Neutral Citation: [2013] IEHC 338

THE HIGH COURT

[2009 No. 1374 P]

BETWEEN:

CROMANE SEAFOODS LIMITED AND O'SULLIVAN MCCARTHY MUSSEL DEVELOPMENT LIMITED

PLAINTIFFS

AND

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

DEFENDANTS

JUDGMENT of Hanna J. delivered on the 31st day of May, 2013

These proceedings concern a claim by the plaintiffs arising from a decision by the defendants ("the Minister") to prohibit the fishing for mussel seed in certain areas, in particular Castlemaine Harbour (Cromane) in County Kerry, which involved the closing of the harbour in 2008, followed by a maintaining of this closure such that the season for mussel seed fishing had passed by the time they were let back into the harbour. A similar situation arose in 2010 where the plaintiffs again claim to have suffered losses in their traditional fishing business.

The plenary summons seeks the following reliefs:

(a) a declaration that the defendants, their servants or agents are estopped from reneging on representations and/or assurances made by them to the effect that the Directives would not impinge on the plaintiffs' business and/or restrict the current usage pattern for the said area for shellfish culture;

(b) a declaration that the purported restrictions imposed by the regulations were arbitrary, unreasonable and irrational by virtue of being in breach of the plaintiffs' legitimate expectations of not being impeded in the operation of their business provided they lawfully operated within existing licensing conditions;

(c) a declaration that the first named defendant acted *ultra vires* in purporting to make regulations which prevented the plaintiffs from operating their business from 9th June, 2008 to the 5th October, 2008;

(d) a declaration that the purported restrictions imposed by the Regulations which closed the mussel industry in Castlemaine Harbour from 9th June, 2008 to the 5th October, 2008 were in breach of the plaintiffs' constitutional rights to earn a livelihood;

(e) a declaration that the purported restrictions imposed by the regulations which closed the mussel seed industry in Castlemaine Harbour from 9th June to 5th October were based on a mistake of law on the part of the first named defendant in seeking to comply with the State's obligations under the Directives, when there was no scientific evidence that there was any risk posed by aquaculture to the designation of Castlemaine Harbour in accordance with the Directives and/or any available scientific evidence demonstrated there was no such a risk;

(f) A declaration that the purported restrictions imposed by the regulations which closed the mussel industry in Castlemaine Harbour from 9th June to 5th October were based on a misinterpretation of the precautionary principal under European Community law;

(g) Damages for loss to the plaintiffs' business in consequence of the breach by the defendants of the legitimate expectations created by them;

(h) Damages for loss of the plaintiffs' business in consequence of the first named defendant's mistake at law or arising from the Minister's *ultra vires* decision which was made in the knowledge that it was being made without scientific or ecological evidence and support for doing so;

(i) Damages for negligence and negligent misstatement;

(j) Further and other relief; and

(k) Costs.

Background

Castlemaine Harbour has been a Special Protection Area (SPA) since 1979 in accordance with Council Directive 79/409/EEC ("the Birds Directive") as amended and in 2000 a wider area of protection, a Candidate Special Area of Conservation (cSAC), was opened under Council Directive 92/43/EEC ("the Habitats Directive") as amended; together they are known as a "Natura 2000 site". As a consequence the harbour is closed annually for a period of time to allow for stock conservation and authorisation of the Minister is required to obtain mussel seed. Traditionally, the second named plaintiff obtains mussel seed from an area within the bay and from there it places the seed in the nursery ground for further development for a period of six weeks. The mussel seed collection activities usually last for a period of twenty days during the summer months. I understand them almost invariably to be non-consecutive days determined by tidal and weather conditions. After that the seed is taken from the nursery ground and then put into other areas (one shared area under the Fishery Order Licence and two other areas within the SPA where the second named plaintiff has exclusive rights under Aquaculture Fishing Licenses) where it is left for a period of two years for later harvesting.

The plaintiffs have been involved in the mussel fishing business since 1979. The first named plaintiff, Cromane Seafoods Limited, purchases shellfish and fish wholesale from the second named plaintiff, O'Sullivan McCarthy Mussel Development Limited. The second named plaintiff engages in the wholesale sale of molluscs and is licensed to engage in bottom cultivation of mussels at two sites in Castlemaine Harbour (301A and 301B) in accordance with a ten-year aquaculture licence granted under the Fisheries (Amendment) Act, 1997 and a Molluscan Shellfish (Conservation of Stock) permit which allows them to move seed to farm the mussels. It has a sea-fishing boat licence (number 141805994) issued under the Fisheries Acts 1959 to 2006 for its boat *Western Adventure II*. The second named plaintiff is involved in fishing and transplanting mussel seed to the aquaculture site licensed at Castlemaine Harbour. There is common shareholding between the two plaintiffs.

Following a decision of the European Court of Justice in *Commission v Ireland Case* C-418/04 13th December, 2007, concerns arose in the Department of Agriculture and Fisheries and in the Department of the Environment as to whether there was a risk of adverse environmental impact in the areas of the SPA arising from the gathering of the mussel seed. In that case the Commission stated, *inter alia*, that Ireland had not correctly transposed or applied Art. 6(3) and (4) of the Habitats Directive and found, *inter alia*, that:

> "226 As regards the transposition of Article 6(3) and (4) of the Habitats Directive, it should be noted at the outset that the Court has already held that Article 6(3) of that directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (Case C-6/04 *Commission v United Kingdom*, paragraph 54 and case law cited).
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> 227 It follows that the Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned."

In response to the ruling a decision was made not to open the mussel seed fishing activity which normally would be expected to take place during the summer months for the plaintiffs and other mussel fishermen. On diverse dates between the end of August 2008 and 9th September, 2008 the Minister represented to the plaintiffs that the harbour remained closed for mussel seed fishing and the mussel fishery was not opened until 5th October, 2008, by which time predators such as green crabs and starfish had consumed the mussels. This left the plaintiffs without any stock of mussels from 2008 for ongrowing to their licensed sites.

In 2009 similar delays arose in opening the harbour. The second named plaintiff brought its fishing boat out to collect seed and it was informed by the defendants that the harbour was closed but that everything was being done to have it reopened. It was reopened at the end of August and the plaintiff had sufficient time and opportunity to obtain mussel seed for harvesting in the 2011 season. A situation akin to that of 2008 arose in 2010, in that the delay in opening the mussel fishery resulted in the mussel seed being destroyed by predators, significantly reducing the amount of seed which would have otherwise been available to fish.

In effect a series of Statutory Instruments governed the opening and closing of the harbour from 2007. The chronology is as follows: closure of the harbour begins on 30th November, 2007 with SI 798/2007. Two Statutory Instruments were then introduced to take effect from 9th June, 2008. The first SI 162/2008 revoked SI 798/2007 which theoretically would open the fishery. However, the second SI 176/2008 imposed a prohibition on fishing for mussel seed within the areas described in the schedule thereto, which included, inter alia, an area in Dingle Bay described at paragraph U of the schedule and comprising an area which included Castlemaine Harbour. SI 194/2008 came into effect on the 1st July, 2008 and placed an absolute prohibition on mussel seed fishing within the fishery limits of the State, SI 176/2008 was thereby revoked. SI 347/2008, the European Communities Control Regulations 2008 revoked SI 194/2008 and took effect on 23rd August, 2008. On the 5th October, 2008 the first named defendant introduced SI 395/2008 which provided that a person shall not fish or attempt to fish for or transplant mussel seed harvested in an area in paragraph U unless it was transplanted in Castlemaine Harbour. Regulation 4 provided that:

> "The Master of an Irish sea fishing boat shall not transplant mussel seed, or cause or permit another person to transplant mussel seed, in accordance with Regulation 3 unless he or she has given, to a Sea Fisheries Protection Officer at Dingle, at least two hours advance notice of his or her intention to do so."

This was the instrument which opened the mussel seed fishery in Cromane. SI 174/2010 provided that mussel seed fishing is permissible where there is an authorisation to do so, however, this again did not apply to area U, Cromane Harbour (as described in SI 347/2008). This was subsequently revoked by SI 228/2010 which closed the mussel seed fishery in the State and then SI 412/2010 reopened the mussel seed fishery in Dingle Bay by deleting reference to paragraph U on 26th August, 2010. The harbour did not reopen until 30th August, 2010.

The plaintiffs are two separate corporate entities. They have, however, worked closely together for years. They have a common shareholding. Cromane is the centre of their operations. Mr. Daniel O'Sullivan, a third generation native of Cromane, has been operating in the mussel business for practically all of his adult life. In evidence, he stated that he and his co-director and indeed others in Cromane harbour were the first to establish a live mussel business. This has evolved to a situation where the first named plaintiff exports the majority of its mussels abroad, principally to France and Holland. The second named plaintiff sells all of its harvested mussels to the first named plaintiff. However, this is not the only source of mussels for the first named plaintiff. Mussels are also purchased from the other mussel fishermen in the Cromane area. Apart from the second named plaintiff the next largest source of supply is the Foley Teehan Shellfish Partnership. The first named plaintiff also sells oysters and green crab, but mussels constitute the mainstay of the business. Cromane harbour operates effectively as a collective and has a discreet market.

Mr. O'Sullivan works out his buying price thus. He first goes to his own customers who are, as I have said, located chiefly in foreign parts. He discusses with the potential buyers what their requirements are and what price they are willing to pay. Having secured that knowledge, Mr. O'Sullivan then factors in costs, expenses, profit margin and so forth and that then dictates what he is willing to pay to both the second named plaintiff and the other mussel producers in Cromane. The effect of his evidence is that, to that end, their can be no "sweetheart deal" with the second named plaintiff. One price fits all in Cromane harbour. If, however, he were to buy mussels from elsewhere such as Wexford or West Cork, he would, in effect, be dealing with a different market and will have to pay full market price for any mussels purchased. This would eliminate any realistic profit margin and so, according to Mr. O'Sullivan, was not feasible.

The production process begins with the harvesting of mussel seed by the second named plaintiff. Attempts to import mussel seed from elsewhere in the country have proved unsuccessful and I accept the evidence proffered by the plaintiffs that, given the location of their fishery grounds, such alternative supply is unviable. I am also satisfied that the Department of Agriculture, Fisheries and Food has at all times been fully aware of the *modus operandi* engaged in by the plaintiffs. This was not a commercial enterprise carried on

at a remove from a distant Government Department issuing edicts from afar. I accept Mr.O' Sullivan's evidence that there was, at all times up to the matters complained of, a close and good working relationship with the Department including "on the ground" through the good offices of departmental officials. I am satisfied that the Department was well aware of the workings and operational actuality in Cromane.

The plaintiffs' case is this, due to the change in the regime as operated by the defendants in Cromane in 2008 and 2010 the plaintiffs' business was jeopardised and they suffered loss. They argue that they had an expectation that the regime operating in Cromane Harbour regarding mussel seed activities would continue as it had done prior to 2008. By newspaper notice in the Irish Times dated 7th April,1993 the Office of Public Works announced that with the designation of Castlemaine Harbour as an SPA "[i]t is not envisaged that designation will restrict the current usage pattern of these areas for activities such as...their use for shell fish culture." This statement was echoed in a Government Notice at the time. The plaintiffs have operated their mussel farming business in Castlemaine Harbour since 1979 and since the plaintiffs obtained their ten year Aquaculture Licence in 2003, as far as they were concerned each December there was a closure of activities for the purposes of conservation of mussel stocks and then traditionally around June of the following year, the mussel fishing activities and mussel seed fishing activities were reopened. So the plaintiffs expected that under the normal regime which was in place, they would be allowed to go to fish for their mussel seed in a certain area within the harbour and then bring it back to the nursery area and then later to plant it for harvesting two years later. The defendants were aware that the plaintiffs fished for mussel seed in the area and the plaintiffs continued to operate their business lawfully on a regular basis in the expectation that it would not be arbitrarily curtailed. However, they were prevented from carrying out their normal regime by a series of Statutory Instruments. Despite the representations in 1993, it is accepted that policy, environmental circumstances and legislation can change but the decision making must not be arbitrary or haphazard; it must be done in an orderly way involving the gathering of information. There is no good reason why no scientific tests were generated. Statutory Instruments were being put in place and then revoked. When looked at cumulatively there is no clear thinking being their implementation.

Furthermore, the plaintiffs spent a Jot of money in 2005 refurbishing their boat to the tune of €250,000. And then in May, just before the closure of the harbour in June of 2008, they spent approximately €1 million on purchasing a new boat. Mr. O'Sullivan, said he would not have spent the money on the boat in May 2008 if he knew that the gathering of seed was not going to be allowed. There would have been options; they could have availed of the service of other boats or rented a boat as they had done in 2007.

It is submitted that the closure of the mussel seed fishery at Cromane was made by the defendants without any or reasonable or proper or scientific and/or ecological data, studies, assessment, evidence and/or foundation or in the alternative was in complete disregard of existing scientific and/or ecological data, studies, assessment, evidence or foundation. The Department did not generate a finding of information in such a way as would allow them to make an informed and proportionate decision prior to their decision to close Cromane completely for mussel seed fishing. After the closure in June 2008, while the discovery does indicate a high level engagement of officials, it most certainly does not indicate any generation of fact-finding or generation of scientific investigations or appraisal or re-appraisal of existing data.

In relation to the defendants claim that there was a concern by officials from the Department of the Environment that the activity of gathering of mussel seed impacted adversely on food supplies for the bird population in the area, the plaintiffs submit that there was actually no information at all which justified that reservation being held or the decisions which were made on foot of that reservation. The blanket ban was irrationally and disproportionately put in place and in October 2008 when the harbour reopened the predators, mainly starfish, had come in and removed whatever was there which would have been worthwhile and that was foreseeable and known to the defendants. The delayed opening of the mussel seed fishery in Cromane resulted in the destruction of the seed mussels in the harbour due to an attack by predators (starfish and green crabs), in consequence of which the plaintiffs lost nursery stock for 2009 and marketable mussels for 2010.

Dr. Brendan O'Connor, a marine scientist, gave evidence that if a screening test was carried out the probability is that the activity of mussel seed collection in Cromane Harbour would have been screened out as having no adverse impact on the environment. In his view, the possible impact on the environment could and should have been screened out as there was enough information available for such a screening out of any activity. He believes that if one had started with the Duchas report of 2000 and then used the bird counts, there would have been enough information in order to be able to generate an appropriate assessment in a relatively short period of time - a month to two months, which he could have undertaken had he had been asked. But no one like him or in his position was requested by the Department of Agriculture and Fisheries or the Department of the Environment to generate such a report. He continued that if he had that information or was required to assemble more empirical data, he said he would have sufficient information in about two months. This situation on the ground where there was nothing going on in terms of generating scientific investigation is to be strongly contrasted with the situation where there was a huge amount of energy at high-level policy discussion with EU officials in 2008.

The plaintiffs point to an anomaly in the closure; in 2008 they were prevented from going to fish for mussel seed in an area over near the mouth of the harbour, yet they were allowed to go into the SPA itself to carry out normal mussel fishing for fully grown mussels that were planted there two years previously. This involved a dredging activity, the same dredging activity that was involved in collecting mussel seed. If there was an intention to protect the SPA by means of preventing dredging activities in the area of mussel seed fishing activity, how was it justified that the plaintiffs could continue with their normal Aquaculture Licence activities inside the area of the SPA? Obtaining mussel seed takes place over a relatively short period, approximately four to five weeks in the summer months. It usually takes about 20 days, but with weather and time this is not necessarily 20 consecutive days. The intrusive nature of the dredging activity regarding mussel seed was much less than the intrusive nature of the dredging activity for fishing purposes which was actually taking place inside the SPA. This is another example of the inconsistency and unreasonableness of the proscription on mussel seed fishing which arose in 2008 and subsequently..

In 2009 there was another closure for the same reasons; the defendants did not organise appropriate scientific investigations into any possible effects on the SPA or the cSAC arising from mussel seed fishing in the harbour. While there had been no consultation at all in relation to the closures in 2008, there was loose consultation in 2009 and 2010.

In 2010 there was consultation but no proper appraisal of the existing information and there was no generation of an appropriate scientific study which, if available, would have guided the Minister towards a situation of comfort regarding possible adverse impacts from their mussel seed fishing activities in relation to the areas being protected in the SPA. The delayed opening of the mussel seed fishery in 2010 resulted in the mussel seed being consumed by predators in consequence of which the plaintiffs suffered a loss in their nursery stock for 2011 and marketable mussels in turn for 2012.

On learning of the initial closure of the harbour in 2008 the plaintiffs wrote to the Department of the Taoiseach on 6th June, 2008 outlining the effect on their livelihoods, highlighting that no scientific analysis of the area was undertaken and explaining that they had been given assurances that the environmental designations would not impact on the present usage of the area. They also

explained that they were compelled to renew their mussel cultivator, *Western Adventure T246*, at a cost of in excess of €1 million in order to qualify for a new certificate of compliance under the Torremolinos Protocol of 1993. On 19th June, 2008 the All Ireland Mussel Dredger Organisation wrote to the Minister for the Environment stating that it believed that scientific studies undertaken by the Department between 1993 and 2000 were not considered when the decision was made to close the harbour and that Duchas was satisfied that aquaculture activity did not pose a problem to wildlife conservation. The letter also drew attention to the public notice, inserted by the Office of Public Works, in the Irish Times (7th April, 1993) announcing the designation of Castlemaine Harbour as an SPA and that it was envisaged that this would not restrict current usage patterns. Duchas produced a consultation document on the cSAC and SPA in 2000 recognising the ongoing aquaculture activity and stating that the potential for conflict with birds from aquaculture is limited and that aquaculture activity could continue in conservation areas. Correspondence continued between the plaintiffs and the Department of Agriculture and Fisheries. A document from Bord Iascaigh Mhara dated 3rd June, 2010 establishes the foreseeability ofthe eradication of the mussel seed from predators and advises that "[i]n response to this risk and in line with industry practices elsewhere on the island, the Castlemaine fishery should as far as possible be managed in line with seed fisheries elsewhere on the island of lreland where seed fishing opens on the 30th August." The plaintiffs claim that in 2010 there was no good reason for not heeding that strong advice from Bord Iascaigh Mhara in relation to the reopening of mussel seed fishing in Cromane. The opening of the 2010 mussel seed fishing was delayed awaiting the completion of a scientific report on the impact of mussel seed fishing on the area.

In a letter to the Minister for State, dated 24th September, 2010 from Mr. O'Sullivan it is stated that it was requested that, in the event of an invasion by predators, a provision be made for a temporary opening of mussel seed fishing in advance of completion of the consultative process so as to save the mussel seed before being destroyed by predators. This was, however, declined and when dredging was resumed the stock had been substantially destroyed. The Minister responded on 11th November, 2010 that in December 2007 the European Court of Justice found that Ireland was not in compliance with the requirements of the Birds and Habitats Directives in a number of instances and that certain high impact fishing activities, such as mussel seed dredging, should not be undertaken in Natura 2000 areas without a prior appropriate assessment of the potential impact of the proposed fishing activity for the conservation objectives for the site. The mussel seed fishery in Castlemaine Harbour could only be reopened when an assessment had been carried out by the Marine Institute based on a fisheries Natura plan submitted by fishing interests in accordance with SI 346/2009. It was explained that it was not until early June 2010 it was possible for Bord Iascaigh Mhara scientists to make the necessary observations to produce a reliable stock assessment survey.

The plaintiffs argue that if the relevant Government department had started with an appropriate assessment, which normally involves a desk study, they would have been appraised of the information which had been accumulated from 1993 onwards, especially the Ouchas report of 2000, and the fact that nothing much had changed since then, it could have been satisfied that there was in reality no adverse impact from mussel seed fishing in Cromane Harbour over the 20 days of dredging activity associated with it. The plaintiffs claim that their vulnerability would not have been so acute if the Department had properly equipped itself, as it should previously have done, by having appropriate baseline data rather than relying simply on ad hoc subjective observations by coastal staff. There was no ordered decision making process or scheme allowing for the best use of existing information which could have afforded better protection to the plaintiffs. The problems encountered in 2009 and 2010 could have been addressed in 2008. It is clear that the losses in 2008 and 2010, the damage done by the predators to stock, was caused by the late opening of the harbour. Further, this risk was well known to the defendants and the plaintiffs also made this known to the Department in correspondence with them.

The blanket ban was not a matter of law but rather of poorly informed decision making on the part of the Department because it did not have any scientific information available to it and was ignoring the signs from the information that it already had, that the adverse impacts from mussel seed fishing in Cromane were nil or negligible. Furthermore, there should have been a balancing exercise on the part of the decision makers, weighing on one side the impact on a person's constitutional right to earn a livelihood, as against the need to protect the environment. The evolution and the preparation of scientific information in 2010 were too slow and there was no good reason why the reopening should not have been allowed much sooner than it was.

The defendants, the plaintiffs argue, were negligent and in breach of duty in delaying the opening of the mussel seed fishery, or in delaying carrying out tests to exclude any environmental risks from doing so, thus the plaintiffs lost the limited opportunity of obtaining the required mussel seed to be used in connection with their mussel farming business as a result of which they have suffered and continue to suffer loss and damage. In this case there was no scientific information and such information as was there was not looked at, and if it was it would have informed the defendants that there was no risk, or else a negligible risk of adverse impact on the environment from their mussel seed fishing. They say that there was no proper analysis of the situation carried out by the defendants prior to the closure of the harbour and this impacted on their mussel harvesting business of the plaintiffs. For that reason, the regime that was operated by the Minister throughout 2008 and 2010 was ill-informed, disproportionate, arbitrary and irrational and, for those reasons, unlawful. The plaintiffs do not contend that the aquaculture licences were untouchable, but they do contend that the regime that they were entitled to expect would be operated in an orderly manner, not in a haphazard manner along the lines of what we have just seen from the Statutory Instruments.

The defendants argue that both plaintiffs are not in the same position and state that the claim is limited to the plaintiff that was engaged in the fishing and/or engaged in the aquaculture and that is the second named plaintiff only because the evidence in the case has been that these are two separate legal persons. They may have directors in common, but they are two different companies and Cromane Seafoods, the first named plaintiff, is engaged only in the purchase from the second named plaintiff and others of shellfish. It cannot and does not and never could entertain any theoretical or potential expectation in relation to its purchasing of mussels. The defendants say that the first named plaintiff is not entitled to damages at all because of the arm's length operation. The first named plaintiff is not the holder of an aquaculture licence or any authorisations to fish seed or any other documents that connects it with the defendants. As such, the damages sought by the first named plaintiff are too remote and are excluded as a matter of public policy. The first named plaintiff's loss was not caused by any acts or omissions of the defendants and it has failed to mitigate its loss, since it could have, but did not, purchase grown mussels from any other producer in the State. There was nothing to prevent it from purchasing from another part of the State and no attempt was made to do so.

The defendants were not negligent or in breach of duty in delaying the reopening of the mussel seed fishery or in delaying carrying out of tests to exclude any environmental risks. The designation of the harbour as an SPA in accordance with the Habitats Directive is a matter of law and the plaintiffs are not entitled to rely on any representation as to its effect or to hold any legitimate expectation arising from any such representation and such representations are denied. The statutory instruments opening and closing the fishery in Cromane are pieces of legislation lawfully made enjoying the presumption of constitutionality until such time as a court says otherwise. The defendants ask how could a public official be liable for negligence or breach of legitimate expectation if it is simply complying with the law? In order for the plaintiffs to succeed in a claim for negligence they must show that there is an invalidity or unlawfulness in the statutory instruments which have been lawfully made and still enjoy the presumption of lawfulness.

The decision of the European Court of Justice in case C-418/04 is critical in the present case. The key complaint of the Commission

was that "Ireland has systematically failed to carry out a proper assessment of those projects situated in SPAs or likely to have effects on SPAs, contrary to Article 6(3) and (4) of the Habitats Directive." Central to the finding is the absence of data to exclude risk of aquaculture projects having significant effects on the site.

Dr. Tully, a marine scientist, gave evidence having been called on behalf of the defence. He stated that the data available at the time was incomplete and insufficient to allow the State to comply with its requirements under Article 6(3). The ECJ found that the correct screening methodology was not being applied but also that it could not be assumed that aquaculture projects were not free of a risk of significant effect on the sites. The State had an obligation to remedy the failures notified in that case. Dr. Tully stated that gaps existed in the knowledge base ofthe State departments and bodies which as a matter of process had to be supplied before a decision could be made as to whether It appropriate assessment was required. Screening must be based on evidence and the evidence was incomplete. Considerable work and consultation was carried out in the aftermath of the European Court ruling; it was an express objective of the first named defendant to establish conditions for reopening the fishery.

The defendants argue that following the decision the Minister was obliged as a matter of European Community law to take all necessary measures to restrict, *inter alia,* the practice of fishing for mussel seed in Cromane. To permit fishing for mussel seed in a cSAC or SPA prior to the completion of an appropriate assessment constituted a breach of obligations of the State and so the Statutory Instruments affecting the harbour were necessitated by the obligations of lreland's membership of the European Union.

Thus the defendants identify the difficulty with the plaintiffs' argument that there was an ongoing expectation that the situation would continue because the expectation is arguably not legitimate in circumstances where it is an expectation that one be let carry on in conditions where the Court of Justice has interpreted Article 6(3) as requiring that there be an appropriate assessment in place before any of this activity could continue.

The defendants submit that it is not enough for the plaintiffs to simply say that they had fished the area for a number of years and had an expectation that this would continue, simply by virtue of the fact that the Minister had permitted it to go on. In this case the only basis in the evidence for a specific promise that is given is the Irish times advertisement. If that is the promise that is relied upon, a statement made in 1993 that it is not envisaged that this will effect the aquaculture activities in the harbour, this cannot amount to a promise that in 2008, whatever was going on in 1992 and 1993 will continue as happened then. In fact the use of the word "envisaged" clearly flags that it is not a promise, it is merely a statement as to what may well be the case or may well not be the case in the future. One cannot have a legitimate expectation that a policy or that a system that is being operated by the Minister is not going to change, particularly where you are operating on the basis of a heavily regulated licensing regime.

Following the decision of the European Court the evidence supports the proposition that the defendants acted as quickly as they could. They moved to try to get agreement from the Commission to open Cromane. The Commission appeared to be quite intransigent in relation to proposals that were made. It ultimately only agreed to the one off ad hoc opening in 2008 on the basis that there would be demonstrable work done to improve the situation and put in place full compliance. According to the defendants, the State officials were correctly concerned, especially in circumstances where in June or July of 2008 they were hit with infringement proceedings in respect of Cockle Fisheries, which show that the Commission was taking breaches seriously, referring the matter back to the Court of Justice for the purposes of the imposition of fines. How can closure, by officials in those circumstances attempting to satisfy the Commission, amount to negligence or a breach of a duty of care to the plaintiffs?

There was some debate between the scientists in this case as to what an appropriate assessment required. They all agreed that after December 2007 there was no doubt but that an appropriate assessment was required to be put in place. Dr O'Connor said that in his evidence that could have been done within a period of two months but that is not what the scientists and the environmental experts working for the State were saying and these were the people who were dealing directly with the Commission at this time. Again, there is an inherent contradiction in the scientific or the factual case being made by the plaintiffs in these proceedings, because on the one hand the plaintiffs say there was no scientific evidence available, yet Dr O'Connor seemed to suggest that whatever evidence was there would have enabled a decision to have been taken within two months.

This issue as to the application of Art. 6(3) is clear that the appropriate assessment procedure requires that there be an analysis of scientific evidence so that one may exclude the possibility of an environmental impact on Natura sites. It is simply inconsistent to argue that the decision of the Minister to close the fishery is unlawful or illogical because there is no scientific information available, in circumstances where the European authorities say that you cannot allow the activity to go ahead unless you carry out a scientific analysis to exclude the possibility of significant effects. Again, one could never ground a claim that there has been a breach of some duty on the part of the Minister in the making of these Regulations.

The evidence cannot establish that it was at all the singular decision of the Minister not to open the fishery until the Commission was satisfied; the cause of the loss was because the starfish came and ate the mussel seed. In June 2010 a survey by Bord Iascaigh Mhara indicated the possible arrival of the starfish. How could it be said that the loss was caused by the fact that the fishery was opened on a particular date because it was opened on a later date in 2009 than it was in 2010, and yet there was no damage?

Finally, the defendants say that from the evidence there was consultation in relation to 2010 and that Mr McCarthy was on the Advisory Committee as one of the plaintiffs' directors, who attended in consultation with the various State agencies talking about the situation. From the evidence it is evident that Castlemaine Co-operative, the harbour co-operative of which the plaintiffs are members, proposed the plan in 2010 which contained in it the timing at which the fishery was to open on 30th August. It is also known that when Mr McCarthy attended at a meeting in August in relation to the opening of the fisheries generally, the memorandum of that meeting does not record any complaints being made about the timings, notwithstanding that he had previously complained in writing to the Department as between the 1Oth August and the 30th of August, which is the only window in 2010 that is in issue. He was complaining, as all the fishermen were, about the fact that the environmental NGOs had favoured allowing a taking of 500 tonnes, but he favoured 4,000 tonnes and the Minister subsequently acceded to the fishermen's view in relation to the 4,000 tonnes.

Decision

The doctrine of legitimate expectation came to be recognised in the case of *Webb v Ireland* [1988] 1 I.R. 353. In *Duggan v An Taoiseach* [1989] I.L.R.M. 710 Hamilton P applied the Webb criteria at p. 727 as follows:

> "It would appear that the doctrine of 'legitimate expectation' sometimes described as 'reasonable expectation', has not in those terms been the subject matter of any decision of our courts. However, the doctrine connoted by such expressions is but an aspect of the well-recognised equitable concept of promissory estoppel (which has been frequently applied in our courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor. The nature and extent of that doctrine in circumstances such as those of this case has been

expressed as follows by Lord Denning in *Amalgamated Investment & Property & Co. Ltd v Texas Commerce Investment Bank Ltd* [1982] QB 84 at 122:

> 'When the parties to a transaction proceed on the basis that an underlying assumption -either of fact or of law- whether due to misrepresentation or mistake makes no difference -on which they have conducted the dealings between them -neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'"

That has been examined in *Glencar Exploration plc v Mayo County Council* [2002] 1 I.R. 84 where Fennelly J stated obiter, criteria which were expressly approved as part of the ratio by the Supreme Court in *Lett v Wexford Borough Council and Ors* [2007] I.E.H.C. 195, as follows:

> "In order to succeed in a claim based on the 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 annually or potentially in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. 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 be preconditions for the right to invoke the doctrine."

That case examines the criteria of what is involved in the doctrine of legitimate expectation. In that case there was a representation that there would be compensation.

A regards the present case there was a representation made to the plaintiffs in both the government notice and the newspaper notice of 1993. There was comfort given. What happened from then onwards, the annual allocation of seed collection authorisations and the constant refurbishing of the plaintiffs business gave rise to a pattern of events where the plaintiffs had good reason to rely upon the comfort given to them that there would not be a summary closure of their business without some good scientific reasons or without some consultation process before doing so.

This case may be distinguished from *Wiley v Revenue Commissioners* where Mr Wiley failed in legitimate expectation in both the High Court [1989] 1 I.R. 350 and Supreme Court [1994] 2 I.R. 160 as he had misrepresented the extent of his disabilities.

In other words, he had portrayed himself to be someone with a certain set of entitlements in order to induce the Revenue into granting him the exemptions based on a mistaken set of facts. In the present case the plaintiffs made no representations to the Minister which put the Minister in any sense of false comfort or false understanding of the situation.

In *Duff v Minister for Agriculture (No.2)* [1997] 21.R. 22 the plaintiffs claimed operational negligence having expended money in achieving goals set by Community schemes, they had a legitimate expectation that they would not be prevented by another Community scheme from achieving the goals. Here the Minister approved plans to develop the farms, which included the borrowing of money, on the basis that there would be an expanded quota available for the sale of milk. But the Minister was operating under a mistake of law and was not entitled to do this. The majority of the Supreme Court drew a distinction between a policy decision of the Minister and the decision as to how to implement it and went on to find that because of an unlawful means of implementing the Ministerial decision being applied, the plaintiffs were entitled to recover damages. This has been interpreted as an example of operational negligence where fault was found against the relevant Minister where such fault would not arise in relation to policy decision making.

In the present case the decision of the Minister to close Cromane Harbour was an implementation of policy rather than a policy decision.

In *Duff* at pp.74- 75 O'Flaherty J states:

> "In effect, the Minister had said to the plaintiffs: "if you modernise and develop your holdings and so forth, I will see you right". Along comes the super-levy regime and he has a Regulation with a provision at his disposal with which he can keep to his commitment. As a matter of national law (as regards Community law, see the judgment of the Court of *Justice in Deutsche Milchkontor v. Germany* (Joined Cases 205-215182) [1983] ECR 2633), the plaintiffs had a legitimate expectation that the Minister would honour that commitment. The fulfilment of that promise would have required only that the Minister would exercise his discretion in a particular way. It is true, as held by the Court of Justice, that he was not bound as a matter of Community law in the abstract to exercise his decision in favour of the plaintiffs- but, as a matter of national law on the facts as proved in this case, he could hardly have done anything else. In order for him to honour his commitment to the development farmers to give them the fair deal that he had always held out to them, he would not, of course, have been involved in breaking any statutory, or other, duty or obligation, see *Wiley v. The Revenue Commissioners* [1994] 2 I.R.160.
>
> However, he put it out of his power to exercise the discretion that he should have had because he had not created a national reserve.
>
> The question posed for resolution, therefore, in my judgment is this: if a public officer, through a mistake of law on his part, is debarred from exercising a discretion at all, is his situation any different from a public officer who declares that, while he has a discretion, he debars himself from exercising it? The court was concerned with the latter situation in *The State (McGeough) v. Louth County Council (*1956)107 I.L.T. R. 13. There a widow wanted to sell a labourer's cottage, which was subject to a small annuity in favour of the local authority. The relevant legislation required the County Manager's consent to the sale, but the Louth County Manager had taken a stance that he did not favour sales and he would not consent to any sales. It was held by this court that if consent was to be refused it would have to be for a reason that the sale in some way would frustrate the policy of the Labourers' Act, 1936. The County Manager was not

entitled to shut himself out from exercising the discretion that he undoubtedly had, but rather he was required to exercise it in accordance with the policy of the relevant legislation.

In this case, the Minister, through his mistake of law, put himself in a position where he could not come to exercise a discretion. In the one case, the County Manager acted deliberately; the Minister's mistake was inadvertent, but the result looked at objectively is the same: The persons entitled to expect that a discretion might be exercised in their favour are unable to get the benefit of that to which they had a legitimate expectation.

Just as money paid under a mistake of law can be recovered if the responsibility for the mistake lies more on the one party than the other and the one with the responsibility for the mistake is in a more powerful position, (*Rogers v. Louth County Council* [1981] I.R. 265), so I believe should the plaintiffs be entitled to a remedy at the hands of the Minister for the wrongs they have suffered."

Mr. Justice Blayney agreed with the above paragraphs and the judgment of Mr. Justice Barrington at p.75 where he states as follows:

"The facts of this case are not in dispute. The plaintiffs are a group of small farmers. The State, on its own behalf and as agent for the European Commission induced them to borrow money and to develop their farms on the basis that there would be an expanded outlet for the sale of their milk. Now, after they have incurred heavy expenditure they find that they will not get the outlet for the sale of their milk which they expected and were induced to believe they would receive."

Barrington J at pp.89 - 90 continues:

"As previously stated, the plaintiffs could have no legitimate expectation that the law would not be changed. Neither could they have any right that the Minister will exercise his discretion under art. 3 of Council Regulation EEC/857/84 in their favour. But once the Minister had decided to give them a reference quantity out of the national quota the Minister had a duty, and they had a right to expect, that the Minister would implement his decision in a lawful manner. The Minister, in breach of his duty and of their rights attempted to implement his decision in a manner which was unlawful. As a result the plaintiffs did not receive the special reference quantities to which they were entitled and have, in consequence, suffered loss and damage.

The trouble is that the method which the Minister chose to provide for the development farmers was unlawful. He chose this method due to a mistake of law on his part. When he discovered his mistake, in the autumn of 1984, the situation had changed because the national quota had been divided up without making provision for the national reserve out of which the development farmers could receive their quota. It is now too late, or the Minister felt it was too late, to retrieve the situation...

If, as appears to be the case, the plaintiffs have suffered loss and damage as a result of the Minister's mistake of law it appears to me just and proper in the circumstances of the case, that the Minister should pay them compensation.

Moreover, it appears to me that this court would be doing less than its duty if it failed to vindicate their right to compensation in the circumstances of this case."

The discretion of the Minister in the present case is the annual discretion which he exercises in a regular way to allow an authorisation to be given to the plaintiffs to go into Cromane Harbour and collect their seed allocation. That has operated on a regular basis and there was no reason why it should not continue as far as the plaintiffs were concerned. No new law came into being as a result of the judgment of the European Court delivered in December 2007. The Court was interpreting law which was already in place under the Birds and Habitats Directives which would have been in place from the year 2000.

The carrying out of screening tests is all within the control of the Minister. In 2008 the Minister finds himself barred from exercising a discretion as a result of not having carried out an appropriate assessment before granting the seed authorisation, despite the fact that he did so in previous years and did so under a mistake of law on his part. That brings us right into a situation analogous to what happened in the *Duff* case (where the Minister was barred from exercising his discretion in relation to the milk quota because of a mistake of law). The mistake of law in the present case is more than just a pure mistake of law in the legal sense. It is a mistake of law in how the Minister thought it was appropriate to manage the aquaculture business in a balanced way with protecting the environment; the mistake of law that we are looking at here has a relevance in terms of how the regime was managed. There was operational negligence in failing to carry out the regular scientific tests or monitoring that would have provided the baseline data to equip the Minister either to have a proper screening test or to have a fully informed appropriate assessment. The delay could have been avoided if the Minister had not been guilty of operational negligence, which was part and parcel of his mistake of law. These matters are now translated into loss and damage of the plaintiffs in the same way as the farmers in the *Duff* case.

In the *Commission v Ireland* C418/04 the Court finds at para. 236 that: "Ireland has systematically failed to carry out a proper assessment of those projects situated in SPAs or likely to have effects on SPAs, contrary to Article 6(3) and 6(4) of the Habitats Directive."

Article 6(3) of the Habitats Directive provides that:

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans and projects, shall be subjected to appropriate assessment of its implications for the site in view of the site's conservation objectives. In light of the conclusions of the assessment of the implication for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

The evidence of Dr. O'Connor is compelling, that if there had been a screening test carried out this project would have been screened out as having no adverse consequence on the environment. After the decision of the European Court nothing occurred. On the evidence of Dr. O'Connor he could have undertaken the appropriate analysis within two months. The analysis should have been done quickly in 2008.

Everyone was hugely energised at a high level in 2008, however, on the ground nothing happened until the sediments study was carried out in September and then there was very little in the way of scientific information that generated complete comfort until

2010.

The plaintiffs operated lawfully and were entitled to expect that this regime would continue and they had organised their business and expended considerable sums of money in this legitimate expectation. The "operational" negligence on the part of the State was in failing to carry out proper scientific investigations or monitoring between 2000 and 2008 which would have provided base line studies for the prompt carrying out of an appropriate assessment so as to have permitted the timely reopening of Cromane Harbour for mussel seed collection (as in previous years). The breach of legitimate expectation of the plaintiffs is that they were entitled to expect that in the normal way Cromane Harbour would regularly reopen annually for mussel seed collection because the Minister would operate such a regime of granting Aquaculture Licences and also managing the SPA and cSAC in Cromane Harbour and also in a lawful way.

In Hogan and Morgan's *Administrative Law* 4th Edition 2010 at para. 18-149 there is a reference to *Duff* and at 18-150 is the reasoning of Mr Justice Barrington in that case. Then at 1-151 the authors observe in relation to *Duff* that "The Plaintiffs appear to have succeeded on the ground of something like a negligent error of law in that the Minister had misunderstood the EC Directive which he was applying. This may be classified as a special case of operational negligence as opposed to the negligence in the exercise of a discretionary power."

As previously noted in 2008 there was a great deal of energised activity on the part of the relevant departments in their communication with the European Commission, but on the ground, nothing was being done- the Department organised the carrying out of a sediment examination of the nursery beds but this did not help progress matters. By the time the Commission indicated it was going to allow a certain amount of toleration for Cromane as a special case, the predators had come and gone, and that was then going to impact on the mussel seed harvesting two years later in 2010. In 2009 some screening investigation was taking place on the part of Bord Iascaigh Mhara but it was for the Department to decide whether or not the harbour should open. However, nothing has been discovered regarding this process leaving the Court to conclude that there was no adequate screening process. The issue in 2009 is not the loss the plaintiffs suffered but the fact that the carrying out of the appropriate assessment was still dragging on and dragging on longer than it should have, so that by 20 I 0 the same problems were still there which could and should have been addressed back in 2008. The plaintiffs got in quite late in 2010, having made the Department well aware from June 20 I 0 that the predators had come along, so by time they got in there was very little there for them to fish. Some tonnage was acquired by the plaintiffs in 2010. The damage caused by starfish was a well-known phenomenon and it was a threat that was made known to the Department. The risk posed by the starfish was both foreseeable and preventable.

One must look at the scheme by which the defendant operated the management of Cromane Harbour. So between breach of legitimate expectation and common law negligence in terms of a breach of duty, the plaintiffs say that the Department failed in its duty to them in how it operated the licensing scheme in the harbour. The relevant Department failed in its duty to the second named plaintiff in how it operated the licensing scheme in the harbour. The defendants were negligent and in breach of their duty to the plaintiffs in delaying the reopening of the said mussel seed fishery, in delaying carrying out tests to exclude any environmental risks and in allowing the plaintiffs to expend substantial monies on renewing their vessel. In behaving in such a manner the plaintiffs lost the limited opportunity of obtaining the required mussel seed to be used in connection with their mussel farming business, as a result of which they have suffered loss and damage. The State did not operate the regime in an orderly way which would have allowed harmony between environmental protection and the plaintiffs continuing with their business. The sequence of events points out what should have been a necessary state of knowledge on the part of the defendants, who nevertheless decided to sit on their hands and allow matters to carry on in what appears to be defiance of the clearly stated will of the European Court of Justice. Failure to comply with obligations with European law is relevant in flavouring the state of knowledge of what the parties understood as being *their modus vivendi* that came to a screeching halt in June 2008.

The Minister was negligent in failing to operate the protection of the environment in a balanced way which would allow for protection of the aquaculture business. This arose from a) failure to carry out investigations, b) inconsistency in the activities permitted and c) allowing the plaintiffs to spend huge sums of money on renewing their vessel. The result is a glaring lack of a structured approach. There is a requirement on the part of the decision maker, who has the controlling decision making in relation to the plaintiffs' ability to earn their livelihood, not to make sudden, unmeasured, haphazard and arbitrary decisions; the process should be managed in an orderly way by regularly gathering information, so that all parties can organise their affairs in an appropriate way with minimum disruption.

The plaintiffs believed that by way of providing protections to the environment, these protections would be operated in a way which did not disrupt at all or disrupt substantially the operation of their business. That should have translated into the Minister being in a properly informed position to know whether and to what extent there was going to be any possible adverse impact on the environment from mussel seed collection activities and the Minister should have been in an appropriate and informed position to address the situation expeditiously should a situation arise that required the temporary prevention of resumption ofmussel seed collection in Cromane Harbour. Dr O'Connor says that if he had started with the Duchas report of 2000 and then used bird counts, that would be enough in order to be able to generate an appropriate assessment. Moreover, if he was required to assemble more empirical data, he said he would still have sufficient information in about two months. I expressly prefer the evidence of Dr O'Connor on this.

The defendants were negligent because they never put themselves in an informed position to be able to manage and operate in an harmonious way on one side the protection of the environment in Cromane and on the other side the toleration that would have allowed the plaintiffs to continue to collect mussel seed over a limited period of time inside the protected area. This they could reasonably have done in my view.

To conclude, I am satisfied that the defendants were negligent. Further, I am satisfied that the plaintiffs had a legitimate expectation that fishing activities would carry on as before not alone based upon the 1993 newspaper notice but on the years of mutual dealings and interaction between the parties exemplified not least by the substantial investment in a boat not long before the closure. I am persuaded that the defendants could have put themselves in possession of sufficient information to permit activities in Cromane Harbour and to act in accordance with the wishes of the Commission. They had from 2000 to satisfy themselves of compliance with the directive. The defendants had the motivation of the decision of the Court of Justice and the threat of financial penalties. They knew or ought to have known that closure of the harbour would result in financial loss to the plaintiffs. I refer back to my earlier remarks about the relationship, as it were, between the plaintiffs and the Department. The Department knew, through constant contact and face-to-face communication in Cromane through its officials how the plaintiffs (and others) carried on their business. They were aware, or should have been aware, that both plaintiffs would suffer loss in varying degrees as a consequence of the closure which they did. In the circumstances, notwithstanding their separate corporate identities they are both entitled to damages.

As is apparent from the plenary summons, the plaintiffs' claim is multi faceted. However, in his opening statement and closing submissions, Mr. James Connolly S.C. for the plaintiffs relied on operational negligence in the manner in which the defendants operated

the Directive with resultant financial loss as constituting the foremost plank of his case. Of course, he maintained his claim under headings such as negligent misstatement, breach of the plaintiffs' constitutional rights and the plaintiffs' purported entitlement to be compensated under the *Glencar* decision. Given my findings it is not necessary to proceed to consider these.

So, what is the loss? Apart from Mr. O'Sullivan, the Court was offered evidence on behalf of the plaintiff by Mr. Kevin Wynne, Chartered Accountant, who acts as the plaintiffs' accountant. For the defence, the court heard from Mr. Sean Bagnall, also a Chartered Accountant. Both of them dealt separately, as one would expect, with the two plaintiffs respective losses. As already noted, the defendants, through Mr. Paul McGarry, S.C. argued forcefully that the plaintiffs were not in the same position. The first named plaintiff was a buyer of mussels and could deal with any supplier, anywhere. The plaintiffs were at arms length from each other and this, in effect, extinguished sufficient proximity from the torts of the defendants to enable the first named plaintiff to recover damages. Earlier in this judgment, I recounted the discreet nature of the business conducted by the respective plaintiffs in Cromane Harbour. I also noted the fact that this ongoing *modus operandi* was, from the evidence which I have heard, well known to the defendants both in terms of the Department of Agriculture, Fisheries and Food and on the part of the "on the ground" Departmental officials. Cromane Seafoods Limited bought up the entire stock of the O'Sullivan McCarthy Development Limited's produce as well as others. The arrangements in Cromane Harbour were such that it is unlikely that any favourable arrangement would have been arrived at between the first named plaintiff and the second named plaintiff. It is verging on the unthinkable that, dealing as it did, with 'the other producers of mussels in Cromane harbour that the first named plaintiff would have been in a position to come to a "favourable deal" with the second named plaintiff. I am satisfied that, given the specific circumstances regarding the mussels fishing industry in Cromane Harbour, the plaintiffs were at all material times dealing at arms length. I am further satisfied that given the level of involvement and knowledge on the part of the defendants that the defendants knew or ought to have known that any damage to the local mussel industry caused by the closure of the harbour would impact, not alone upon the second named plaintiff, but also upon the first named plaintiff.

The first named plaintiff is, in my view, in sufficient proximity, therefore, to recover damages for the reasonably foreseeable loss incurred through the abrupt closure of Cromane harbour in 2008 and, notwithstanding some degree of consultation, the late opening of same in 2010.

Both Mr. Bagnall and Mr. Wynne offered starkly differing figures as to the loss of profit endured by the plaintiffs. In approaching the losses, it is useful to refer again to the process in which the plaintiffs were engaged. In the initial stages, the harvesting, the "window of opportunity" between June and August of each year enables the second named plaintiff, over a period of approximately 20 fishing days, to harvest the mussel seed and thereafter transfer it to the nursery bed and thereafter to permit it grow up to a period of two years. This would enable development of the mussel stock appropriate to the first named plaintiffs customers. Mussels, however, are no respecters of accountancy practice and the seed harvesting, development and final harvesting present their own complications which otherwise, would not be reflected in the more usual year on year accounts. Therefore, in presenting his figures for the losses, Mr. Wynne, sought to reflect the 24 month cycle of the mussel production business although, as he pointed out, this could extend into a further period depending on the times of harvesting. Thus, whereas the accounts for Revenue and Company's office purposes would reflect a year on year position, the calculation of losses, on the other hand, would necessarily have to be based on criteria which could well expand over two and possibly three seasons. Accordingly, the loss arsing from 2008 could be calculated in 2010 and any loss arising from what occurred in 2010 could be calculated by reference to projected figures available in 2013.

There were significant differences of methodology in the way in which the respective accountants arrived at their estimations of loss of profit. I think I would be correct in identifying two main areas of dissent. Firstly, Mr. Wynne, in arriving at his figures for loss, used the figures for actual sales from the second named plaintiff and the first named plaintiff over the years 2007, 2008 and 2009. From those figures he extrapolated the loss of profits claim. This was calculated by reference to what he identifies as lost mussel sales from which he extracted saved variable costs. These are the costs which he identified as, in effect, travelling with the sales and, for example, would include such things as seed purchases, boat rental, gear and transplanting and ground maintenance. These would contrast with fixed expenses such as accountancy fees, company secretarial services, legal and professional fees, fishing licences and so forth. These, Mr. Wynne said, should be factored out of the loss of profits claim. The saved variable costs consequent upon commercial inactivity should be factored in and subtracted from the loss of profit claim. As a consequence, in terms of the second named plaintiff, the lost "sales" amounted to €320,934 for 2010. From that saved variable costs was subtracted in the sum of €31,335 leaving a loss of profit claim for 2010, reflecting what occurred in 2008 at €289,599. For 2013, reflective of what occurred in 2010, the lost sales amounted to €158,934. The saved variable costs came to €38,993 and the loss of profit claim for that period amounted to €119,941. For the first named plaintiff, applying a broadly similar methodology, the loss of profit figures arrived are €134,777 in 2010 and €51,168 in 2013 respectively.

As I have already noted, Mr. Bagnall's figures are distinctly different giving losses for 2010 and 2013 respectively for the first named plaintiff in the sum of €29,084 and €700 respectively and, for the second named plaintiff, €41,853 and €14,653.

As to the significant differences in methodology employed by Mr. Wynne and Mr.Bagnall, it is appropriate that I highlight two. Firstly, Mr. Wynne relied on the accounts for 2007 to 2009 and extrapolated his figures for loss from that source. On the other hand, Mr. Bagnall relied on the national figures provided by Bord Iascaigh Mhara for price per tonne over like periods. Secondly, both gentlemen adopted a markedly different approach to the manner in which one treats business costs either as fixed or variable and, therefore, to be counted in or out of any loss of profits claimed. A significant factor in this was the treatment of directors' remuneration as a fixed rather than a variable cost in the accounts of the two companies. This arose from a change of accountancy practice in 2008 recommended by Mr. Don Wynne, Mr. Kevin Wynne's father, who was the senior partner in the plaintiffs' accountancy advisers and who signed off on the accounts. In that year, the directors' remuneration was recategorised as being a fixed rather than a variable charge and therefore to be counted out of any loss of profit calculation. Both Mr. O'Sullivan and Mr. Don Wynne gave evidence that this was nothing more than an accountancy exercise and was not done with any eye to future proceedings and the possibility of inflating a damages claim. The effects, however, on the damages claim is highly significant. It must be observed that the accounts demonstrate that the directors' remuneration over the material years does not reflect any degree of increased enrichment of the directors.

I prefer the approach employed by Mr. Kevin Wynne. In my view, the trading circumstances throughout Cromane harbour not only between the plaintiffs, but between the first named plaintiff and other mussel producers there are more likely to reflect the actuality of loss rather than seeking to refer to national statistics. By way of example, though not reflected in the years upon which Mr. Wynne makes his calculations, 2006 showed an enormous spike in the figures for national output of bottom grown mussels. This was reflected in an average market price per tonne of €1,518. According to Mr. Kevin Wynne, returns of this magnitude have never been recorded in Cromane. In 2011, Mr. Bagnall's figures extracted from the national average reflected a price of€854 per tonne whereas Mr. Wynne's figures recorded €600 per tonne. Again, this would, if employed by the plaintiffs, have the effect of inflating the plaintiffs claim for loss. Finally, the national figures show a steep decline from 2007 to 2009 whereas the Cromane figures show quite the reverse with, ironically in the circumstances, a sharp spike in profits in 2008. This is not to say that national statistics are of little value. Indeed

they are and may fully inform an assessment of loss of profit in appropriate circumstances. Indeed, Mr. Wynne relied in part on same in his valuation of the first named plaintiffs costs.

Broadly speaking, I am of the view that the figures relied upon by Mr. Wynne more accurately reflect the plaintiffs loss. However, I feel it appropriate that some regard be given to the national statistics which could well reflect some degree of influence upon the first named plaintiffs dealings were it operating on the open market notwithstanding the discreet customer corps of which Mr. O'Sullivan told us.

As regards the identification of which constitutes a fixed or variable cost the position is less clear. Mr. Bagnall's view, to which he firmly adhered, was that in calculation of loss most charges, including director's remuneration, should be treated as variable and therefore deductible. Therefore, if variable they would be subtracted from the figures for loss of profit. If the alternative were the case, as counsel for the defendants suggested, the directors could enrich themselves (which clearly did not happen) at the expense of the party compensating the loss of profit. A "stroke of the pen" in accountancy terms could, by itself, greatly multiply such a claim.

Whereas I accept the honesty and Messrs Wynne and Bagnall in their evidence, I think that there is some merit in what Mr. Bagnall says in terms of identifying the actual Joss of profit incurred by the first named plaintiff. Therefore I must make allowance to account for a minor degree of influence of the market and also to allow for the impact of no-doubt valid and appropriate accountancy practice in assessing the loss incurred by the plaintiffs. In my view, the influence of these factors and matters such as the exigencies of nature, business and so forth would accurately be reflected by a deduction in the plaintiffs claim in the order of roughly one third.

I accept the plaintiffs' figures as presented by Mr. Kevin Wynne as a top line. In the circumstances, I feel that the actual loss incurred by the plaintiffs in total is reflected in an award of damages to the first named plaintiff of €125,000 and the second named plaintiff damages in the sum of €275,000.