed to employed pilots, section 59(1) provides for the making of a pilotage agreement between a port company and its licensed pilots. For the purpose of concluding such an agreement section 59(1) allows the pilots to nominate a person or persons for the purpose of concluding such an agreement. In this case the pilots nominated SIPTU to represent them in negotiations with the Company.

9. Sections 59(2) and 59(3) are of particular relevance to this application and they read as follows:

(2) A pilotage agreement may be varied or replaced by another pilotage agreement by agreement between the company concerned and the person or persons nominated under subsection (1) or such other person or persons as the licensed pilots for the companies pilotage district nominate for that purpose and references hereafter in this part to a pilotage agreement shall unless the context otherwise requires, be construed as including references to a pilotage agreement so varied and a pilotage agreement that so replaces a pilotage agreement (including a pilotage agreement that has itself so replaced such an agreement).

(3)(a) In this subsection relevant representatives means the person or persons nominated under subsection 1 or 2 to enter into-

(i) A pilotage agreement with the company referred to in this subsection, or

(ii) An agreement providing for the variation of a pilotage agreement to which the said company is a party or

(iii) A pilotage agreement which will replace a pilotage agreement referred to in sub-paragraph (2) and references in this subsection to a pilotage agreement shall be construed as references to a pilotage agreement referred to in sub-paragraph (i), (ii) or (iii), as may be appropriate.

(b) If a company and the relevant representative cannot agree as to whether a particular term or terms ought to be included in a pilotage agreement they may refer the matter to a person who shall be nominated by them or in the event of them being unable to agree as to the person to be nominated for that purpose, to a person who shall be nominated by the Minister.

(c) The person nominated under paragraph (b) shall, having considered the matter referred to him or her under that paragraph and any submissions which the company concerned and the relevant representatives have made to him or her in relation thereto (being submissions made to the person within such reasonable period of time as he or she shall specify for the purposes of the matter, decide whether the particular term or terms ought to be included in the pilotage agreement and his or her decision shall be binding on the company concerned and the relevant representatives.

10. Section 59(4) sets out the matters which must be included in a pilotage agreement. Having set out a number of specific matters at subsection 4(a) to (e), a power is given at 4(f) to include in the agreement, such supplemental, incidental or consequential matters as respects the matters referred to in paragraphs (a) to (e). Finally, section 59(4)(g) permits the inclusion in the pilotage agreement of such other matters as may be required for the proper and efficient organisation and provision of pilotage services in the pilotage district of the company concerned.

11. Section 59(5) provides for the cancellation of a pilotage agreement to be replaced by employment of pilots but this power can only be exercised by the port company if a majority of the licensed pilots vote in favour of the proposal in a secret ballot. Thus once a company opts for a licensed pilot system, it cannot alter that arrangement without the consent of the pilots.

12. Section 64 is the next section of relevance to this application. That section deals with pilotage charges. It provides:

(1) A company may, in respect of pilotage services that are provided by pilots in its pilotage district, impose charges (in this part referred to as pilotage charges) at such rates as are from time to time determined by it.

(2) Without prejudice to the generality of subsection 1 the pilotage charges that may be imposed under this section shall include-

(a) pilotage charges by way of penalties payable in cases where the estimated time of arrival or departure of a ship is not notified as required by byelaws made by the company under s.71 or where a ship does not arrive or depart at the time notified in accordance with such bye laws, and

(b) pilotage charges in respect of the cost of providing, maintaining and operating pilot boats for the pilotage district.

(3) (a) Different rates of pilotage charges may be imposed by a company in different circumstances.

(b) Without prejudice to the generality of paragraph (a) charges may be imposed in a similar manner and in the circumstances as provided for under subsection (9) of section 13 in respect of harbour charges and that subsection together with subsection 10 of that section shall also apply to pilotage charges in the same manner as they apply to harbour charges, as if references to harbour charges were references to pilotage charges.

(4) Pilotage charges shall be recoverable by:-

(a) The company concerned or

(b) If a pilotage agreement provides that the licensed pilots for its pilotage district shall recover pilotage charges in that pilotage district, those licensed pilots, from the person on whom they are imposed as a simple contract date in any court of competent jurisdiction.

13. In construing Part IV of the Act, it appears to the Court that sections 79 and 80 are also of significance. Those sections give to the Minister an overarching power in relation to pilotage. Section 79 confers on the Minister the power to reorganise the provision of pilotage services by order. Section 80(2) gives the Minister a discretion to make policy decisions of a general kind in relation to the levels of pilotage charges imposed by a company. The Minister is obliged to consult with the company in respect of such policy decisions but thereafter the company is required to comply with any direction given by the Minister.

14. The Agreement
Following the passing of the Harbours Act in 1996, interim measures were put in place for the continuation of the provision of pilotage services until such time as the new Act took effect and decisions were made on the manner in which pilotage services would be supplied. The respondent company decided to opt for the provision of licensed pilots rather than employed pilots. Pursuant to section 59 of the Act it entered negotiations with the applicant's representative SIPTU for the conclusion of a pilotage agreement. In the course of the negotiations the parties were unable to agree on three issues and in accordance with section 59(3)(b), those three issues were referred to an arbitrator and having been determined by her, became binding on the Company and the representatives of the pilots. The agreement which appears to have been concluded on 27th February 2002 contains twenty five clauses dealing with a wide range of matters such as the number of pilots; the rostering of pilot services; the ongoing training of pilots and review of technical training and safety issues; the collection and disbursement of pilotage charges; the handling of industrial relations issues and grievance procedures. The clause at issue in this application is clause 4. It deals with pilotage charges and states as follows:

Pilotage charges will be levied on the gross tonnage as determined on the International Tonnage Certificate 1969 of every vessel.

The Pilotage Agreement provides the basis on which pilotage charges will be levied but is silent as to the rate to be charged.

15. Operation of the Agreement
From the conclusion of the Pilotage Agreement in 2002 until 2013 no difficulties arose. According to the applicants the rates for pilotage were agreed on an annual basis with the Harbour Master by fixing the charge on each ship with reference to the criterion of gross tonnage to reflect pay inflation. They contend that over the years the relative difference in charges for the different ports in the pilotage district remained unchanged these having been historically determined. Furthermore they contend while the variation in pilotage charges each year reflected changes in the national wage index, the pilots' income remained subject to fluctuations in trade since in any particular year, more ships or less ships would be paying the pilotage charges. The respondents dispute this and have pleaded that while there was consultation with the pilots prior to the making of a determination of rates of pilotage there was no agreement that the relevant difference in charges for the different ports in the pilotage district would remain unchanged. Whatever the true position, no issue arose between the parties in circumstances where it is common case that the pilotage rates increased each year to 2009 and remained static between 2009 and 2013.

16. The Dispute
Following a meeting with the pilots on 7th May 2013, the Port Company sent an email to the pilots on 12th July 2013 announcing new pilotage charges which it intended to impose with effect from 1st January 2014. The genesis of the proposed new charges which were lower than the previous year's rates, was according to the respondent, to give effect to the Company's aim of competitively aligning the company with other major (Tier 1) ports such as Cork and Dublin whose pilotage rates were significantly lower. The purpose was to make the ports in the Shannon estuary commercially attractive so as to encourage greater throughput and activity in the estuary. While negotiations/consultations over the proposed new charges continued over the following months battle lines between the parties were quickly delineated. On the applicants side it was contended that the proposed changes constituted a restructuring of the pilotage charges in the pilotage district which would result in a significant loss of income for the pilots; that such a restructuring could not be effected without the agreement of the pilots; that the changes required a variation of the Pilotage Agreement. They invited the respondent to submit the issue to an independent arbitrator pursuant to section 59(3)(b) and drafted a proposed clause for the determination of the arbitrator. On the respondent's side it was contended that the Company was fully entitled to determine the pilotage rates by virtue of the powers conferred by section 64 of the Act; that the proposed charges did not constitute a variation of the Pilotage Agreement and that as the Company had no wish to vary the Pilotage Agreement, section 59(3)(b) of the Act was not applicable. The impasse was not resolved. The Company put the new charges into effect. On the 13th January the Applicants were granted leave ex parte by Peart J. to seek an Order of Mandamus directing the respondent to submit the dispute to arbitration pursuant to section 59(3)(b) of the Harbours Act 1996.

17. The Issue
On this application the Court is not concerned with the merits of the substantive dispute between the parties. The Court's sole function is to decide whether the applicants are entitled to the Order of Mandamus sought, or any Order of Mandamus. The Court's decision depends on the proper construction of the Harbours Act and in particular section 59 and section 64 thereof.

18. Counsel for the applicants advanced to the Court a construction of the statute which was based on what he described as an interplay between section 59 and section 64 of the Act. He contrasted the current position with that which pertained under the now repealed Pilotage Act 1913. Prior to the introduction of the Harbours Act 1996, the whole of pilotage, including charges, was

administered by bye-laws.

19. Section 6 of the 1913 Act provided that the Board of Trade or pilotage authority, before making any amendments had to take steps to ascertain the opinion of the pilots at the port with respect to the matter in question, if there were no pilots directly represented on the board or authority. Section 17(f) gave the pilotage authorities power to make byelaws to fix pilotage rates. Section 18 allowed anybody, including licensed pilots, to come back to the Board of Trade and ask for a byelaw to be changed. Therefore, even a byelaw itself was not written in stone. Therefore the pilots were protected in a number of ways by the process under the Pilotage Act 1913.

20. Counsel submits that what previously done by byelaws is now imposed by section 64 of the 1996 Act which provides that a port company may impose pilotage charges at such rates as from time to time are determined by it. He accepted that section 64(1) gives the Port Company the power which they claim but he contended the Port Company has incorrectly claimed this as an exclusive, absolute or unfettered power. Section 64 is only one side of the coin. The other side of the coin, he maintains, is section 59 whereby, as a supplier of services to ships, the respondent must actually procure the services from the applicants by entering into a Pilotage Agreement which accommodates what they propose to do.

21. He pointed out that section 56 of the Harbours Act requires that port companies must ensure the provision of pilotage services either by employing the pilots or by continuing to licence them, subject to a pilotage agreement. He states therefore that where the pilots are not subject to a contract of employment and the pilotage charges go directly to the pilots (except charges which go to the pilots boats and subject to a number of deductions provided for in the 1996 Act), there is almost a direct relationship between section 64 and what the pilots actually receive. Therefore, if section 59 is to have any meaning, there must be agreement about pilotage charges before they are passed on under section 64. It was pointed out that section 64 comes after section 59 and while the respondent is free to determine its charges which relate to other matters, including what is to be received by the pilots, this should happen subsequent to an agreement being reached with the pilots in relation to what is to be received by them, pursuant to section 59. According to counsel for the applicants section 64 cannot be taken out of context, the Act must be construed as a whole. In essence counsel for the applicants accepted that the company had power to set the rates for pilotage pursuant to section 64, but argued that they were not at large in doing so; that they had to agree the rate with the pilots and, in default of agreement, had to refer the matter to arbitration pursuant to section 59(3)(b).

22. In support of this construction he drew an analogy with the provisions of the Act relating to disputes between harbour companies relating to harbour fees and pilotage charges. As a result of the amendment to section 64 under the Harbours (Amendment) Act 2009, section 64(3)(b) gives a landlocked company which has a grievance in relation to pilotage or harbour charges imposed on their harbour users by another port company, the opportunity to complain to the Minister who can refer the matter to arbitration. The wording in the relevant section for an arbitration between port companies is the same as that contained in section 59(3)(c) in relation to a pilotage agreement and from that he extrapolates that in the event of a dispute between the pilots and the company about pilotage rates the same provision applies.

Counsel for the applicant also contended that if section 64 was construed as conferring on the respondent the exclusive right to set pilotage rates then the Company was in effect acting as a judge in its own cause. If the respondent had an unfettered right under section 64 in administering the pilotage legislation, the respondent would not be entitled to take their own commercial interests into account, since they would be the deciding authority and that would make them a judge in their own cause. This scenario was avoided he maintained by construing section 64 with section 59 and in those circumstances, the Port Company is entitled, in making an agreement with the pilots, to further its own interests in negotiations. Therefore, it was submitted, the pilotage charges must be arrived at by taking the pilots' views into account through engaging in negotiations under section 59, and referring the issue to an independent person if this becomes necessary.

23. From the start of this dispute, the respondent's position has been clear. It contends that it has sole and exclusive power to determine the rate for pilotage in its district pursuant to section 64 of the Act. Were there a precondition to the exercise of that power that it must agree rates with the pilots, the Act would have said so. The new regime for fixing pilotage rates is broadly similar to that contained in the Pilotage Act 1913, contrary to what counsel for the applicant has suggested, save that the power to fix charges has been upgraded in the 1996 Act to a legislative power as opposed to a power to make byelaws. While the opinion of the pilots had to be sought under the old regime, they had no power of veto in respect of the fixing of the rate which was the function of the pilotage authority.

24. As to the applicant's suggestion that the conferring of such an unfettered power would offend the principle of *nemo iudex in causa sua*, the respondent points out that it is expressly conferred with the statutory power to determine rates of pilotage charges subject to section 64(1), and the exercise of that power involves a range of considerations, which include the meeting by the respondent of its statutory obligations (including its obligation in respect of its own financial position). The applicant's submission is completely misconceived. The respondent is a commercial entity which has been created by statute and is not carrying out judicative functions. It is required to have regard to commercial considerations and to balance the books and it is free to set charges in order to ensure that the books are balanced. Analogies to administrative decision making are simply incorrect in this case.

25. The respondent also maintained from the outset and throughout this application that the provisions of section 59 dealing with pilotage agreements has no application to this dispute. By way of illustration counsel for the respondent pointed out that the measure upon which the pilots were seeking arbitration is one which would provide a guaranteed income for pilots so that the income of the pilots shall not be reduced "*by more than 7.5% less than the average income of each pilot averaged over the years 2010, 2011, 2012, as a once off reduction in income similar to other persons working in the public service*". Such a clause according to the respondent could never be lawfully inserted in a pilotage agreement as it would amount to a usurpation of the powers of the respondent conferred by section 64. The Act connects the pilots' earnings to the charges and the respondent company must be free to set the charges because that is the clear intention of the legislature. That was the system which operated under the 1913 Act. To write a minimum level of remuneration into the pilotage agreement would mean that charges would have to be fixed to ensure this minimum level of remuneration and that flies in the face of the scheme created by the Act.

26. Counsel for the respondent also contended that on a proper construction of section 59(2) it is a precondition of the variation or replacement of the pilotage agreement that the parties agree that it should be varied or replaced. Section 59(3)(b) only comes into play in the context of such an agreement to vary or replace the pilotage agreement.

27. Decision of the Court

The entire foundation of the applicants' argument is that on a proper construction of the Act, there is an interplay between the provisions of section 59 and section 64 of the Harbours Act 1996. In the Court's view there is no such interplay as has been contended for on behalf of the applicants. There is nothing in either section 59 or in section 64 or indeed in the existing pilotage

agreement which supports such an interpretation In the Court's view the exercise of the powers created by section 64 is not linked directly or by necessary implication to section 59 of the Act. Section 59 prescribes the process which is to occur if a new port company decides to use licensed pilots rather than employed pilots. It is part of the transition process from Harbour Board to Port Company. If a new company decides to use licensed pilots it must conclude a pilotage agreement with its pilots. Section 59(1) provides for the nomination of a person or persons to act on behalf of the pilots for the purpose of concluding an agreement. Section 59(3)(b) deals with the situation in which the parties negotiating the agreement cannot agree on whether a particular term or terms ought to be included in the agreement. In that event, the matter may be referred to a person agreed by them or in default of agreement to a person nominated by the Minister. Section 59(3)(c) provides that the determination of the matter by the nominated arbitrator shall be final and binding on both parties. Section 59(4) specifies the items which must be included in the agreement and other items which may be included. None of the required matters deals with rates for pilotage. Given that the setting of the rates for pilotage is reserved by section 64 to the company, this is not surprising. Using this formula, an agreement was concluded in 2002 which is binding on both parties. Can this binding agreement be changed? Yes, the agreement can be varied or replaced pursuant to section 59(2). That subsection provides:

> *(2) A pilotage agreement may be varied or replaced by another pilotage agreement by agreement between the company concerned and the person or persons nominated under subsection (1) or such other person or persons as the licensed pilots for the companies pilotage district nominate for that purpose and references hereafter in this part to a pilotage agreement shall unless the context otherwise requires, be construed as including references to a pilotage agreement so varied and a pilotage agreement that so replaces a pilotage agreement (including a pilotage agreement that has itself so replaced such an agreement).*

28. The Court is satisfied that the option to vary or replace the Pilotage Agreement can only be exercised by agreement between the parties. Were it otherwise, no agreement would be worth the paper it is written on. There is in existence a binding pilotage agreement between the parties. Neither the applicants nor the respondents can unilaterally require the alteration of that legally binding contract. If there is a breach of that contract the remedy is a civil action in contract.

29. The option to refer a term or terms to an arbitrator in section 59(3)(b) is clearly, in the Courts view, predicated on an agreement to vary or replace the Pilotage Agreement. The comparison by analogy with the statutory provisions for resolving disputes between port companies in respect of harbour fees and pilotage fees is in the courts view a false analogy. Those companies, unlike the parties to this dispute, do not have contractual arrangements and accordingly it is appropriate that the statute provide a mechanism for the resolution of any dispute which might arise between them.

30. The Court is satisfied that on a proper construction of section 64, it is clear that the rate of pilotage charges is a matter for determination by the Port Company. Section 64(1) empowers the company to impose charges in respect of pilotage services and those charges may be imposed at such rates as are from time to time determined by it. Section 64(3) provides that different rates of pilotage charges may be imposed by a company in different circumstances. This appears to the Court to confer on the company a wide discretion in relation to fixing the rates for pilotage. It is inherent in this power that rates may go down as well as up. However, in fixing the rates, the Company must do so by reference to gross tonnage, because that is what they agreed with their pilots in the Pilotage Agreement concluded in 2002. The functions statutorily conferred by section 64 on the Company are those previously exercised by the pilotage authority by means of byelaws. Under the old regime any person aggrieved by the rates set, could complain to the Board of Trade. However, there was no right of veto given to any party in respect of pilotage rates. Under the new regime which aspires to create commercially vibrant port companies independent of the dead hand of state bureaucracy, there is no equivalent right of complaint. However, in the Court's view it is significant that Part IV of the Act reserves to the Minister a power of oversight of pilotage charges at a policy level . Section 80(2) provides that the Minister after consultation with the company, may give a direction in writing to a company requiring it to comply with policy decisions of a general kind made by the Minister in relation to the levels of pilotage charges imposed by a company or companies and the company shall comply with any such direction. To that extent, but to that extent only, there is fettering of the Company's discretion.

Even if the Court is wrong in its construction of the provisions of section 59 the Court is satisfied that by virtue of the provisions of section 64 no arbitrator could lawfully insert into a pilotage agreement the term which the applicants seek to have inserted. Their clause seeks a contractual guarantee of minimum remuneration. Such a clause would amount to a usurpation of the statutory powers conferred by section 64 and as such would be invalid.

31. In circumstances where there is a binding pilotage agreement between the parties which the respondent has not agreed to vary or replace, the court is satisfied that no Order of Mandamus lies pursuant to section 59(3)(b) of the Act. Such differences as exist between the parties (and the Court stresses that it is expressing no view on the substantive dispute) fall to be decided by civil law remedies in contract and/or equity. For these reasons, the Court dismisses the application.