Neutral Citation Number: [2011] IEHC 187

THE HIGH COURT

2007 9273 P

BETWEEN

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

PLAINTIFFS

AND

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

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 15th day of April, 2011.

1. EU law background

1.1 Council Regulation (EC) No. 894/97 of 29th April, 1997 (the 1997 Regulation), which was made in implementation of the Common Fisheries Policy of the European Union, lays down certain technical measures for the conservation of fishery resources, including regulation of the use of drift-nets in fishing for tuna.

1.2 Council Regulation (EC) No. 1239/98 of 8th June, 1998 (the 1998 Regulation), which was also made in implementation of the Common Fisheries Policy, amended the 1997 Regulation. It provided that from 1st January, 2002 no vessel might keep on board, or use for fishing, one or more drift-nets intended for the capture of the species in Annex VIII, which included albacore, that is to say, tuna. It also provided that it was prohibited, from 1st January, 2002, to land, *inter alia*, albacore which had been caught in drift-nets. In other words, it was enacted that a total ban on fishing with drift-nets for tuna would come into operation on 1st January, 2002 and would apply to all Member States.

1.3 On the night the 1998 Regulation was adopted in Luxembourg, a press release issued by the Council summarised the effect of the 1998 Regulation, which it stated the Council had adopted by a qualified majority with the French and Irish delegations voting against and the Italian delegation abstaining. The press release went on to record a Council and Commission Joint Statement (the Joint Statement), which, it was stated, was joined to the agreement which had been reached "[a]s to social flanking measures to enable reconversion of the fishermen and the owners of fishing vessels to other fishing methods or activities". In the Joint Statement it was acknowledged that to abolish drift-net fishing would have "unfavourable economic and social repercussions in the short term for a number of fishing fleets". It also recorded that the Council and the Commission agreed on the need to introduce in the Community "an appropriate range of actions and special supporting measures for fishermen serving on board and the owners of fishing vessels". It stated that the measures concerned would have to be exceptional in character and in any event "be met from the budget for the affected Member States' existing structural programmes". It was stated that, to that end, the Commission would present to the Council at the earliest opportunity a proposal for an *ad hoc* decision, based on Article 43 of the Treaty, introducing a series of supporting measures. The statement went on to outline measures which might be included, such as alterations to fishing vessels, compensation for fishermen, schemes to retrain fishermen, and decommissioning of vessels involved in the drift-net fishery. The measures would apply only to fishermen and/or the owners of vessels who could show that they used drift-nets in 1995, 1996 or 1997. The Joint Statement continued:

> "The Member States concerned undertake to draw up detailed plans and send them to the Commission. The plans prepared by the Member States will be devised to ensure early and progressive reduction of drift-net effort in the fishery.
>
> In order to respect the conditions imposed under the procedure laid down in Article 43 of the Treaty, the Council undertakes to adopt the *ad hoc* decision before the end of 1998."

1.4 The proposal for the Council Decision was submitted by the Commission on 4th September, 1998 and published in the Official Journal of the European Communities on 13th October, 1998. It recited that a specific number of fishing vessels flying under the Spanish, French, Irish, Italian and United Kingdom flags were affected by the ban on fishing with drift-nets imposed by the 1998 Regulation. It also recited:

> "Whereas the Member States concerned must draw up conversion plans for this purpose;"

In Article 1 it provided that "the Member States concerned shall draw up a conversion plan and communicate it to the Commission".

1.5 The Council Decision of 17th December, 1998, namely, Council Decision 1999/27/EC (the Council Decision) implemented the proposal subject to variation. It recited:

> "Whereas the Member States who wish to avail themselves of the specific measures proposed must draw up conversion plans for this purpose;"

Article 1 obliged "Member States availing themselves of the specific measure provided for in paragraph 2" to draw up a conversion plan and communicate it to the Commission. In other words, the Council Decision gave the Member States concerned the option of implementing, rather than mandating them to implement, the specific measure provided for in para. 2, which was to grant aid to fishermen and owners of vessels in accordance with the conditions laid down in the Council Decision. Ireland did not opt to implement

the specific measure, so that no compensation scheme was put in place for fishermen and vessel owners affected by the drift-net ban from 1st January, 2002.

2. The factual background

2.1 Twelve of the thirteen plaintiffs are individuals who are fishermen and who, at all material times, were owners or part-owners of fishing vessels and were involved in drift-net fishing for tuna prior to the ban. The remaining plaintiff is a limited liability company which, at all material times, was the owner of a fishing vessel involved in drift-net fishing prior to the ban. The first named plaintiff is the acting chairman of an informal group entitled the Irish Tuna Association, which was formed to fight the proposed ban on tuna fishing prior to its proposed introduction in 1998. Along with others of the plaintiffs, he was in Luxembourg on 8th June, 1998. He and his colleagues were "on the margins" of the meeting of the Council of Fisheries Ministers. They assert that on the night in question they met the predecessor of the first defendant (the Fisheries Minister) and officials of his department (the Department). When consensus had been reached at the Council meeting, the Fisheries Minister met the representatives of the Irish Tuna Association. It is asserted that he told them that he was very pleased with the result, that there would be a four year moratorium in which they could fish for tuna, and that he had got a good compensation package for the fishermen and the boat owners when fishing stopped.

2.2 As a result of documentation obtained by the plaintiffs' solicitors in response to a request under the Freedom of Information Acts 1997 and 2003, the plaintiffs assert that the variation to the proposal for the Council Decision submitted by the Commission on 4th September, 1998, whereby it was proposed that Member States be given the option of availing of, rather than being mandated to, implement a scheme of compensation, was made at the behest of the Fisheries Minister and the amendment was requested by the Department. The plaintiffs' position is that this represented a *volte face* on the part of the Fisheries Minister from the representations he made to them on 8th June, 1998 regarding the measures which were to be taken to alleviate the hardship that tuna fishermen would, and did, suffer as a consequence of the drift-net ban.

3. Chronology of these proceedings

3.1 The plenary summons was issued on 12th December, 2007, but it was not served until 8th December, 2008. An appearance was entered on behalf of the defendants on 10th December, 2008. Notice of intention to proceed was filed on behalf of the plaintiffs on 26th January, 2010.

3.2 The statement of claim was delivered on 3rd February, 2010.

3.3 On 14th May, 2010 the plaintiffs issued a motion for judgment in default of defence returnable in this Court on 11th October, 2010. The defendants' reaction was to issue a motion on 3rd June, 2010. It is the defendants' motion which is the subject of this judgment.

3.4 The time gap between the coming into operation of the drift-net ban, 1st January, 2002, and the initiation of these proceedings at the end of 2007, although not really relevant to the issues the Court has to determine, is explained in the affidavits filed on behalf of the plaintiffs. When it became apparent that the compensation scheme for tuna fishermen was not going to materialise, the plaintiffs instructed a firm of solicitors to initiate proceedings against the State. The proceedings were not initiated. Following a complaint to the Law Society on behalf of the plaintiffs, the Law Society, apparently, obtained the relevant documentation from the solicitors who had been originally instructed. The plaintiffs' current solicitors were retained in 2006. Proceedings have been initiated by the plaintiffs against their former solicitors. The plaintiffs' current solicitors suggested to the Chief State Solicitor in October 2009 that these proceedings were issued "as a precaution in case the case was not statute-barred". It was the position of the solicitors on record for the plaintiffs that they have a good cause of action but that there may be an issue as to whether the cause of action is statute-barred. It was suggested by the plaintiffs' solicitors to the Chief State Solicitor that the plaintiffs' motion for judgment in default of defence and the defendants' motion might be adjourned to await the outcome of the High Court proceedings against the former solicitors. However, apparently, the Chief State Solicitor was not agreeable to that course. The foregoing is by way of explanation only, and the Court, on this application, is not concerned with any issue as to whether the cause of action is statute-barred or any issue of delay on the part of the plaintiffs.

4. The defendants' motion

4.1 On their motion the defendants seek an order dismissing the plaintiffs' claim pursuant to:

> (a) Order 19, rule 28 of the Rules of the Superior Courts 1986 (the Rules), as disclosing no reasonable cause of action; or
>
> (b) the inherent jurisdiction of the Court, on the grounds that the plaintiffs have no reasonable prospect of success or that the action is bound to fail.

4.2 There is one perceived factual controversy on the affidavits filed to ground and in response to the motion. In relation to the representations which the plaintiffs allege and plead that the Fisheries Minister made on 8th June, 1998, what is contended in the grounding affidavit of Josephine Kelly, a Principal Officer in the Department, which was sworn on 31st May, 2010, is that the plaintiffs seek compensation "on foot of a statement which, if made, amounted to no more than that". I do not construe that averment as a denial that the statement was made. Therefore, I am addressing the defendants' application on the basis that it is not denied that the Fisheries Minister made the representation pleaded in the statement of claim, and averred to in the replying affidavits sworn on behalf of the plaintiffs, although there is a controversy as to the implications and consequences of any such statement.

5. The statement of claim

5.1 As the first limb of the defendants' motion falls to be determined by reference to what is pleaded in the statement of claim, it is necessary to outline its contents in detail.

5.2 In the statement of claim it is pleaded that each of the plaintiffs is an undertaking for the purposes of Community law and a producer within the meaning of the Common Fisheries Policy (para. 14).

5.3 It is pleaded that the defendants were fully aware in 1998 of the plaintiffs' concern that a ban on drift-net fishing for tuna would adversely affect their fishing undertakings and livelihoods (para. 22). Having pleaded the effect of the 1998 Regulation and the content of the Joint Declaration, and the adoption of the Council Decision on 17th December, 1998, it is pleaded that the Council decision failed to respect the rights and entitlements of the plaintiffs both in national and Community law as a consequence of the matters complained. In substance, it is asserted, the Council Decision was amended at the request of the defendants with the intended effect that it would have no application to the personal circumstances of the plaintiffs and other members of the Irish tuna fishery (para. 27). It is pleaded that, notwithstanding the contact between the plaintiffs and the Fisheries Minister regarding their anxieties and concerns relating to the unfavourable economic and social repercussions that would follow for the Irish albacore tuna fleet if the drift-netting ban was adopted, the plaintiffs were denied all benefits intended for producers and undertakings thereby affected and the adverse consequences followed directly as a consequence of the amendment made at the request of the defendants to the Commission's proposal for the Council Decision.

5.4 After reiterating that the Fisheries Minister was fully aware of the plaintiffs' anxieties and concerns regarding the restriction and prohibition of fishing for tuna by drift-nets and the adverse consequences such a ban would have on the plaintiffs' fishing undertakings, it is pleaded that the Fisheries Minister represented:

> (b) the need to address in a concrete way the consequences of a decision to introduce a drift-net ban;
>
> (c) that the tuna fishery was important to the fishermen in the south west of the State (centering on Castletownbere and Dingle), especially between the months of July and September;
>
> (d) that the Commissioner (presumably a reference to Ms. Emma Bonino, a signatory to the Joint Declaration) had been very helpful in her statement on compensatory measures and that the Commission was fully prepared to adopt, together with the Member States, appropriate flanking measures, thereby representing that such flanking measures were effectively compensatory measures;
>
> (e) that compensation should apply only to fishermen and fishing undertakings who had already participated in the tuna fishery and were known to have had a track record;
>
> (f) that the Joint Declaration recognised the unfavourable economic and social repercussions in the short term for a number of fishing fleets, including the Irish fleet, and made the specific representations to the plaintiffs outlined below;
>
> (g) subsequent to the adoption of the 1998 Regulation, that throughout the negotiations leading to its adoption he had been in close contact with the tuna fishermen in the south west, including the plaintiffs, and that the plaintiffs' backing was critical for him and he was very glad to see the fishermen in Luxembourg forcibly underline their case to the media and the public generally;
>
> (h) subsequent to the adoption of the 1998 Regulation, that the four years stay secured on the drift-net ban underlined the importance for a small country such as the State of taking a tough and principled negotiating stance in Europe and that he would be working intensively with the fishing industry in the months following the adoption of the 1998 Regulation to use the period to best effect to prepare for a new future in the Irish tuna fishery; and
>
> (i) that the Joint Declaration, the 1998 Regulation and the Council Decision together would provide a secure basis on which the Irish tuna fleet, boat owners and fishermen, could prepare for the future when the four year stay expired.

Those representations are contained in paras. 34 to 39 and in paras. 41 to 43 and para. 45. In addition, the following representations by the Fisheries Minister to the plaintiffs are pleaded in paras. 39, 40 and 44:

> (i) that the Fisheries Minister specifically stated, promised and represented to the plaintiffs and their representatives that good and substantial compensation would accrue to each qualifying boat and fisherman, thereby adding to a substantive legitimate expectation to compensation and other flanking measures when the drift-net ban came into operation, the said representations having been made on 8th June, 1998;
>
> (ii) that following the adoption of the 1998 Regulation, he had won Council recognition of the human consequences of a ban and an agreement to put off a decision until the socio-economic consequences for Irish fishermen and coastal communities were addressed in a framework that would allow funding for research into alternative techniques and for re-conversion and training of fishermen; and
>
> (iii) that the plaintiffs would be entitled to secure the compensation and other rights and entitlements to fishermen and owners of fishing vessels, that the plaintiffs personally would receive compensation for ceasing their fishing activities as and from 1st January, 2002, the said representations being made on 8th June, 1998 to the representatives of the plaintiffs, including those plaintiffs who were present, thereby representing that he had secured a good and substantial compensation package for the fishermen affected.

5.5 In paragraphs 46 to 51, the plaintiffs allege that the defendants procured an amendment to the proposal for the Council Decision to give effect to the Joint Declaration making the compensation and conversion schemes optional rather than mandatory on the Member States concerned, which rendered the Council Decision a "dead letter" with regard to the Irish tuna fishery. It is further pleaded that thereafter the defendants failed, refused and neglected to draw up a conversion plan for the purposes of the Council Decision (para. 52) and thereby acted in breach of obligations to the plaintiffs both in national law and in Community law. It is pleaded that the amendment to the proposal for the Council Decision breached the principle of equality and the requirement that Community legislation should exclude any discrimination between producers and consumers within the Community and that the plaintiffs, as producers in the State, were subjected to discrimination otherwise prohibited by Article 34 of the EC Treaty (para. 53). It is further pleaded that the Fisheries Minister at all material times kept secret and undisclosed the real purpose behind the representations made. It is asserted that a drift-net ban was introduced in circumstances where the defendants were aware of the inevitable damage which would be sustained and suffered by the plaintiffs and that legislation that would have provided for an entitlement to compensation and conversion schemes anticipated by the Community legislation was denied to the plaintiffs in a manner which infringed their entitlements in both Community law and national law (para. 54).

5.6 Particulars of discrimination between producers are set out in paras. 55 to 58 inclusive. In summary, it is pleaded as follows: the benefits of the social flanking measures were denied to the plaintiffs; mandatory Community obligations intended to respect the substantive rights and entitlements of the plaintiffs both in national law and in Community law, including respect for legitimate

expectations and the supremacy of Community law, were rendered nugatory and of no force and effect; the requirements of Article 34 of the EC Treaty were breached; and the defendants concealed that the social flanking measures became optional, because they regarded the adoption of the Council Decision as a largely academic exercise as, apparently, they did not have the funds to provide for the said measures.

5.7 The breach of statutory duty, breach of fiduciary duty and breach of duty resulting from directly applicable provisions of Community law, arising from the failure to implement a conversion/compensation plan, are particularised in paragraph 59 as:

> (i) failing to respect the legitimate expectations of the plaintiffs – both in Community law and in national law;
>
> (ii) failing to respect the plaintiffs' rights, entitlements and expectations further to statements of the Fisheries Minister and the Joint Declaration on 8th June, 1998;
>
> (iii) failing to inform the plaintiffs of the amendment made on behalf of the defendants to the Commission's proposal for the Council Decision, which it was asserted was made with the intention of defeating and rendering nugatory the legitimate expectations, rights and entitlements of the plaintiffs to the benefit of conversion plans, including compensation provided for in the Council Decision;
>
> (iv) causing, allowing or permitting the proposal for the Council Decision to be amended, thereby leaving the adverse consequences of the drift-net ban unameliorated as regards the plaintiffs, notwithstanding the statements, promises and undertaking of the Fisheries Minister and the Joint Declaration;
>
> (v) failing to act in accordance with the principle of Community solidarity;
>
> (vi) failing to respect the principle of equality in Community law;
>
> (vii) failing to act in accordance with the principle of non-discrimination between producers in a common organisation as required by Article 34; and
>
> (viii) failing to preserve equity between the fishermen and fishing vessel owners of all Member States concerned.

5.8 Particulars of special damage are pleaded in para. 60 and there is a claim, by way of special damage, for the compensatory payments which would otherwise be available under the Council Decision.

5.9 In the prayer for relief in the statement of claim the plaintiffs claim declaratory and injunctive relief and damages. The declaratory reliefs claimed, which are formulated in specific terms, are:

> (i) a declaration that the plaintiffs are entitled to have a legitimate expectation to compensation pursuant to and arising from obligations of the State as a member of the European Union, whether arising from or on the basis of –
>
> > (I) the introduction of the ban and the Joint Declaration as to flanking compensation measures, and/or
> >
> > (II) the representations and undertakings connected with the 1998 Regulation and the Joint Declaration as to flanking compensation measures, and/or
> >
> > (III) the representations made on behalf of the defendants to the plaintiffs,
>
> (sub-para. (b));
>
> (ii) a declaration that the defendants have failed to fulfil their obligations and representations to compensate the plaintiffs as agreed on 8th June, 1998(sub-para (c)); and
>
> (iii) a declaration that the acts of the Fisheries Minister, in raising an impediment to the recovery of compensation by the plaintiffs is null, void and of no force and effect (sub-para. (d)).

As regards (iii), I assume the reference to acts of the Fisheries Minister relates to the procurement of the amendment of the proposal for the Council Decision and the State's opting out of the specific measure provided for in the Council Decision.

5.10 In addition to a claim for damages for breach of duty, breach of statutory duty and breach of fiduciary duty, the plaintiffs seek an order directing the Fisheries Minister and the second defendant to compensate the plaintiffs for their losses, including loss of their income consequent on the ban from 1st January, 2002.

6. Challenge to the 1998 Regulation

6.1 As is recorded in the decision of the Supreme Court in *Browne v. Ireland* [2003] 3 I.R. 205 (an application for judicial review in which the fifth named plaintiff in these proceedings was the applicant), proceedings were instituted in the Court of First Instance of the European Communities in *Armement Coopératif Artisanal Vendéen (ACAV) v. Council of the European Union (Case T/138/98)* [2000] II E.C.R. 341, seeking to set aside the 1998 Regulation. The members of the Irish Tuna Association, including some of the plaintiffs in these proceedings, were given leave to intervene in that case. Ireland also intervened in the proceedings and supported the application to set aside the 1998 Regulation. In its judgment of 22nd February, 2000 the Court of First Instance dismissed the action as inadmissible.

7. The legal submissions

7.1 The starting point from the defendants' perspective is that the European Union has exclusive competence in respect of the Common Fisheries Policy. That is not disputed and, indeed, it could not be disputed by the plaintiffs. As Keane C.J. stated in *Browne v. Ireland* (at p. 220):

> "[s]ince the 1st January, 1979, the power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has been vested exclusively in the European Communities."

Nor is it disputed that the jurisdiction to determine the validity of Community measures is solely and exclusively within the jurisdiction of the legal system of the European Union, so that a national court cannot declare the acts of Community institutions invalid (case C – 314/84 *Firma Foto-Frost v. Hauptzollant Lübeck-Ost* [1987] E.C.R. 4199.

7.2 In summarising their submissions, counsel for the defendants contend that the matters pleaded by the plaintiffs –

> (a) are not justiciable before an Irish court,
>
> (b) impermissibly seek to indirectly impugn legislation of the European Union and the actions of its institutions before a national court of a Member State, and
>
> (c) do not amount to a cause of action.

I propose considering the defendants' contentions, and the plaintiffs' response thereto, under two headings: justiciability; and whether there is a cause of action.

8. Justiciability

8.1 The defendants addressed the issue of justiciability on the basis that any suggestion or policy proposal made by the Fisheries Minister to the Commission falls outside the scope of what is justiciable in an Irish court. As I understand the defendants' position, that proposition was put forward on two bases. One was that any suggestion or policy proposal on an issue such as the Common Fisheries Policy which is exclusively within the competence of the European Union is not justiciable in an Irish court, and neither the Commission's proposal in relation to the Council Decision nor the Council Decision itself can be impugned in an Irish court. In view of the citation of the decision of Kearns P. in *Doherty v. Government of Ireland and A.G.* [2010] IEHC 369, I infer that the other basis was that, having regard to the provisions of the Constitution, a suggestion or policy proposal made by the Minister with a view to the State being in a position to opt out of a compensation scheme is not a justiciable controversy, in the same way, as Kearns P. pointed out, in *O'Reilly v. Limerick Corporation* [1989] ILRM 181 the question as to whether the Oireachtas had adequately provided for disadvantaged groups via its taxation policies was deemed to be non-justiciable.

8.2 It was the defendants' position that, even if the 1998 Regulation has adversely impacted on the plaintiffs, that impact, as a direct consequence of an act of an institution of the European Union , is not cognisable or reviewable by this Court. Their analysis of the plaintiffs' case was that the plaintiffs are not suggesting that the State is in breach of, or has failed to fully observe, a law imposed by a European Union institution.

8.3 Counsel for the plaintiffs highlighted certain alleged frailties in the defendants' submissions. One was that the defendants' analysis of the plaintiffs' case is not correct and that the plaintiffs do, in fact, challenge the Council Decision referring to the following elements of the statement of claim:

> (a) the plea that the Council Decision fails to respect the plaintiffs' rights and entitlements in Community law (para. 27),
>
> (b) the particulars of the breaches of the principles of Community law in support of the challenge to the Council Decision set out in paras. 53 and 54, and
>
> (c) the particulars of breach of duty in Community law particularised in para. 59,

8.4 Accepting that the plaintiffs do challenge the Council Decision, the obvious question is: how can the plaintiffs circumvent the lack of jurisdiction of a national court to overturn Community legislation in pursuit of their challenge to the Council Decision? The plaintiffs' answer was to rely on what they characterised as an oversight on the part of the defendants and a frailty in their submissions. The suggested oversight is not recognising the existence of the reference jurisdiction of, *inter alia*, this Court under Article 267 of the Treaty on the Functioning of the European Union. The plaintiffs submitted that the case law of the European Court of Justice is replete with examples where items of Community legislation have been struck down for the first time in a reference from a national court or tribunal. They cited *Duff v. Minister for Agriculture (No. 2)* [1997] 2 I.R. 22 as an example of a case before a national court which was influenced by an earlier reference to the Court of Justice. The farmer plaintiffs in the *Duff* case claimed to be entitled to an additional milk quota under an article of a Council Regulation of 1984 and sought relief on other grounds. They were unsuccessful at first instance. Before hearing their appeal, the Supreme Court referred questions of law to the European Court of Justice pursuant to Article 177 of the Treaty of Rome. The Court of Justice ruled on the questions referred, clarifying the effect of the article which had been invoked by the plaintiffs, including its effect, having regard to general principles of Community law, including the protection of legitimate expectations, and ruling that the regulation of 1984 was not invalid having regard to the provisions of Community law. When the matter was resumed in this jurisdiction, the plaintiffs were successful on the appeal, the Supreme Court holding that the Minister had made a mistake of law rendering his decision illegal and remitted the matter to the High Court to assess damages. It is difficult to deduce how the course and outcome of the *Duff* case, as outlined, assists the plaintiffs in their invocation of the reference jurisdiction.

8.5 In developing their submission based on the reference jurisdiction, counsel for the plaintiffs also relied on recent jurisprudence of the European Court of Justice in relation to liability of a Member State to make reparation for loss or damage caused to individuals as a result of breaches of Community law: the judgment in case C – 224/01 *Kobler v. The Republic of Austria* [2003] ECR 1 – 10239, which was followed by the Court of Justice in case C – 173/03 *Traghetti del Mediterraneo v. The Republic of Italy* [2006] ECR 1 – 5177.

8.6 In response, it was submitted on behalf of the defendants that, even if one were to regard the plaintiffs' proceedings as a vehicle for a reference, that does not advance the plaintiffs' position. It was pointed out that under Article 267 a national court may "if it considers that a decision on the question is necessary to enable it to give judgment" request the Court of Justice to make a ruling on the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union. The plaintiffs have not shown why it would be necessary for the Court hearing the plaintiffs' case to make a reference under Article 267, it was submitted. Aside from that, counsel for the defendants raised issues as to how a reference could assist the plaintiffs, even if it resulted in an affirmative ruling that the Council Decision infringed principles of Community law. It was emphasised on behalf of the defendants that the plaintiffs' claim is against the State on the basis of some wrong alleged on the part

of the Fisheries Minister and that the Fisheries Minister did not make the Council Decision. It was submitted that the decision in the *Kobler* case is of no relevance.

8.7 As I understand it, the reliance of the plaintiffs on the *Kobler* case arises from the fact that in that case it was held for the first time that the failure of a judge of last instance in a national court to refer a question of Community law to the Court of Justice under the reference jurisdiction could lead to an action for damages against the State for breach of its Community law obligations. There is no reason why a similar principle should not apply to the actions of the executive, the plaintiffs submitted, where it acts through a minister in breach of well established principles of Community law.

8.8 I consider it appropriate to preface my comments on the defendants' contention that the issues raised in these proceedings are not justiciable and the plaintiffs' response to it, as outlined above, by remarking that I consider that it verges on undesirable that a court should have to address questions as difficult and as novel as those raised on the submissions on a motion to strike out the proceedings. Having said that, with a considerable degree of diffidence, I propose to address this aspect of the defendants' case in a general way. In *Kobler*, the Court of Justice set out the conditions governing State liability in para. 51, stating:

> "As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are three fold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties … ."

The Court then stated in para. 52 that State liability for loss or damage caused by a decision of a national court adjudicating at last instance, which infringes a rule of Community law, is governed by the same conditions.

8.9 I find it very difficult to apply paragraph 51 to the plaintiffs' case, even in a general way. Before one comes to considering the three conditions stipulated, a number of preliminary questions arise. First, what breach of Community law do the plaintiffs allege against the State? The kernel of the plaintiffs' complaint in relation to the adoption of the Council Decision is that it allowed an affected Member State to opt out of the provision of a compensation scheme. Even if it constituted an infringement of Community law, the Council, not the State, was responsible for that decision, albeit on the plaintiffs' case as pleaded the decision was made at the urging of the State. Secondly, what loss and damage are the plaintiffs requiring the State to make reparation for? I will assume it is the loss of the compensation they would have got if the State had been precluded from opting out of providing for a compensation scheme by the Council Decision, although the statement of claim appears to envisage compensation by reference to the plaintiffs' loss of their income consequent on the fishing ban from 1st January, 2002. That leads to the application of the third condition, which raises the question whether there is a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained. The plaintiffs' loss of the compensation to which a comparator fisherman or vessel owner in a Member State which opted into a scheme under the Council Decision became entitled, is directly due to the fact that the State opted out, as it was entitled to do under the Council Decision, as adopted. If the adoption of the Council Decision infringed principles of Community law, and the plaintiffs' counsel, in their comprehensive submissions, set out to demonstrate that it does infringe the principle of non-discrimination in, and fails to respect the legitimate expectations of the plaintiffs as required by, EU agricultural and fisheries law, how is the State responsible for such infringement?

8.10 One is confronted with a "chicken and egg" type situation in endeavouring to address that last question. Counsel for the plaintiffs, in demonstrating the alleged failure of respect for the plaintiffs' legitimate expectations under EU law, by analogy to Case 120/86 *Mulder I* [1988] ECR 2321, tracked the alleged creation of legitimate expectations on the part of the plaintiffs through the 1997 Regulations, the 1998 Regulation and the Joint Declaration and from there to the Council Decision, where, it was contended, the plaintiffs' legitimate expectations were set at nought. Particular emphasis was attached to the adoption of the 1998 Regulation in tandem with what is referred to as "an unequivocal representation" made by the Council and the Commission in the Joint Declaration to persons and undertakings affected, including the plaintiffs. If, assuming it occurred, in not following through on that representation, the Council Decision infringed EU law, I revert to the question posed previously: how is the State responsible? The plaintiffs' answer, as I understand it, is to be found in the development of the argument on the infringement of the non-discrimination principle, namely, that the amendment to what was proposed by the Commission in September 1998, which was incorporated in the Council Decision, was brought about by the Fisheries Minister and the Minister for Finance. On the basis of the evidence before the Court, for present purposes, I think it can be accepted that the Fisheries Minister canvassed for an opt out for an affected Member State in the proposed Council Decision. However, I do not think it can be accepted, for present purposes, that agents of the State brought about the Council Decision in its final form. On that basis, I cannot see how an issue of infringement of Community law on the part of the State can arise out of the plaintiffs' case, as pleaded, which is justiciable by this Court, nor can I see how the utilisation of the reference jurisdiction can be advocated by the plaintiffs to circumvent that problem.

9. Cause of action

9.1 Turning to the defendants' contention that the pleadings do not disclose a cause of action under Irish law, counsel for the defendants submitted that the doctrine of legitimate expectation could not operate to prevent the Fisheries Minister or the Minister for Finance from exercising their statutory powers and discharging their statutory functions or to fetter their discretion in deciding to adopt or not to adopt a policy, citing *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20 and *Tara Prospecting v. Minister for Energy* [1993] ILRM 771. That submission re-states, in part, what I inferred from the defendants' reliance on the decision in *Doherty v. Ireland* (as set out at 8.1 above) and it unquestionably is a correct statement of the law, although I do not see its relevance to the plaintiffs' case as pleaded. The core of the plaintiffs' case under Irish law, as pleaded, is that it had a legitimate expectation, arising out of the representations made by the Fisheries Minister that the compensatory measures, as envisaged in the Joint Declaration, would be put in place to ameliorate the adverse effects of the ban on fishing which would come into force on 1st January, 2002.

9.2 The analysis of counsel for the defendants of the doctrine of legitimate expectation in Irish law is based primarily on the decision of the Supreme Court in *Glencar Explorations v. Mayo County Council* [2002] 1 I.R. 84 and the decisions of the High Court (Clarke J.) in *Lett & Co. v. Wexford Borough Council* [2007] IEHC 195 and *Atlantic Marine Supplies Ltd. and Rogers v. Minister for Transport* [2010] IEHC 104. The following oft quoted passage from the judgment of Fennelly J. in the *Glencar Exploration* case outlines the essential features of a claim based on legitimate expectations:

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a

> statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

9.3 That passage was quoted in the *Lett & Co.* case by Clarke J., who also quoted the following passage from the judgment of Fennelly J. in *Daly v. Minister for the Marine* [2001] 3 I.R. 513 (at p. 528) as illustrating the nature of the representation and the relationship between the parties which may give rise to legitimate expectation:

> "Those who come within the ambit of an administrative or regulatory regime may be able to establish that it would be unfair, discriminatory or unjust to permit the body exercising a power to change a policy or a set of existing rules, or depart from an undertaking or promise without taking account of the legitimate expectations created by them. However, the very notion of fairness has within it an idea that there is an existing relationship which it would be unfair to alter."

The reference to "the body exercising a power" in that passage was emphasised by counsel for the defendants and I will address the significance attached to it later.

9.4 Having reviewed other authorities, in the *Lett & Co.* case Clarke J. summarised the principles to be derived from them in the following passage (at para. 4.7):

> "In the light of those authorities it seems to me that, on the current state of the development of the doctrine of legitimate expectation, it is reasonable to state that there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from *Glencar Exploration* to which I have referred. The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley*, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall*, legitimate changes in executive policy to take place."

9.5 It is instructive to consider, as counsel for the defendants did, the manner in which Clarke J. applied those principles to the facts before him. In the *Lett & Co.* case, the issue which is of relevance for present purposes is whether the plaintiff had a legitimate expectation that it would receive compensation for the adverse impact on its commercial mussel farming enterprise in Wexford Harbour as a result of the imposition of an exclusion zone around the outfall point of a sewerage system which prevented the plaintiff continuing to harvest mussels from mussel beds within the exclusion zone. The sewerage system was installed by the local authority, Wexford Borough Corporation, pursuant to a foreshore licence granted by the Minister for Communications, Marine and Natural Resources (the Marine Minister) to it, which contained a provision that any claims for compensation for proven loss should be "assessed and settled in accordance with an agreement which shall be entered into by the licensee with mussel fishermen prior to any discharge from the outfall pipe and diffuser". In applying the legal principles he had outlined, Clarke J. found as follows:

> (a) A public authority had made a statement or adopted a position amounting to a promise or representation in that, the Marine Minister had adopted a position which amounted to a representation to the effect that an appropriate compensation scheme would be put in place to deal with any adverse consequences of the operation of the waste water treatment plant to mussel farmers.
>
> (b) The representation was conveyed directly or indirectly to an identifiable person or group of persons, namely, mussel fishermen including the plaintiff.
>
> (c) The representation did create an expectation, reasonably entertained, that the public authority would abide by the representation to the extent that it would be unjust to permit it to resile from it, in that the Marine Minister was persuaded that, in balancing the various rights, entitlements and obligations which were at play in considering to grant the foreshore licence, it was appropriate to grant the licence provided an appropriate compensation scheme was put in place. Noting that no basis of fact or policy for departing from the promise was advanced, Clarke J. found that to resile from the obligation would be unjust.
>
> (d) Having found that the plaintiff met the positive elements, the three tests adumbrated in the *Glencar Exploration* case, Clarke J. then went on to address the negative factors, stating that:
>
> > (i) holding the Marine Minister to the representation did not constitute interference with the exercise of a statutory discretion, because there was no legislation providing for compensation in the relevant sphere,
> >
> > (ii) nor was it an interference with the freedom of the executive to change policy, because the representation was specific and related to a particular incidence – the compensation of mussel farmers in respect of the adverse consequences of the development of a particular waste water treatment plant.

As counsel for the defendants pointed out, Clarke J. found that the plaintiff's claim was not one for damages for breach of legitimate expectation, but rather that the legitimate expectation itself was to the effect that compensation should be paid.

9.6 It was submitted on behalf of the defendants that there is a crucial difference between the circumstances which gave rise to the claim in the Lett and Co. case and the claim being advanced in these proceedings, in that in the former case it was the decision of the Marine Minister that a foreshore licence be granted and he was the body exercising the "power", which is a reference to the phrase in the passage from the *Daly* case quoted above which was emphasised. As it was put, the representation was made and then resiled from by the authority (the Marine Minister) whose task it was to make a decision as to whether to permit the activity in question or not. In this case, it was submitted, whatever may or may not have been said by the Fisheries Minister on the margins of

the meeting on 8th June, 1998, it was not a decision of the Fisheries Minister which imposed a ban on fishing for tuna with drift-nets, which is true, nor was it the Fisheries Minister's decision that the European Union would not set up a compensation fund for fishermen, which is also true. However, on the evidence before the Court, it was the Fisheries Minister who urged that the Council Decision should be amended to permit an affected Member State to opt out of the proposed compensation provisions and when the Council Decision was adopted in December 1998 it was the Minister who made the decision that the State should opt out.

9.7 In the *Atlantic Marine Supplies* case, as counsel for the defendants pointed out, Clarke J. revisited the topic of legitimate expectation as a basis for a cause of action. He dealt with two issues of principle. First, he concluded that it is possible for a legitimate expectation to exist in relation to a substantive, rather than a purely procedural, matter, but entered the *caveat* that significant care needs to be exercised in the case of a claim to a legitimate expectation for a substantive benefit, for the public policy requirements to which significant weight needs to be given are more likely to be present and are more likely to weigh heavily in the case of a substantive rather than a procedural legitimate expectation (para. 7.9). Secondly, he concluded that a claim in damages, in an appropriate case, may lie in respect of a breach of legitimate expectation (para. 7.10). The aspect of his judgment to which counsel for the defendants referred is the following statement (at the end of para. 8.1):

> "A legitimate expectation as to enforcement necessarily implies the means of enforcement."

The context in which that statement was made was the contention of the plaintiff, a commercial enterprise in the business of providing safety equipment for fishing boats, that it had a legitimate expectation that the relevant minister, who was a defendant in the proceedings, would rigorously enforce the licensing regime in relation to fishing vessels so that they would not be permitted to carry life rafts which did not conform to the Code of Practice and the Marine Notices referred to in it. Clarke J. pointed out that until, legislation was introduced in 2006, the Code of Practice had no statutory basis so that the minister had no means of enforcing it. Clarke J. found that any issues concerning compliance with the Code of Practice up to the coming into force of that legislation could not give rise to a legitimate expectation and no claim for damages in respect of any such period could arise (para. 9.1).

9.8 The European Union law matrix in which the plaintiffs' case against the defendants in Irish law is being pursued gives rise to complications over and above the norm. However, when one considers the declaratory relief sought by the plaintiffs against the defendants, the essence of the plaintiffs' case in Irish law is that the Joint Declaration, to which the Fisheries Minister was a party, coupled with the representations made by the Fisheries Minister on 8th June, 1998, gave rise to an expectation on the part of the plaintiffs that they would be compensated in the same manner as fishermen and vessel owners in other affected Member States in accordance with the provisions in the Council Decision, which would be forthcoming by the end of 1998, but by reason of the acts of the Fisheries Minister, presumably, his urging of the Commission to permit an opt out and the subsequent opting out of the State, the plaintiffs' legitimate expectations have not been met. In my view, it is open to the plaintiffs to argue that, but for the actions of the Fisheries Minister, they would have been compensated in the same manner as their comparators in the other affected Member States, although it may be argued that there is a residual justiciability issue under national law, to which I will allude later.

10. The principles of law applicable to determination of the defendants' motion

10.1 There was broad consensus between counsel for the parties as to the relevant principles of law applicable to the determination of the defendants' motion to dismiss the plaintiffs' proceedings at this juncture, although there was a difference of emphasis as to their application.

10.2 As regards the jurisdiction under Order 19, rule 28, both sides relied on the commentary in Delany and McGrath on *Civil Procedure in the Superior Courts* (2nd Ed., para. 14 - 05), which states that a pleading, such as the statement of claim in this case, can be struck out where it fails to disclose a cause of action, that is to say, where the facts and matters pleaded in the statement of claim do not constitute a cause of action that is known to the law or likely to be established. Counsel for the plaintiffs pointed to the onus which rests with the party seeking to have the pleadings struck out under the Rules, referring to the observations of Denham J. in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd*. [2004] 1 I.R. 506 and, in particular, her observations in the following paragraph (at p. 509):

> "The jurisdiction under O. 19, r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However, if a court is convinced that a claim will fail such pleadings will be struck out."

10.3 Both sides referred the Court to the leading case on the Court's inherent jurisdiction to strike out or stay proceedings on the ground that they are frivolous or vexatious or are bound to fail: the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306. Once again, counsel for the plaintiffs emphasised the heavy onus which a defendant who seeks to have proceedings struck out under the Court's inherent jurisdiction must discharge. In *Barry v. Buckley*, Costello J. explained the Court's inherent jurisdiction as follows (at p. 308):

> "But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case … . The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail … .
>
> This jurisdiction should be exercised sparingly and only in clear cases … ."

10.4 I have already indicated at 4.2 above that I do not find that the perceived conflict of evidence on this motion identified by counsel for the plaintiffs exists. However, if there is such conflict, then, as is pointed out in Delany and McGrath at para. 14 – 17, it is well established that it must be resolved in favour of the party against whom the application to strike out has been brought, citing *Ennis v. Butterly* [1996] 1 I.R. 426. For the purposes of this application I am assuming that the assertions made by the plaintiffs as to the representations which the Fisheries Minister is alleged to have made on 8th June, 1998 are correct and can be proved at the trial.

11. Conclusions on the applicability of the relevant legal principles on the defendants' motion

11.1 As regards the exercise of the jurisdiction conferred by Order 19, rule 28, which must be exercised by reference to the pleadings only, it is impossible to conclude that the matters pleaded in the statement of claim do not constitute a cause of action that is known to the law or likely to be established. The existence of a cause of action based on a legitimate expectation has been known in Irish law for almost a quarter of a century, its genesis being probably the decision of the Supreme Court in *Webb v. Ireland* [1988] I.R.

353, as pointed out by Clarke J. in the *Lett & Co.* case.

11.2 As regards the Court's inherent jurisdiction, the question which the Court has to determine is whether the defendants have made out a clear case that the plaintiffs' claim must fail. While, as will be clear from the observations I have made at 8 above, I am far from convinced that the plaintiffs' invocation of the reference jurisdiction overcomes the justiciability argument advanced by the defendants based on the exclusive competence of the European Union and its institutions in relation to the Common Fisheries Policy, I consider that the defendants have not demonstrated that there is a clear case that the plaintiffs' claim based on the doctrine of legitimate expectation in Irish law must fail. In particular, I do not consider that the fact that the competence in relation to implementing the promise of a compensation scheme contained in the Joint Declaration lay with the Council, rather than the Fisheries Minister, is a clear absolute bar to the plaintiffs succeeding against the defendants on the basis that their legitimate expectations were not fulfilled. On the contrary, on the basis of the analysis set out at 9 above, in my view, it is open to the plaintiffs to argue that the fact that they were not able to benefit from a compensation scheme of the type envisaged is attributable to the actions on the part of the Fisheries Minister. Having said that, I am not overlooking the fact that there may well be difficulties inherent in the plaintiffs' claim based on the doctrine of legitimate expectation. While the evidence before the Court does not indicate why the Fisheries Minister adopted the approach he adopted, in due course the evidence may show that for policy considerations it was considered that existing structural funds should not be diverted to the type of scheme envisaged in the Joint Declaration and that policy informed the Fisheries Minister's action, or, alternatively, that the funds were exhausted, as hinted at in the plaintiffs' statement of claim. If that type of argument arises, the plaintiffs will have to meet it. However, it is impossible to find at this juncture, on the evidence before the Court, that the plaintiffs' claim is entirely devoid of merit and must fail.

12. Order

12.1 There will be an order dismissing the defendants' application.