Neutral Citation Number: [2011] IEHC 388

THE HIGH COURT

COMPETITION

2005 3195 P

BETWEEN

ISLAND FERRIES TEORANTA

PLAINTIFF

AND

THE MINISTER FOR COMMUNICATIONS, MARINE AND

NATURAL RESOURCES,

IRELAND AND THE ATTORNEY GENERAL AND

THE MINISTER FOR AGRICULTURE, FISHERIES AND FOOD

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered the 18th day of October 2011

Introduction

1. The plaintiff company is the owner and operator of a number of vessels engaged in the provision of passenger services between Rossaveel harbour in Co. Galway and the Aran Islands. It is the family owned company of the O'Brien family whose members have been engaged in providing services between the mainland and the Aran Islands for several generations. Having in times gone by ferried not only passengers but cargos of livestock, turf and other supplies to the islands by Galway hooker, they now operate a number of modern passenger ferries catering principally for islanders going to and from Galway and, in the summer season, for visiting tourists making short-stay or day trips to the islands. As explained in greater detail below, at the time to which the issues in this action relate, the company had six such ferries. The motor vessels Ceol na Farraige and Draoicht na Farraige are the main operating vessels with MV Aran Flyer (renamed Glor na Farraige) and MV Aran Express (renamed Banrion na Farraige) providing standby cover. The two remaining vessels are currently up for sale.

2. These vessels are based at Rossaveel harbour and as such are required to pay various harbour dues, fees and other charges for use of that harbour and for services, fuel supplies and other facilities made available there. These charges are defined, imposed and payable under orders made by the first named defendant under the provisions of the Fishery Harbour Centres Acts 1968-1980 (the "Act of 1968") and the dispute in this action arises out of increased charges and a new basis for the principal charge introduced at Rossaveel with effect from the 1st May, 2004 by the adoption of the Fishery Harbour Centres (Rates and Charges) Order 2003 (S.I. 493/2003, the "2003 Order"). The plaintiff has contested the legality of these new charges and of that new regime; has refused to pay the increased amounts for that reason and, as a result, had one of its vessels detained for a period until it was released under bond.

3. In this action the plaintiff seeks to make good that challenge to the legality of the charges and to recover damages for the losses it claims to have sustained as a result of the detention of its vessel. The defendants dispute these claims and counterclaim for the amounts said to be owing, together with interest on the amount of the outstanding charges. At the date of delivery of an amended defence and counterclaim in 2006, the aggregate amount of the various heads of charge in the counterclaim was €987,657.69.

4. The plaintiff's challenge to the legality of the 2003 Order is threefold. It is submitted that:

> (1) The relevant order is *ultra vires* the powers of the Minister under the Act of 1968 (as amended);
>
> (2) The Minister acted unlawfully in imposing the charges in that he is an "undertaking" in the sense of s.3 (1) of the Competition Act 2002 which occupies a dominant position as the sole provider of harbour facilities and services at Rossaveel and has thereby abused that dominant position in violation of s. 5 of that Act;
>
> (3) In the alternative, the order and the provisions of the Act of 1968 are unconstitutional.

5. The plaintiff also challenges as similarly *ultra vires* or unconstitutional the provisions of certain bye-laws made under the Act of 1968 which were relied upon to withdraw the operating permits from its vessels. (See paragraph 21 below).

6. Subsequent to the commencement of this action against the first named defendant, the powers and functions of that Minister under the Act of 1968 were transferred to the Minister for Agriculture, Fisheries and Food and by order of the 27th April, 2010 (McKechnie J.) the latter Minister together with Ireland and the Attorney General were directed to be joined as co-defendants in the proceedings. (The references in this judgment to "the Minister" are to be taken as referring to the Minister for the time being vested with the powers and functions of the Act of 1968.)

7. On the 2nd November, 2010, an order by way of case management was made by the Court (Cooke J.) in which the issues apparently raised by the claims and counterclaims in the proceedings were divided into three groups or modules as follows:

> A. Basic competition issues;
>
> B. Issues relating to the harbour charges; and

C. Issues relating to the claims to and quantification of damages together with the issues arising out of the counterclaim.

8. As required by that order of the Court, lists of witnesses and legal submissions were exchanged by the parties and filed with the Court and common books of pleadings, documents, statements and correspondence were agreed between the parties and lodged. On the 18th January, 2011 and the following days, the Court heard the evidence and argument relating to the issues within the first two modules above. This is the judgment of the Court upon those issues.

9. Although both in the pleadings and in the expert evidence and argument at the trial, primary emphasis has been laid upon the issues arising out of the allegations of abuse of dominance on the part of the Minister in the unilateral imposition of the increased charges, the Court considers it appropriate and necessary to deal first with the claims made to the effect that the 2003 order imposing the new charges with effect from the 1st May, 2004, is *ultra vires*. If it is established that the Minister acted in excess of the power delegated to him under the Act of 1968, in imposing the charges, the amounts in question cannot be recovered and it may be unnecessary for the Court to consider the complex issues raised by the allegations of anti competitive conduct. It is appropriate therefore first to set out the legislative and regulatory framework within which those issues are raised.

The Legislative and Regulatory Framework

10. The principal act under which the orders and bye laws imposing the contested charges are made is the Fishery Harbour Centres Act 1968, as amended by the Fishery Harbour Centres Act 1980. As its long title indicates, the Act had the objective of enabling the Minster to designate certain harbours as centres in which sea fishing might be developed and promoted by facilitating the fishing industry and various related downstream commercial activities including processing, packing, selling of fish and the manufacture of fish products. The harbours to be brought within the regime were listed in a Schedule to that Act and included Galway. By the amending act of 1980 Galway was removed and Rossaveel took its place.

11. Section 2 of the Act gave the Minister power by order to take over those harbours and adjoining lands from the existing harbour management authorities by declaring the harbour and adjacent area to be a "fishery harbour centre". On and from the commencement of such an order the properties in question were to transfer to the Minister without conveyance. In exercise of that power, the Minister made the Fishery Harbour Centre (Rossaveel) Order 1981 (SI No. 208/1981) which had the effect of transferring to the Minister all of the property of Rossaveel harbour together with its liabilities from Galway County Council as the previous managing authority.

12. The powers of the Minister which are at the centre of the disputes in the present action are those contained in s. 4 of the Act and, so far as relevant to those issues, are defined as follows:

> "Section 4(1) The Minister shall manage, control, operate and (to such extent as he thinks proper) develop each fishery harbour centre and shall have all such powers as are necessary for those purposes.
>
> (2) For the purposes of subsection (1) of this section, but without prejudice to the generality thereof, the Minister may, in relation to each fishery harbour centre -
>
> (a) make such bye-laws as he deems necessary or desirable for the purposes of the management, control, operation and development of the centre (excluding bye-laws in relation to the matters referred to in paragraph (b) of this subsection),
>
> (b) by order, fix rates, tolls and other charges for the use of facilities (including the harbour) and services in the centre and provide for their payment and collection and for penalties and remedies for their non-payment (including distress and sale of ships, boats and goods in respect of which any rates, tolls or charges are payable),
>
> (c) provide, or arrange for the provision of, facilities in the centre for the sale of fish landed at the centre and require that fish so landed be offered for sale at the centre and that sales of fish at the centre be conducted in such manner as the Minister may specify,
>
> (d) appoint, to manage, control, operate and develop the centre, such number of officers and servants as he deems necessary for the purpose and provide for their powers, functions and duties and, with the consent of the Minister for Finance, for their terms and conditions of service (including, if, and in such cases as, he thinks fit, superannuation benefits),
>
> (e) provide, improve and develop or arrange for the provision, improvement and development of, such facilities and installations as he considers desirable or necessary at the centre,
>
> (f) provide, improve and develop or arrange for the provision, improvement and development of, such services ancillary to or connected with the fish industry as he considers desirable or necessary at the centre."

13. Subsection (5) provides that the Minister may "by order amend or revoke an order under this section including an order under this subsection".

14. By s. 9 of the 1968 Act the Minister is required to establish the "Fishery Harbour Centres Fund" into which is to be paid all monies received from rates, tolls and other charges and out of which all outlay and expenditure incurred in the exercise of the functions are paid. Surplus monies in the Fund not immediately required for payments are to be invested by the Minister in trustee securities.

15. Prior to the events giving rise to the disputes in this action, the charges payable in respect of the harbour at Rossaveel and the use of its facilities and services were those introduced by the Fishery Harbour Centres (Rates And Charges) Order 1990 (S.I. 239/1990). The charges introduced were set out in a schedule to that order and listed according to ten headings or reference numbers with varying rates of charge according to the description of the facility or service applicable. Thus, reference Nos. 1 and 2 applied to boats engaged in fishing and imposed charges for each harbour entry by a boat according to its size and a charge by weight for use of the harbour in connection with fish cargoes. Reference Nos. 3 and 4 charged for use of electricity by the hour and freshwater by ton. Reference Nos. 5 – 8 imposed charges for berthage and moorings, loading or discharging cargos with particular variations being made for certain vessels at Castletownbere harbour. Under reference No. 9 boats plying for hire between Howth and Ireland's Eye were to be charged £100 per boat for each year beginning on the 1st May and payable in advance.

16. Reference No. 10 applied to passenger boats operating out of Rossaveel as follows:

10.	Charge for boat operating out of Rossaveel –	£10 for each entry into harbour, or £1,000 per annum per boat for each year beginning on the 1st day of May, payable in advance;
	If boat has a permitted complement of under 50 passengers:	
	If boat has a permitted complement of between 50 and 100 passengers:	£25 for each entry into harbour, or £2,500 per annum per boat for each year beginning on the 1st day of May, payable in advance;
	If boat has a permitted complement of over 100 passengers:	£40 for each entry into harbour, or £4,000 per annum per boat for each year beginning on the 1st day of May, payable in advance.

17. It is to be noted that under the 1990 Order charges were fixed by reference to the specific or particular conditions and uses of individual harbours such as Howth, Castletownbere and Rossaveel. For passenger boats operating out of Rossaveel the rate or charge was based either upon harbour entry or fixed as a lump sum payable per annum per boat depending upon the passenger numbers the boat was permitted to carry. In other words, the charge was imposed upon the boat according to its size and was not dependent upon the number of passengers actually carried on any trip. As a result, an operator such as the plaintiff was in a position to calculate each year the overhead liability for such harbour charges and to budget and plan accordingly.

18. As indicated, by the 2003 Order this regime was changed. The new charges imposed by this order are set out in comparatively greater detail over two Schedules. Schedule 1 contains 12 "charge numbers" relating to facilities or services involving the use of a harbour as such, including entry charges for vessels, landing and discharge of cargos including fish, and the use of the harbours by passenger or cruise vessels. Schedule 2 contains 11 heads of charge relating to what might be described as ancillary facilities in or near the harbour including charges for waste disposal, storage of goods, parking of cars and lorries and the operation of cranes. The rates of charges listed in Schedule 2 are fixed as maximum charges recoverable by any of the harbours concerned for those facilities or services.

19. The new charge introduced with effect from the 1st May, 2004, under the 2003 Order which gives rise to the present action is that under the heading of Charge No. 10, which is as follows:

10.	(a) Use of harbour by passenger or cruise vessels with a permitted complement of 100 passengers or more. This charge will be payable monthly.	€1.20 per passenger, per departure on a monthly basis from 1 May 2004
	The charge will be reduced by €0.40 per passenger, per departure in respect of multiple journey tickets (5 return journeys or more). To avail of this reduction the vessel operator must provide satisfactory evidence to the Harbour Master of such multiple journey ticket sales on a monthly basis.	
	(b) Use of harbour by passenger vessel with a permitted complement of 13 to 99 passengers	€40.00 per entry, or €4,000.00 per calendar year payable in advance
	(c) Use of harbour by small passenger boats licensed to carry 7 to 12 passengers	€15.00 for entry, or €1,000.00 per calendar year payable in advance
	(d) Use of harbour by small passenger boats licensed to carry up to 6 passengers	€10.00 per entry or €500.00 per calendar year payable in advance
	In the absence of accurate passenger numbers the permitted vessel Passenger Certificate complement will be charged per departure	

20. It will be noted, accordingly, that for passenger vessels with a permitted complement of 100 passengers or more, the basis of charge was altered from an annual lump sum or a charge per harbour entry to a charge based upon the number of passengers actually carried at each departure. It will also be noted that when compared with reference Nos. 9 and 10 of the 1990 Order, the heads of charge in the first Schedule no longer contain any explicit distinction for particular harbours but are applicable to all fishery harbour centres on the same basis. Nevertheless it does not appear to be in dispute that Rossaveel is the only designated fishery harbour centre in which any substantial passenger ferry service was operated in 2003-2004, such as would come within the charge at (a) of Charge No. 10.

21. On foot of his power under s. 4(2)(a) of the 1968 Act, the Minister has also made bye laws regulating the way in which the harbours are to be managed, controlled and operated. The principal bye laws in this regard are the Fishery Harbour Centre (Management, Control, Operation and Development) Bye Laws 1979, (the "1979 Bye-laws") which contain detailed provisions governing the movement of vessels in accordance with the directions and requirements of the harbour master, the anchoring and mooring of vessels, their loading and unloading, together with provisions governing the general conduct of persons in and using the ports. Bye laws applicable specifically to Rossaveel are made in Fishery Harbour Centre (Rossaveel) Bye Laws 1999 (S.I. No. 250/1999), (the "1999 Bye-laws") the effect of which is to exclude all vessels over 40m in length and to require the operator of a passenger vessel of 40m or less in length to obtain a permit from the Minister in order to operate a ferry and to board and disembark passengers at Rossaveel harbour and to comply with any terms and conditions laid down in such a permit.

The Plaintiff's Operations.

22. The plaintiff company was incorporated in July 1986 and, as already indicated, carries on the business of providing passenger and other services between the mainland at Rossaveel harbour and the Aran Islands, a business in which the O'Brien family has been engaged since at least the beginning of the 20th century. Five members of the family are now engaged as directors and full time employees of the company in the business. Since the incorporation of the company the business has expanded, the fleet of vessels has been upgraded and modernised and includes vessels specially commissioned and built to suit this particular business and the conditions at Rossaveel and Kilronan harbours. The two main vessels mentioned in para. 1 above can each carry 294 passengers.

23. In recent years the company has had between 25 and 30 full time employees and, during the high season, can employ up to 70 people. As a result of the public service contracts mentioned below, the company operates a minimum of two sailings per day, seven days a week all year round between Rossaveel and the islands. During the summer months additional daily sailings operate. The users of the ferry are both islanders commuting to work or making visits to the mainland and, particularly during the summer season, tourists making day trips or longer visits to the islands. Since 2001, the passenger numbers carried have averaged 150,000 equivalent to 300,000 passenger movements in the harbour and of these average movements, approximately 36,000 would be of islanders. Accordingly, the tourist business is the dominant element in the turnover of the company.

24. As a result the company invests heavily in marketing its services in the tourist sector. It maintains five sales offices, two of which are in Rossaveel, (including one on the quayside at the harbour) and three in Galway city. Susan O'Brien, general manager of the company in recent years explained in evidence that the viability of the business is very much dependent upon winning business from tour operators both Irish and international. The company invests approximately €100,000 a year in marketing and advertising for this purpose. She also explained the competitive constraints which this aspect of the business places on the company. The day trip to the Aran Islands is invariably included as one of the excursions in a tour package sold by tour operators to tourists visiting the country. These contracts with providers such as the plaintiff company are the subject of extremely keen bargaining on price and the company is effectively in price competition with other possible attractions such as, for example, tours elsewhere in the western counties or an excursion to the Burren or the Cliffs of Moher. Furthermore, the company is always obliged to agree prices for a season with tour operators a year in advance. While these are negotiated on the basis of the volumes of business the tour operators propose to bring to the company during the season, the company has no choice but to accept the prices as applicable throughout a season even when the operators bring fewer groups or smaller numbers of passengers.

25. It is clear to the Court both from the fact of its designation under the Act of 1968 and from the evidence given by witnesses on both sides that, from the point of view of the use of space and the intensity of operations in the harbour, Rossaveel is predominantly a fishing harbour. The use made of the harbour and its facilities by the plaintiff company is essentially that of the berthing space for its vessels; the embarking and disembarking of its passengers at the quayside at each sailing; some use of an adjacent car park by customers; the use of toilets by passengers; a small ticket office on the quayside for which the company pays a separate rent, and the use of facilities for supply of water and fuel and disposal of waste from the vessels which are also paid for separately. Mr. Paddy O'Brien, managing director of the company and father of Susan O'Brien, estimated that the company's effective use of the harbour and its facilities amounted to 13.7% of the berthing space and 4% of the pier space available. At the times to which the events in this case relate (that is prior to the recent construction of new pontoon berthing areas for passenger vessels) the limited space available to passenger ferries required that the vessels had to be "double or triple banked" or moored alongside one another at the quay wall with the inconvenience thereby caused to passengers of having to board the outer vessel by crossing the one closest to the quay.

The Plaintiff's Public Service Contracts

26. Since 1995 one of the features of the plaintiff's business and an important factor in its financial viability has been a series of public service contracts which it has tendered for and been awarded by the Department of Community, Rural and Gaeltacht affairs. Under these contracts the company has agreed, in return for an annual subvention or public service subsidy received from that Department in monthly instalments, to provide a minimum service of two daily sailings, seven days per week throughout the entire year to the three Aran Islands.

27. At the time of the introduction of the 2003 Order in 2004, the plaintiff provided these services under a single contract which had been concluded in November 2002, for a term of three years and which covered the services to the three islands. Since 2005, the service has been provided under subsequent contracts in which separate agreements are made for the service to Inis Mór on the one hand and the service to the two smaller islands Inis Meáin and Inis Oirr on the other hand. Under the 2002 contract the subvention paid to the plaintiff by the Department amounted to €240,900. The current contract for the Inis Mór service was entered into in January 2008, for a term of five years.

28. One of the common features of the series of contracts has been that the islands must be served by a minimum of two sailings each per day, one in the morning and one in the evening to suit the islanders. Further, the passenger fares which the company may charge are fixed by each contract and cannot be increased without the prior written consent of that Minister. The fares so fixed also distinguish between the passengers who are residents of the Aran Islands ("islanders") and those who are not. Thus, under the 2002 – 2005 contract the maximum fare chargeable for the return trip to adult islanders was €12 with a fee of €10 for students and senior citizens and a fare of €6 for children. The corresponding fares for non-islanders were respectively €19, €15 and €10. In the various contracts since 2002, the maximum fares fixed for the different categories of passengers have varied both by increases and decreases. Thus, in the contract for the Inis Mór service entered into on the 31st January, 2008, the adult return fare for islanders was reduced to €8 and increased for adult non-islanders to €25. Significantly, pensioners with a free travel pass whether islanders or non islanders were required to be carried free of charge. The significance of this distinction lies in the fact that the 2003 Order contains no exemption by reference to passengers possessing a free travel pass. This has the result that while the company is obliged under its public service contract to carry such passengers free of charge it is nevertheless invoiced under the 2003 Order for the per capita charge of €1.20 for all passengers.

29. Although the plaintiff has been the main ferry service operator at Rossaveel over the years, the company has not been without intermittent competition from other undertakings from time to time. Bád Arainn Teo which traded as "Aran Direct" operated two passenger vessels between 2005 and 2008 but ceased trading. Inis Mór Ferries started a service with one vessel, the MV Queen of Aran, in May 2003 but ceased operations in August 2004. The plaintiff purchased that vessel and renamed it "Banríon Chonamara".

Events leading to the 2003 Order

30. The process by which the 2003 Order came to be formulated and then adopted was described in evidence by Mr. Peadar Ward who was at the relevant time an officer in the Sea Fisheries Administration Division of the Department of the Marine with particular responsibility for the management of the five fishery harbour centres of Howth, Dunmore East, Castletownbere, Rossaveel and Killybegs. He had been in this position since 1997 and during that time the policy in relation to the centres had been that capital expenditure was funded out the central exchequer while operating costs were to be met from income generated in the centres, being mainly harbour dues and rent from properties. In some of the centres, revenue exceeded operating costs while in others (including

Rossaveel) there was a deficit and the policy was to allow the former to cross subsidise the latter.

31. In 2000 however, a report of the Comptroller and Auditor General drew attention to the fact that income in the centres overall had dropped and that this was having an impact on their viability. As a result the Department commissioned a "value for money report" from consultants Richard Banks Limited which drew attention to the low level of user fees being charged and recommended that they be urgently reviewed. A further study was then commissioned from a consultancy, Westbic which drew attention to the operating losses in the harbours but particularly at Rossaveel and Dunmore East between 1998 and 2001. The report pointed out the potential revenue that might be obtained from introducing a per capita passenger tariff at Rossaveel.

32. The draft accounts for the fishery harbour centres in 2002, disclosed an operating deficit of €554,990 on a total income of €1,295,197. It was the urgent need to address this overall deficit that led to a review conducted by the Department under Mr. Ward during 2002, with a view to putting in place a new regime of charges. The investigations carried out under Mr. Ward involved looking at the various dues and charges operating in other ports both in the State, Northern Ireland and elsewhere. In addition to considering the potential of a per capita passenger charge, the potential revenue to be gained by changing the charge on fish landings from a charge per tonne to an *ad valorem* rate was examined. Mr. Ward pointed out that the vast majority of ports throughout Europe including major domestic ports such as Dublin, Cork, Rosslare and Dun Laoghaire operated a per capita passenger charge both for passengers embarking and disembarking and these range from .70c to €1.50 per head.

33. These investigations ultimately culminated in 2003 in the preparation of a draft order for consideration by the Minister together with an *aide memoire* for submission to the government proposing the new structure and the range of dues and charges ultimately set out in the 2003 Order. In the initial draft the per capita passenger charge was proposed at €1.30.

34. A briefing memorandum dated the 14th April, 2003, prepared for the Minister and the government meeting of the following day, set out in some detail the reasons for the proposed new charges, particularly in relation to the switch to the *ad valorem* charging regime, based upon three bands of charges for fish landings. Paragraph 3 of the memorandum outlined briefly the other charges to be introduced in respect of various uses made of the harbours and their facilities including charges for use of slipways, lifts, cranes and so forth and charges for vehicle parking. Amongst these "other significant changes" was listed:

> "A passenger charge of €1.30 is proposed in respect of ferry passengers. This replaces a set annual fee per ferry and it will have its greatest effect at Rossaveel where up to 200,000 people depart to visit the Aran Islands annually."

35. Following a Government decision on 15th April 2003, notices of the intention to introduce the charges were published in the press inviting submissions from interested parties. Over 50 submissions were received. Amongst the representations received was a letter from Ms O'Brien on behalf of the plaintiff protesting the proposal to impose the per capita passenger charge at Rossaveel. Amongst the points made by Ms. O'Brien in the letter were the following:

> "When the contract we have with An Roinne Ealaíon, Oidhreachta Gaeltachta agus Oileáin to provide a service to the three Aran Islands was negotiated, there was no mention of the said charges. It will have to be reviewed if they are implemented. This contract is in force until September 2005, and cannot be changed without the approval of (The Department). It has to be remembered that the service to Inis Meáin and Inis Oirr is running at a loss even with the subsidy from the aforementioned Department.
>
> We were here long before Rossaveel was designated a major fishing port. We have a crew whose experience has grown over the years. . . .
>
> We started with a twice week daily service to the Islands when the only alternative was a twice weekly cargo-passenger ferry from Galway docks.
>
> We were grudgingly allowed berthing rights in Rossaveel harbour at a rate per boat per annum, which is excessive given the absence of basic facilities. We recognise that the only solution to this embarrassing problem was to build our own pier with passenger comfort and safety as our aim. Our application was refused.
>
> The negative and very damaging effects of this proposal if introduced will be:
>
> (a) a major reduction in tourist revenue in the west of Ireland
>
> (b) downsizing of the company resulting in job losses for employees many of whom live on the Islands and have been contributing very positively to the Island communities for years.
>
> (c) loss of employment in tourism and allied industry.
>
> (d) the immediate increase in fares for islanders and tourists.
>
> (e) increase in number of people on unemployment assistance with resultant demand on State coffers.
>
> This proposal has been introduced by a Government desperate for funds without consultation and with this company and relevant tourist business interests on the Aran Islands. In conclusion the cumulative effects of poor tourist revenue in the past two years and its implementation will strike the death knell for Island Ferries and associated services."

Detention of Ceol na Farraige

36. The plaintiff refused to implement the charge imposed in the 2003 Order and has not paid any of that charge to the Minister pursuant to it since. It has continued however to pay the per vessel charges calculated in accordance with the 1990 order. (See paragraph 16 above.)

37. By letter dated the 30th June 2005 the Minister notified the plaintiff that a sum of €201,476.74 was owing for the period from May 2004 to December 2004, and warned that failure to comply with the payment proposal contained therein would result in the withdrawal of operating permits for the plaintiff's vessels at Rossaveel Harbour. Further to this letter, correspondence passed between the plaintiff's solicitors and the Department. In a letter dated the 4th of August 2005, the plaintiff's solicitors outlined the plaintiffs'

objections to the charges introduced by the 2003 Order. In particular, they disputed the power of the Minister to impose the levy in the 2003 Order; asserted that the Order was *ultra vires* and that there was no power to withdraw the permits. By letter dated the 16th August 2005, the Department rejected these claims and warned that unless the outstanding charges were settled in full all enforcement measures available to the Department would be utilised. By letter of 17th August 2005 the Department notified the plaintiff that the passenger vessel permit for the MV Ceol na Farraige would be withdrawn until further notice with effect from midnight on the 17th of August 2005 because of the plaintiff's failure to pay the charges under the 2003 Order.

38. On 18th of August 2005, the harbour master Captain John Donnelly detained the MV Ceol na Farraige pursuant to s. 4 (2)(b) of the Fishery Harbours Centre Act 1968 and Bye-law 85 of the Fishery Harbour Centres (Management, Control, Operation and Development) Bye-Laws 1979. Further correspondence was then exchanged with the Department and on 5th September 2005 a meeting between representatives of both sides took place in Dublin to discuss the details of the amounts being claimed by the Department and how they had been calculated and in an attempt to find a solution to the impasse. These discussions led to a proposal that the plaintiff put in place a bond in order to obtain the release of the vessel pending a resolution of the dispute.

39. On the 26th of September 2005, the plaintiff commenced the present proceedings. On the 30th of September 2005, after further exchanges as to the terms of a bond, the Minister agreed to accept a bond and when this was put in place in the amount of €200,000, the MV Ceol na Farraige was released from detention and the passenger vessel permits in respect of the MV Ceol na Farraige and the MV Draíocht na Farraige were reinstated with effect from 3rd October 2005.

The Financial Effects of the 2003 Order.
40. The memorandum to government [see paragraph 34 above] for the meeting of 15th April 2003 outlined the current state of the finances of the Fund and estimated the effects of introducing the new rates:
"The 2002 outrun (provisionally) for the fund is as follows:

Income	€000	Expenditure	€000
Harbour dues	747	Salaries & Wages	1072
Rents	507	Maintenance	163
Sundries	5	Electricity, Telephone etc	141
Waters rates	124		
Other	314		
	12591814		

Operating deficit €555,000

The implementation of the proposed increase for say 6 months of 2003 (taking account of various staffing requirements) are estimates to show on outrun as follows:

Income	€000	Expenditure	€000
Harbour dues	1696	Salaries & Wages	1165
Rents	507	Maintenance	163
Sundries	5	Electricity, Telephone etc.	141
		Waters Rates	124
		Other	314
	2208		1907

Operating Profit €301

While the implementation of the proposed increases for a 12 month period is estimated to provide an annual income of €3.012 million, it is important that costs will continue to increase and should the new charges not be introduced the operating deficit is likely to increase to €660,000 per annum within a year. It should also be pointed out that as things stand not all costs are charged to the fund eg. engineering time, accounts etc. Many maintenance items are also treated as capital expenditure, at present."

41. As explained above, under the regime in place prior to 2004, the plaintiff company's operating overhead in the form of harbour fees or "entry" charges consisted primarily of an annual lump sum per vessel of €5,080. Thus, in the calendar year 2003, the company paid a total of €26,000 in dues for the use by its fleet of harbour entry and berthing facilities throughout the year.

42. With the commencement of operation of the 2003 Order on the 1st May, 2004, a financially significant change took place for the plaintiff company in that the lump sum annual charge per vessel was replaced, for vessels of the size used in its fleet, by a charge of €1.20 per passenger payable monthly throughout the year. In 2002, the plaintiff was charged total harbour dues of 22,475 representing 26% of all dues charged to users (€87,741). In 2003 as mentioned, the charge of €26,965 represented 29% of the total (€93,456). In the 2004 the first full season of the new rates the plaintiff was charged €163,724 representing 50% of the total user revenues of €326,492. (See the evidence of the DHKN report on behalf of the plaintiff.)

43. It should be added that Ms O'Brien gave evidence that it had proved impossible to introduce the reduced fares of 40 cents for 5 multiple journey tickets permitted by the charge at sub-head (a). This was intended to facilitate islanders travelling regularly but in the absence of any means of identifying islanders (especially for staff at the ticket office in Galway,) it was impossible to prevent such books of tickets being purchased and then sold on at a mark-up on the 40 cents face value.

The Validity of the 2003 Order
44. By way of preliminary remark it should be noted that this issue is concerned only with the validity and thus the reasonabless and proportionality of the per capita charge introduced at Charge No. 10 (a) in the 2003 Order. As such, the lawfulness of the exercise of the Minister's power falls to be assessed on the basis of the facts and circumstances then prevailing and the information available to the Minister when the Order was adopted. During the hearing much time was devoted to evidence in relation to the costs and finances of the harbour in later years and to the justification for expenditure on maintenance, repairs, salaries and other outgoings as well as on the plans for investment in new works and development of the harbour including new pontoon berths for the ferries. While such evidence might be relevant to an examination of possible objective justification for the continuing imposition of the per capita charge in those years in the context of the claim of abuse of dominant position, the Court does not consider that the evidence is directly relevant to the issue as to the lawfulness of the exercise of the charging power in s. 4(2) (b) at the date it was used.

45. As already indicated, it is appropriate to deal first with the plaintiff's submission that the 2003 Order is invalid and unenforceable against it as being *ultra vires* the power to impose charges conferred on the Minister by s. 4 of the Act of 1968 and particularly that contained in subs. (2)(b) namely, in relation to each fishery harbour centre to:-

> "By order, fix rates, tolls and other charges for the use of facilities (including the harbour) and services in the centre and provide for their payment and collection and for penalties and remedies for their non-payment (including distress and sale of ships, boats and goods in respect of any rates, tolls or charges are payable)."

46. It is well settled that a public authority exercising powers delegated to it by statute may be found to act *ultra vires* that power in a variety of ways. The most obvious is that in which the power is exercised in a manner which results in something being done or imposed which goes beyond the scope of what is authorised by the statute when correctly construed. The matter is put succinctly by O'Higgins C.J. in the frequently cited passage from his short judgment in *Cassidy v. Minister for Industry* [1978] I.R. 297 at p. 305:-

> "Under the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas and there is no other legislative authority. As a consequence where, as in this case, a statutory instrument made by a Minister is impugned, the Courts have the duty to enquire whether such instrument has been made under the powers conferred, and for purposes authorised, by the Oireachtas. If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is *ultra vires* and of no effect."

47. Insofar as it is submitted in the present case that the passenger ferry charge introduced by the 2003 Order is one which the Minister had no power to impose as being outside the type of charges authorised by subs. (2)(b), the Court is satisfied that the submission is unfounded. It is to be noted that the power to impose charges is not limited by reference to the nature of the uses of the harbour and facilities nor by reference to the identity of the party making the use. It is a power to fix rates, tolls and charges for any use made by any person of any facility or service including the facility of the harbour itself. Obviously, the facilities of any harbour can be used in numerous ways and by a variety of users although in the case of Rossaveel the predominant use is that of the vessels whether fishing trawlers or ferries using it for its berths and for loading and unloading cargoes in the case of the former and the embarking and disembarking of passengers by the latter. In the case of the fishing vessels at Rossaveel, their use of the harbour and its facilities according to the evidence is clearly more constant and intense. The trawlers require to enter and depart at anytime, both day and night; they occupy more extensive quay space; require more extensive supervision and support by the Harbour Master and his personnel because of their use of the facilities to land their catches, repair their nets, take on supplies and make use of the ice plant, auction hall and other facilities. From the description given in evidence by the Harbour Master Captain Donnelly of the activities in the harbour and of what he referred to as the "stakeholders" involved in landing, auctioning, treatment or storage and subsequent processing of fish, it is clear to the Court that it is this side of the management and functioning of the harbour that takes up the predominant part of the time, attention and effort of Captain Donnelly and his staff. By way of contrast, the services, time and attention required from them by the operations of the ferries are comparatively small because the ferries come and go at regular times during the day and their own crews attend to the marshalling and boarding of passengers and the tying up of the vessels. Fuelling, waste disposal and other services are charged and paid for separately.

48. However, even if the use made by ferry passengers can be described as brief and incidental, namely, walking the length of the quay when embarking or disembarking, it is nevertheless a use by them of the facilities in question. Indeed, there would not appear to be any reason to construe the sub-section so as to confine chargeable uses to those directly connected with any type of vessel entering or leaving the harbour. In principle, the plain wording of the sub-section would be sufficient to enable a charge to be imposed for purely recreational use of the pier such as fishing from the end of the pier, swimming from it in the sea or even sun bathing on the harbour wall. As the Court points out later in this judgment, there is an uncertainty as to the precise basis of the user charges which are imposed in Charge No. 10 of the 2003 Order, but insofar as the Order can be construed as having introduced a charge on the use of the harbour and its relevant facilities by passengers, the Court is satisfied that the charge cannot be invalidated as being outside the plain meaning of the words in the sub-section. What the Minister is empowered to do is to charge a sum for the use of any of the various facilities which the State provides at each of the harbours including the harbours themselves. The amounts charged are however a fee or price for a use made so that, in the view of the Court, the provision necessarily implies that the amounts fixed will be based on some economic or commercial relationship between the value of the facility or the cost to the harbour of providing it on the one hand and the nature and extent of the use made of it by the different categories of user on the other. That is something however, that goes to the reasonableness of the amount of the charge in the particular circumstances rather than a consideration which bears upon the validity of the imposition of such a charge under s. 4(2)(b). Accordingly, insofar as the charge in question can be construed as a charge for the use of the harbour facility by individual passengers but collected from them through the ferry operators, it cannot in the judgment of the Court be condemned as a charge unauthorised by the literal or plain meaning of the subsection.

49. It is, of course, also clear that even when such a power is apparently exercised in accordance with the correct scope of the statutory empowerment, it may nevertheless be invalid as *ultra vires* if the discretion accorded to the public authority as to the choices of terms, conditions and the circumstances of its exercise is so misused as to render it vitiated by bad faith, arbitrariness, improper purpose or because the manner in which it is exercised is so clearly unreasonable (including disproportionate), unjust or oppressive as to result in the conclusion that the Oireachtas could not have intended the power to be exercised in that manner.

50. The passage quoted above from the judgment of O'Higgins C.J. in the *Cassidy* case is immediately followed by the following:

> "Equally, if the rule-making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have the duty to interfere. Not to do so in such circumstances would be to tolerate the unconstitutional assumption of powers by great departments of State to the possible prejudice of ordinary citizens. If what the Minister seeks to do was not contemplated by the Oireachtas then, clearly, it could not have been authorised."

51. It is also appropriate to have regard to the economic and commercial context with which the judgments in the *Cassidy* case were concerned by quoting once again the well known passage from the judgment of Henchy J:-

> "The general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being *ultra vires*. And it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably. Diplock L.J. has stated in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* [1964] 1 Q.B. 214, at p. 237 of the report:
>
> > 'Thus, the kind of unreasonableness which invalidates a by-law [or, I would add, any other form of subordinate legislation] is not the antonym of 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*'.

> I consider that to be the correct test. Applied here it produces the conclusion that Parliament could not have intended that licensees of lounge bars would be treated so oppressively and unfairly by maximum-price orders."

52. The *Cassidy* case was concerned with the validity of an order made by the respondent Minister fixing maximum prices at which alcoholic drinks could be sold in the Dundalk area. The Supreme Court, reversing the decision of the High Court, concluded that the legislature could not have intended that the delegated power would be exercised so oppressively and unfairly as to apply the same maximum prices to public bars and lounge bars; or that it would be exercised so arbitrarily as to apply maximum prices to drinks sold in lounge bars in Dundalk, while leaving free of price control drinks sold in some lounge bars outside that area. What is pertinent in the context of the present litigation is the finding that although the order made by the Minister was one which came within the scope of the power conferred upon him under the Prices Acts 1958 – 1972, the particular basis upon which it was made rendered it *ultra vires* as oppressive and unreasonable in a manner which Parliament could not have intended because of the failure to have regard to and provide for the commercial or economic realities of the distinct impact of the price control upon public bars as opposed to lounge bars and its geographic scope and effect.

53. This principle or test as to the reasonableness in law of the exercise of statutory powers to make rules, orders or bye laws and to take administrative decisions affecting rights or interests of members of the public has of course been confirmed as encompassing the proportionality of the result to the objective for which the power has been conferred. The point was made in these terms by Murray C.J. (as he then was,) in *Meadows v. Minister for Justice* [2011] 2 I.L.R.M 157 at 173-174:

> "I am of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and common sense. In applying the principle of proportionality in this context I believe the court may have regard to the degree of discretion conferred on the decision-maker. In having regard to the degree of discretion a margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives."

54. It is to be noted that the Chief Justice expressed that conclusion having reviewed extensive case-law including notably the observations of Keane J. in *Radio Limerick One v. I.R.T.C.* [1997] 2 I.L.R.M. 1 where he said "…it can be said with confidence that, in some cases at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and a permanent withdrawal of the privilege would be so gross as to render the revocation unreasonable within the Wednesbury or Keegan formulation." That was a case which was not, unlike the Meadows case, concerned with an administrative decision impacting on fundamental human rights but one affecting what were essentially commercial interests derived from a statutory concession.

55. In the judgment of the Court similar considerations arise in the context of the present case and lead necessarily to the conclusion that the contested order is *ultra vires* as having been made upon a basis that cannot have been contemplated by the Oireachtas in conferring the charging power s. 4 (2)(b). This is so, in the view of the Court, because of the cumulative effect of a number of aspects of the order and the manner in which it was introduced which result in it having a manifestly severe and unreasonably oppressive impact upon the plaintiff company and upon the plaintiff company in particular. These factors are as follows.

56. First and most obviously, as indicated in the figures given above, the coming into operation of the Order on 1st May, 2004 had the effect of imposing an immediate and dramatically increased operating cost upon the plaintiff's business. For the plaintiff company the total costs of using the harbour and its facilities rose from €26,965 in 2003 to €163,724 in 2004 and further to €258,774 in 2005 the first full year of operation of the new charge.

57. Secondly, although the charge (so far as it was a charge for vessels with a permitted complement of 100 or more,) was formulated as a form of individual departure fee for embarking passengers so that it might, in theory, have been passed on to passengers in increased ticket prices, it was known from at least the letter of 4th June 2003 from Ms O'Brien, that this would be impossible for the plaintiff company because of the constraints which the company had agreed with another department of State under the public service contracts referred to above for the provision of the year round service to the islands upon terms which could not be altered. It is notable that the Department was alive to the far reaching impact of this change at Rossaveel because although the other charges imposed in the 2003 Order came into effect on 1st October 2003, a decision was taken, as explained by Mr Ward, to postpone the passenger charge until 1st May 2004 "to take specific account of the fact that ferry operators had advertised their rates for the current season and it was to facilitate (them) giving advance notice to their passengers and agents for the following season". Thus it was envisaged by the Minister that the charge would be passed on to the passengers rather than borne by the ferry operators but no consideration appears to have been given to the fact that in the plaintiff's case, its prices had in fact been fixed under contract with the State for a period beyond 1st May 2004.

58. Thirdly, the power conferred upon the Minister by s. 4(2) is a power to make orders "in relation to each fishery harbour centre" so that it is obviously envisaged that individual orders could be made fixing rates, tolls and charges taking into account the particular facilities in each harbour and the cost to the harbour of providing them; and the actual uses made by operators and particularly non-fishing operators in each case. As indicated in paragraphs 15 – 16 above, this was effectively the approach that had been taken by the orders made prior to 2003. Regard was had to the particular differences between the activities carried out in particular harbours such as Castletownbere, Howth and Rossaveel. That approach has been abandoned in the 2003 Order and the schedule is effectively set out on the basis that the charges apply to all designated fishing harbour centres. Thus, while s. 4(2) is clearly enacted on the basis that the Minister is entitled to have regard to the distinct facilities and uses of each of the harbours in question, it is clear to the Court from the evidence given, notably by Mr. Ward, that the primary consideration in adopting the new approach was to find and generate sources of revenue sufficient to enable the operation of all of the harbour centres taken together to break even or produce a surplus.

59. By fixing a per capita fee for the use of the harbour by passenger ferries with a complement of 100 or more, the Minister was not in the judgment of the Court, fixing a fair or reasonable commercial price for that use. Rather, he had as his objective the raising of extra revenue by the exploitation of the only source of passenger traffic in the fishery harbour centres to which the charge applied namely, Rossaveel, in order to permit the Fund to break even or achieve a surplus. The amount of the passenger charge was not based upon the value of the service to the ferry operator or the actual cost to the harbour of its supply but on the amount needed (in conjunction with the other charges made,) to eliminate the accumulated deficit in the Fund. Although passing consideration appears to have been given to the fact that passenger fees were charged at the main international ferry ports, these charges appear to have been viewed as a precedent for imposing the charge, but were not examined as a series of comparators for the fixing of the amount of the per capita fee by reference to the cost, type and quality of the facilities provided to passengers in those ports.

60. Accordingly, the Court considers that the actual purpose of the Minister in fixing the per capita passenger charge was not to fix a

fair and reasonable commercial price for the use made of the harbour and its facilities by the ferry operators or by individual passengers, but to generate funds in order to eliminate the deficits that had been incurred in the overall management and operation of all of the harbours taken together. In other words, consideration was not given to charging the operators of the passenger ferries at Rossaveel an amount which was based upon or reflected the actual cost to the Department of the use actually made of the harbour and its facilities by those operators or their passengers. Having regard to the obvious disproportion between the use made by the passenger ferries and their passengers of the harbour facilities as compared with the far more constant and intensive use of more extensive facilities made by the operators of the fishing fleet, the basis upon which the charge was fixed amounts, in the view of the Court, to a manifestly unreasonable exercise of the power to impose such charges.

61. That this is so can be seen from the effect the charge brought about in the finances at Rossaveel – or would have brought about had the plaintiff actually paid the charge. According to the evidence given based upon the financial statements for the operations at Rossaveel, in 2000 the dues paid by the ferry operators accounted for 28% of all income generated by users of the harbour and its facilities. In the first full year of the new charge this rose to 62% and by 2007 to 86%. The total income attributable to activities and use by operators on the fishing side fell from over 55% in 2002 and 2003 to 13% in 2007. Harbour operations in the each of the years 2000 to 2003 incurred a deficit but the introduction of the new passenger charge generated a surplus of €118,037 in 2004. Dues from use by the ferry operators represented 12% of the operating costs of the harbour in 2000 but by 2007 were equivalent to 86% of the costs. Having regard to the clearly greater use of the harbour facilities including the time and attention of the harbour personnel by the fishing users, this was in the judgment of the Court a radical and disproportionate shift of liability for the operating costs of the harbour from the fishing operators to the ferry operators

62. This was of course the objective of the 2003 Order because it is clear to the Court from Mr Ward's description of the researches that were done in preparing a solution to the deficits in the fishery harbour centres, that the change in the basis of charge for the use of Rossaveel by the ferries was seen not as a price for the use of the facilities as such but as a fee analogous to the passenger departure taxes or fees imposed at the State's airport and at the major ferry ports such as Dublin, Cork, Rosslare and Dun Laoghaire.

63. This however leads to a fourth factor which contributes in the view of the Court, to the oppressive and distorting effect of the impugned charge in the way it was introduced, namely the ambiguity as to whether the charge is imposed as the price for the use made of the harbour by the ferry operator and its vessels or as a fee charged to passengers for the use which they make in embarking and disembarking. The charge at sub-head (a) is a per capita charge on passengers actually embarking on each sailing but only in respect of vessels with a permitted complement of 100 passengers or more. The charges made in the other sub-heads of Charge No. 10 for use of the harbour by passenger vessels with a permitted complement of 99 or less are not based on actual passengers but upon harbour entry or as an annual fee. A vessel with a complement of 99 will pay a fee of €40 per sailing irrespective of the number of passengers, while the plaintiff's vessel, if sailing with 99 passengers will be invoiced a charge of €118.80. Thus the charges in the remaining sub-heads are clearly made for the use of the harbour by the vessels and the vessel operators while the charge in sub-head (a) (given that it was apparently envisaged it might be passed on the to passengers,) is imposed by reference to the use made by the passengers although the actual use by the vessels involved is essentially the same in each case.

64. It is true of course that no charge is payable by the plaintiff's vessel when it departs Rossaveel harbour with no passengers – not an infrequent occurrence outside the tourist season according to Mr O'Brien. This however underlines the distorting and potentially discriminatory basis upon which Charge No. 10 has been formulated. When the plaintiff's vessel departs empty it pays no "entry charge" but a vessel with a complement of 99 coming within sub-head (b) pays €40 although (vessel sizes apart,) the facility use made by the vessel in entering and leaving the harbour is effectively identical. (See by way of analogy the assessment by the European Commission of the different rates for piloting services when the service provided to vessels was essentially the same in its Decision of 21 October 1997 cited at paragraph 77 below.)

65. For this reason the Court considers that the divergence between the per capita passenger charge for vessels coming under sub-head (a) and the different basis of charge for the remaining sub-heads was unreasonable and oppressive in the disproportionate and distorting effect of its impact. If the charge is to be imposed on passengers for their use of the harbour facilities there does not appear to be any objective justification for imposing it on 99 passengers when embarking in the plaintiff's vessel but not on 99 passengers when embarking on a vessel within sub-head (b).

66. The Court accordingly considers that the plaintiff has discharged the onus of establishing the unlawfulness of the per capita passenger charge imposed by the 2003 Order. There will therefore be an order of the Court declaring unlawful as *ultra vires* the particular provision of the 2003 Order applicable to the plaintiff namely, Charge No. 10 (a) of Schedule 1 which is clearly severable from the remainder of the Order.

67. In these circumstances it is unnecessary to consider the issues raised as to the compatibility of the provisions of the 2003 Order and of the Act of 1968 with the Constitution. The Statement of Claim also includes claims for declaratory relief as regards the alleged invalidity of Bye law 85 of the 1979 Bye laws and Bye law 4 of the 1999 Bye Laws as *ultra vires* the Act of 1968. In the judgment of the Court, to the extent that these claims have been addressed in the submissions they have not been made out. The measures in question are unquestionably within the scope of the powers created by the Act and clearly necessary and reasonable for the efficient, orderly and safe management of such a harbour.

68. It is not necessary to consider either, at least in detail, the second issue raised as to the alleged abuse by the Minister of a dominant position rendering the 2003 Order illegal as a violation of s. 5 of the Competition Act 2002. The essential grievance of the plaintiff is directed at the increased dues imposed by Charge No. 10 (a) of the 2003 Order and the subsequent allegedly unlawful detention of the vessel. As these grievances are effectively met by the order the Court will make the plaintiff will be relieved of the claims made for payment of those dues. In addition, the plaintiff will presumably seek to recover as damages, any losses incurred as a result of the wrongful detention of its vessel.

69. Furthermore, if the Court is correct in finding that the Minister acted unlawfully in employing the power conferred by s.4 of the Act of 1968 to impose the particular passenger charge with the consequence that the corresponding amounts of the counterclaim are thus irrecoverable, it must follow in the view of the Court that there can be no infringement of the prohibition in s. 5 of the Act of 2002.

70. The prohibition in s. 5 is directed at market distorting conduct made possible by the misuse of a position of influence over a market held by (usually) a single undertaking. The classic definition is that of the Court of Justice in the United Brands Case as:

> "A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it a power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. In general it derives from a combination of factors which taken

separately are not determinative." (Case 27/76 *United Brands v Commission* [1978] ECR 207.)

71. It is well settled that the achieving by an undertaking of such a dominant position in the market is not of itself unlawful nor is there any necessary abuse involved in the continued exploitation by a dominant undertaking of the talents for efficiency, productivity, innovation or customer satisfaction which have enabled it to achieve that dominance. A dominant undertaking does, however, have a position of "special responsibility" to avoid conduct which impairs a genuine undistorted competition in its market. (*Michelin v. Commission* [1983] E.C.R. 3461, Para. 57).

72. What is crucial to the concept of "abuse", in the view of the Court, is that a dominant undertaking uses its position of market power in a way which, while otherwise possibly lawful, has as its purpose or effect the exacting of some additional gain or collateral advantage made possible for it only because of its ability to ignore the likely reaction of affected undertakings in that market. It can so conduct itself to its advantage because affected undertakings have no option but to continue dealing with it. Where a dominant undertaking avails of its market power to impose excessive or unfair prices which have no objective justification in order to extract a rent or generate revenues in order to cross subsidise some wholly unrelated activity, that undertaking may infringe section 5.

73. In this case the abuse alleged against the Minister consists of his use of his statutory control over the operations of the harbour and his ability to fix prices for use of facilities unilaterally under s. 4(2)(b) of the Act of 1968 to extract additional revenues in order to defray a deficit accumulated in the Fund by the imposition of prices which are excessive, unfair and discriminatory. Had the ferry operators an option of avoiding those charges by switching to another suitable harbour from which a viable service might be operated, the Minister could not have imposed the charges without risk of loss of all revenue from passengers services. However, as the Court has held that the attempt to impose those charges has failed, the abuse has not occurred and the coercive use of the market power has not taken place. The situation is somewhat analogous to that of an undertaking with a dominant position attributable to ownership of some intellectual property such as a patent which is accused of abuse by imposing discriminatory conditions on licences of the patent. If it transpires that the patent is invalid so that the technology is in the public domain and the licences are unnecessary, the abuse does not occur. It is only where the market power derived from the intellectual property right is real and enforceable that the exercise of the right can become an abuse. (See for example Case T-69/89 *RTE v Commission* (1991) ECR II-485, where the complaint of abusive refusal of a copyright licence was upheld, the challenge to the validity of the copyright having failed in the national court.)

The Claim under s.5 of the Competition Act 2002

74. While the Court is so holding with the result that it is unnecessary to adjudicate on the claim made under s. 5 of the Competition Act 2002, the Court will briefly outline its view of that claim in case the parties may wish to appeal this judgment to the Supreme Court and in deference to the investment the parties made in the litigation of the issue and the attention given to it at the hearing. If it should be held that the 2003 Order was valid and that the Minister accordingly had the power to impose the charge in question, it is clearly desirable to place the Supreme Court in a position to resolve the litigation definitively without having to remit the issue for consideration by the High Court at a date even more distant from the date of making of the 2003 Order.

75. First, in the judgment of the Court the Minister is clearly an "undertaking" within the definition of that term in s. 3(1) of the Act of 2002. He operates a facility – the harbour – with commercial activities and purposes and does so by allowing a variety of operators providing commercial services (including fishing vessels, fish processors, suppliers of various services and materials, ferry operators, car parking and so on) in return for the various dues, tolls and other charges imposed. The fact that the Minister as a public authority is not required to operate the harbour on a profit making basis as may be the case in other semi-State enterprises is irrelevant once the harbour facilities and services are provided for gain. (See *Deane v.VHI* [1992] IR 319).

76. It is also clear that because of its geographic location, its proximity to the Aran islands and its distance from Galway city as well as its orientation, water depth and other characteristics, Rossaveel harbour is effectively an essential facility for any operator wishing to provide regular sea transport services between the mainland and the islands. The distance by sea to Galway harbour from the islands is such that that harbour is not a viable alternative to the Rossaveel Harbour/bus service to Galway option.

77. In that regard it is clear that the Minister as operator of the harbour occupies a dominant position in respect of the market for the provision of facilities for the operation of sea transport services and particularly passenger services to the Aran Islands. As such, the Court is satisfied that the prohibition of s. 5 of the Act of 2002 is applicable in principle to the conduct of the Minister in providing the facilities and services at Rossaveel Harbour. In this regard the Minister's position is not materially distinct from that of other comparable harbour authorities or harbour service operators. (See, for example Case C-179/90 *Porto di Genova* [1991] ECR I-5889; the Decisions of the European Commission of 21 October 1997 on piloting services in the Port of Genoa (1997) OJ L301/27; and of 21 December 1993 on refusal of access to facilities in the Port of Rodby (1994) OJ L 55/52)

78. For the reasons already given above in relation to the invalidity of the 2003 Order, the Court considers that the imposition of the per capita passenger charge by that Order on one class of harbour user, (had it been otherwise lawfully imposed,) would have infringed s.5 of the Act of 2002.

79. It is the case, of course, that excessive pricing as such by a dominant undertaking is not necessarily abusive: it may well have the effect of attracting new market entrants and be short-lived. At Rossaveel however, a new entrant is not possible as no other viable harbour for passenger ferries could be brought into operation in the vicinity in any reasonable timescale and probably not without the permission of the State in any event.

80. It is also the case that abuse on the part of a dominant undertaking in the form of excessive pricing is not easily established in that it is usually necessary to demonstrate that the prices bear no reasonable relation to the economic value of what is supplied. It is normally necessary to point to some comparative basis of pricing to demonstrate the degree of the alleged excess. (See for example United Brands and Case 30/87 *Bodson v. Pompes Funebres* [1988] ECR2479.) Although as mentioned above, the Department had regard to the fact that passenger-user fees were imposed at other ferry ports in the State, it is clear to the Court that no assessment was made of the comparative value or cost of the services provided to passengers at those ports and at Rossaveel when it was decided to introduce the charge. This was because as indicated earlier, the objective was not to charge a fee based upon the value or cost of the service provided but to exploit the passenger traffic in question as a new source of revenue.

81. In seeking to generate new revenue the Minister was of course both addressing the deteriorated finances of the fishery harbour centres and seeking to further the primary statutory objective of the 1968 Act namely, the promotion of the fishing industry. The major shift in the respective contributions to the operating costs of Rossaveel from the fishing operations to the ferry operators thus involved a degree of cross subsidisation of the former by the latter. Such a policy if carried out by a purely commercial dominant undertaking would, in the view of the Court, infringe the prohibition in s.5 of the 2002 Act at least in the absence of an objective justification for the amount of the charge and for its differential basis of treatment of vessels with permitted complements of more

and less than 100.

82. The fact that the Minister has a statutory function and duty to promote the fishing industry does not however alter the effect of the prohibition in s.5. It must be borne in mind that once it is established that a Minister or any other public authority is an "undertaking" and that the undertaking occupies a dominant position in the relevant market, the competition rule applies as it stands. Unlike Article 106 of the Treaty on the Functioning of the European Union, the Competition Acts 2002- 2006 contain no provision which mitigates or alters the prohibition in deference to the obligation of a public undertaking to discharge public interest tasks or to exercise special or exclusive rights.

83. For the sake of completeness the Court would add that in its judgment, the corresponding prohibition in Article 102 TFEU has no application in the context of these claims. Insofar as the conduct alleged against the Minister can be shown to have an effect on trade, it is purely domestic. There is no evidence of any effect actual or potential on inter-state trade. In effect, any adverse impact on the trade of the plaintiff company would appear to be confined to its ability to compete with other tourist attractions in Galway, Clare and possibly Mayo (see paragraph 24 above,) and on its competition with other ferry operators at Rosssaveel and particularly any operators who might enter the market using vessels with a permitted complement of 99 or less.

84. In conclusion, it must be emphasised that this assessment of the claim under s.5 of the Competition Act is given conditionally for the reasons given above and has no bearing on such of the remaining issues as may yet require to be decided in this case in the High Court.