Neutral Citation Number: [2011] IEHC 427

THE HIGH COURT

2010 471 P

BETWEEN

CARBERY FISHING LIMITED

PLAINTIFF

AND

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

DEFENDANTS

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

1. The factual background

1.1 The plaintiff, a company incorporated in the State, carries on the business of fishing. It is the owner of a licensed sea-fishing boat, the MFV "Atlantic Quest", which is in the polyvalent (multipurpose) general segment of the fishing fleet. In order to conduct the aspect of its business in issue in these proceedings, which is fishing for mackerel, the plaintiff has to engage with two regulatory regimes: it has to be the holder of a sea-fishing boat licence and it has to have an authorisation from the first named defendant (the Minister) to fish for mackerel. The two regulatory regimes are distinct. The issues which the Court has to determine in this case arise from the following factual circumstances:

> (a) that the plaintiff decided in 2009 to modify the MFV "Atlantic Quest", in consequence of which the plaintiff required the approval of the licensing authority, namely, the Licensing Authority for Sea-Fishing-Boats (the Licensing Authority) and the issuance of an amended sea-fishing boat licence; and
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> (b) that in July 2009 the Minister embarked on a review of eligibility for mackerel and herring fishing and the internal allocation of mackerel to vessels in the polyvalent fleet.

1.2 Dealing with the licensing of the MFV "Atlantic Quest" first, in 2009 the plaintiff was the holder of a licence for the purposes of s. 4 of the Fisheries (Amendment) Act 2003, as inserted by s. 97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006 (the Act of 2006), which had been issued by the Licensing Authority on 1st October, 2008 and which covered the period from 1st October, 2008 until 30th September, 2011. Although this does not appear on the face of the licence, the registered length of the vessel when that licence issued was under 65 feet (or 19.81 metres). By letter dated 24th April, 2009, the plaintiff notified the Licensing Authority of its intention to modify the vessel by lengthening it to 19.83 metres registered length. In connection with that notification, the Licensing Authority was requested by the plaintiff to inform it of the requirements to get the vessel modified and subsequently licensed and registered and the Licensing Authority was also asked to confirm whether, if the plaintiff went ahead with the modification, the plaintiff would be in a position to maintain its existing pelagic entitlement in relation to the vessel. The significance of the pelagic entitlement was that, in the case of vessels with a registered length over 65 feet, the issue of an authorisation permitting the vessel to fish for herring or mackerel was dependent on it having an "active pelagic history", which in 2009, on the basis of a moratorium which had been introduced in 2002 and had been extended in the subsequent years up to and including 2008, involved being able to show that the vessel had fished during the years 2005, 2006, 2007 and 2008 for herring and mackerel for eight weeks in each year.

1.3 The response of the Licensing Authority, which was contained in a letter of 18th May, 2009, is of particular significance to the issues before the Court. It stated as follows:

> (a) the Licensing Authority thereby "in principle, subject to formal approval by the Marine Survey Office", approved the proposed lengthening of the vessel;
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> (b) that it should be noted that the approval in principle by the Licensing Authority referred exclusively to the issue of a sea-fishing boat licence and any queries regarding quota allocation should be referred to the Minister's Department;
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> (c) that on the basis of the then current pelagic history of the vessel, while it did not meet the requirement of eight weeks in 2005, it did meet the requirement of eight weeks in 2006, 2007, 2008 and 2009 and, consequently, could not be considered as having an active pelagic history until the year 2010;
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> (d) if the vessel was lengthened to 19.83 metres during the year 2009, the amended sea-fishing boat licence to be issued in respect of the post-modified vessel for the year 2009 would preclude it from fishing for herring and mackerel from the date of issue to 31st December, 2009, because the active pelagic history would not be fulfilled until 2010, but the licence in respect of the period commencing on 1st January, 2010 would contain no such preclusion; and
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> (e) that the letter concerned licensing of the vessel only and did not in any way concern the allocation of quota, reiterating what was stated earlier, as recorded at (b) above, which was in bold print in the original.

That letter drew a clear distinction between the function of the Licensing Authority in issuing a sea-fishing boat licence and the function of the Minister in allocating quota.

1.4 The intention to extend the registered length of the vessel was implemented in due course and a certificate of survey in respect of the vessel was issued by the Marine Survey Office on 18th November, 2009. Thereafter, on 3rd December, 2009, the Licensing Authority issued a sea-fishing boat licence in respect of the vessel for the period commencing on 3rd December, 2009 and ending on 31st December, 2009 and, as had been signposted in the letter of 18th May, 2009, it was a condition of the licence that fishing for mackerel and herring was precluded. On 15th December, 2009 a sea-fishing boat licence for the period 1st January, 2010 to 30th September, 2011 issued, and, as also signposted in the letter of 18th May, 2009, there was no mackerel and herring preclusion

conditioned into the licence. Accordingly, the position as of 1st January, 2010, was that the MFV "Atlantic Quest" was licensed as a vessel with a registered length of over 65 feet with an active pelagic history. Counsel for the plaintiff laid particular emphasis on the fact that the vessel was licensed with a registered length of over 65 feet before the Minister made any decision on foot of the review of eligibility for mackerel and herring fishing, which he had embarked on in the year 2009.

1.5 Before outlining what was represented by the Minister to the owners of vessels in the polyvalent fleet in relation the review he was embarking on, it is convenient to outline how mackerel fishing was managed from 2001 onwards, which counsel for the plaintiff relied on as manifesting a course of conduct, although counsel for the defendants pointed out that the course of conduct on the part of the Minister contended for was not part of the plaintiff's case as pleaded. As I outlined in my judgment in *Meade v. The Minister for Agriculture, Fisheries and Food* [2010] IEHC 105, which case arose out of similar circumstances to the circumstances of this case, the State's mackerel quota is allocated between Refrigerated Sea Water (RSW) vessels and polyvalent vessels, including hand liners, hand liners being allocated a set quantity. Under an arrangement which commenced in October 2001, the total mackerel catch for polyvalent vessels was capped at 7,000 tonnes, of which 1,500 tonnes were set aside for vessels of under 65 feet registered length. Between 2001 and 2005 there were no specific management arrangements in place for the polyvalent mackerel fishery, which operated on a "first come, first served" basis. However, in 2006 a new management regime was introduced for the under and over 65 foot registered length vessels. The new arrangements involved vessels "booking in" and being granted a quota allocation for a set period during the two fisheries in the year, the Spring fishery and the Autumn fishery. In January 2009, the Minister decided that 13% of the State's mackerel quota would be allocated to the polyvalent segment. After allocating a set quantity of 400 tonnes for hand-liners, it was decided that the balance of the polyvalent allocation would be divided between vessels with a registered length of over 65 feet (81.5%) and vessels with a registered length of under 65 feet (18.5%).

1.6 The proposed review was announced by the Minister, or, more accurately, by the Minister of State at the Minister's Department, by letter dated 24th July, 2009 to the Chairman of the Federation of Irish Fishermen (FIF). That letter, as I read it, addressed two matters, namely, licensing policy and quota allocations, and, indeed, the heading to the letter bears that out. In relation to licensing policy, the letter outlined the existing position as follows:

> "… vessels in the polyvalent segment of the fleet 65 ft. in registered length and under are all permitted to fish for herring and mackerel under their Sea Fishing Boats Licence subject to the quota management arrangements in place. The Polyvalent segment of the fleet is segmented into 18m and over and under 18m in length for replacement capacity purposes. The capacity of vessels between 18m and 19.81m (65 ft) may if it builds up the necessary 'active pelagic' history be used to introduce vessels into the over 65 category without a pelagic preclusion attached to the licence i.e. the vessel will be permitted to fish for herring and mackerel. For vessels over 65 ft. in registered length, mackerel and herring fishing to be restricted to vessels without a preclusion in their licence and when a new vessel is being introduced the replacement capacity must have an 'active pelagic' history in order for the vessel to remain without the preclusion. This policy on 'active pelagic' history has been subject to interim arrangements in recent years."

In relation to that policy, the Minister invited views as to whether it should be changed or modified to, *inter alia*, limit increases in the number participating to then current levels or even to reduce numbers. Views on the then current arrangements for determining "active pelagic" history were also requested.

1.7 In relation to the second matter, the then current arrangements for quota allocations, proposals for modification of them were invited. The then current arrangements were outlined as follows:

> "… the current arrangements for allocation of mackerel is based on the licensing arrangements whereby the polyvalent mackerel allocation is divided between vessels 65 ft. and under in registered length and over 65 ft."

1.8 A *caveat* was included in the Minister's letter which is of particular significance in the context of the issues before the Court. It stated:

> "I do not intend to make any further changes in licensing policy in respect of 'Active Pelagic' history until this review has been completed. In addition, it is important to make clear to your members that the review may change the criteria for determination of mackerel allocation and the allocation of other pelagic stocks within the polyvalent segment of the fleet. Any actions planned or recently taken by owners may not qualify them for an increased share of these stocks. **In particular, owners with vessels currently in the 65 ft. and under category for mackerel and other pelagic stock allocations who are intending to modify their vessels should be aware that such modification may not secure entry into the over 65 ft. mackerel and other pelagic fisheries."**
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> (Emphasis added)

Subsequently, the Minister elicited the views of the industry and held a meeting with industry representatives on 18th December, 2009 to discuss the issue. It is hardly surprising that the Minister found, as he subsequently outlined in his letter of 15th January, 2010 to the FIF referred to below, that there were substantially divergent views within the industry on changes to the mackerel management arrangements.

1.9 However, at the beginning of 2010 no decision had been made on foot of the Minister's review.

1.10 The State's final national allocation of mackerel quota for 2010 had not been agreed at EU level at the beginning of 2010 because bilateral negotiations between the EU and Norway had not been completed. At the December 2009 Fisheries Council an interim national quota for 2010 at 65% of the 2009 quota was set.

1.11 In the letter of 15th January, 2010 to the FIF, the Minister of State set out his proposal for the Spring 2010 season as follows:

> "My proposal is to continue with current O65 ft. and U65 ft. arrangements with the exception of a new allocation based on 50% of the O65 ft. allocation for the four participating vessels which were lengthened in 2009. I also propose to transfer 300 tonnes of quota from the U65 ft. to the O65 ft. sector for distribution in the Spring fishery."

The proposal, if implemented, would effectively have created a third category of a vessel for allocation purposes, namely, the four vessels which were lengthened in 2009, including the MFV "Atlantic Quest". Obviously, the plaintiff's directors, Denis Carbery and Paul Carbery, had "wind" of that proposal. The solicitors who are acting for them in these proceedings, D. P. Barry & Co., wrote to the Minister on 15th January, 2010 referring to the "recent indication" that the MFV "Atlantic Quest", which was one of the "four participating vessels" referred to in the Minister's letter, would be entitled to only 50% of the amount allocated to other vessels in its

sector. It was stated that, as the plaintiff had undertaken the lengthening process before there was any such indication from the Department that it was reviewing existing eligibility rules, it "obviously had a legitimate expectation that it would secure a equal allocation to all other vessels in the sector". The response from the Minister's Department of the same date pointed to the *caveat* in the letter of 24th July, 2009, which I have quoted above.

1.12 In fact, the Minister did not implement that proposal in relation to the Spring 2010 season, but instead made a decision on 27th January, 2010, which was less favourable to the plaintiff than the proposal would have been if implemented. The decision was communicated to the fishing industry on the following day. By e-mail dated 28th January, 2010 from the Minister's Department, the representatives of the industry were informed that it had been decided "to freeze all quota management arrangements as they were in the Spring of 2009 pending the evaluation and consideration of long-term arrangements as part of the current mackerel review". That was explained as meaning, in effect, that all vessels would continue to be treated for quota allocation purposes as they were in 2009. In relation to the MFV "Atlantic Quest", what that meant was that, notwithstanding that it was now licensed in the over 65 foot category, without preclusion, it was allocated quota on the same basis as it had been in the year 2009, that is to say, in the under 65 foot category.

1.13 On 28th January, 2010 an authorisation was issued on behalf of the Minister to the plaintiff under s. 13 of the Act of 2006 in respect of the fishing period from 31st January, 2010 to 28th February, 2010, under which the MFV "Atlantic Quest" was authorised to catch 32 tonnes of mackerel. On the same day, another vessel, which was treated as being in the over 65 foot category, the MFV "Village Queen", was authorised to catch 263 tonnes of mackerel in the fishing period from 31st January, 2010 to 7th April, 2010. These proceedings were already in being, having been initiated by a plenary summons which issued on 20th January, 2010, when the Minister made his decision on 27th January, 2010 in relation to the allocation of quota for the Spring 2010 season.

1.14 As the ambit of the plaintiff's case as pleaded was put in issue on behalf of the defendants on a number of counts at the hearing, it is necessary to consider the pleadings in some depth.

2. The plaintiff's case as pleaded

2.1 The statement of claim was delivered by the plaintiff's solicitors on 19th February, 2010. The history of the management of the polyvalent mackerel fishery is briefly narrated in the statement of claim, as is the plaintiff's decision to extend the registered length of the MFV "Atlantic Quest" and the contents of the letter dated 18th May, 2009. It is stated that the Minister approved the proposed lengthening in principle. That is not correct. It was the Licensing Authority which gave the approval in principle. It is also narrated that the MFV "Atlantic Quest" was one of four vessels which were lengthened in 2009 with the intention of fishing for pelagic species in the over 65 foot category of the fleet. The Minister's letter of 24th July, 2009 is also referred to and the passage to which I have added emphasis in para. 1.8 above is quoted. It is specifically pleaded that that letter issued "after the plaintiff had undertaken the lengthening process". The correspondence of 15th January, 2010 referred to at para. 1.11 above is then narrated. It is pleaded that the plaintiff, through its representative body and directly by letter dated 19th January, 2010, furnished specific written comments on the letter of 15th January, 2010 from the Minister of State to FIF. The initiation of these proceedings is then referred to. I will return to the aspect of the plaintiff's claim which is founded on these proceedings having been initiated before the Minister's decision of 27th January, 2010 was made later.

2.2 The main thrust of the plaintiff's case centres on the Minister's decision of 27th January, 2010, which was conveyed by the e-mail of 28th January, 2010 from his Department referred to at para. 1.12 above, and the mackerel authorisation issued to the plaintiff on 28th January, 2010. It is pleaded that, by issuing the mackerel authorisation, the defendants thereby discriminated unlawfully between the plaintiff's vessel and other polyvalent vessels in the over 65 foot segment of the fleet. It is specifically pleaded that, notwithstanding the *caveat* in the letter of 24th July, 2009, the plaintiff's vessel, by earlier authorisations which are identified, had been admitted into the over 65 foot fishery in relation to other pelagic species, namely, horse mackerel and north western herring (which authorisations were dated respectively 16th December, 2009 and 5th January, 2010). Having narrated that the letter of 18th May, 2009 defined active pelagic history as "a boat with an active pelagic history of at least sixteen weeks in each of the previous four years" and that vessels in the over 65 foot category must have an active pelagic history, it is pleaded that, as the Minister had not absolved the plaintiff from the requirement of an active pelagic requirement of at least sixteen weeks, the plaintiff had to fish for the full sixteen weeks, notwithstanding that within a short period of time it had caught the 32 tonnes of mackerel allocated to it in the mackerel authorisation. I am unclear as to the significance of that plea, as the validity of the Minister's decision by reference to his power under s. 13 of the Act of 2006 has not been challenged. Its import may relate to the plaintiff's claim for damages and the quantification thereof.

2.3 What I consider to be the nub of the plaintiff's case is contained in para. 15 of the statement of claim in which it is pleaded that, in consequence of the matters narrated, which I have outlined, the Minister has breached the plaintiff's legitimate expectation that the MFV "Atlantic Quest" would be treated the same as other vessels in the over 65 foot category of the fleet, particularising the following matters, namely:

> (a) although the Minister made clear in the letter of 18th May, 2009 that his consent (and again it must be emphasised that it was the consent of, and the letter was from, the Licensing Authority) to the lengthening of the plaintiff's vessel did not affect quota, it was not indicated that the Minister proposed to discriminate between vessels in the over 65 foot category;
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> (b) the first indication the plaintiff received that this was a possibility was the letter of 24th July, 2009, after consent in principle had been given to the lengthening of the plaintiff's vessel;
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> (c) the plaintiff had a legitimate expectation at the time consent was given in principle to the lengthening of the vessel that the plaintiff would be treated equally with other vessels in the over 65 foot category;
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> (d) the Minister's decision of 27th January, 2010 breaches that legitimate expectation and unfairly discriminates between the four vessels that were lengthened in 2009 and other vessels in the over 65 foot class without giving reasons justifying the discrimination; and
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> (e) if the plaintiff had been aware that this discrimination was a possibility, it would not have incurred the expense of lengthening the vessel.

2.4 The plaintiff's solicitors' response to the defendants' request for particulars identifies the letter of 18th May, 2009 as giving rise to a legitimate expectation, in that there was no indication in the letter that the plaintiff's vessel would be treated differently from other vessels in the over 65 foot class in the allocation of quota. It is contended that the decision on 27th January, 2010 breaches the legitimate expectation of the plaintiff, in that it treats the plaintiff's vessel differently from other vessels in the over 65 foot class in

the allocation of quota. Further, it is contended that the decision unfairly discriminates, in that some vessels in the over 65 foot category were awarded a quota allocation of 263 tonnes and other vessels in the same category, such as the plaintiff's vessel, were awarded an allocation of 32 tonnes.

2.5 It is also pleaded in the statement of claim that, in consequence of the matters narrated, the plaintiff's constitutional rights have been breached in that, it is alleged, the defendants –

> (a) failed to defend and vindicate the personal rights of the plaintiff in breach of Article 40.3.1 of the Constitution,
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> (b) failed to protect from unjust attack the property rights of the plaintiff in breach of Article 40.3.2,
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> (c) failed to respect the property rights of the plaintiff and to regulate those property rights in accordance with the principles of social justice in breach of Article 43.2.1, and
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> (d) failed to delimit by law in accordance with the exigencies of the common good the property rights of the plaintiff in breach of Article 43.2.1.

2.6 As regards these proceedings, which, as I have recorded, were initiated by a plenary summons which issued on 20th January, 2010, before the Minister's decision was made on 27th January, 2010, it is pleaded that on 22nd January, 2010 the plaintiff applied for, and was granted, short service of a notice of motion seeking a *quia timet* injunction restraining the Minister from discriminating unlawfully between the plaintiff's vessel and other polyvalent vessels in the over 65 foot category, but, notwithstanding the fact that the Minster was on notice that the plaintiff had issued the proceedings, the Minister made the decision of 27th January, 2010. It is pleaded, that by so doing, the Minister interfered with the plaintiff's constitutional right pursuant to Articles 34 to 37 of the Constitution to have the *quia timet* injunction determined by the judicial organ of the State.

2.7 The primary relief sought by the plaintiff is a declaration that the MFV "Atlantic Quest" was entitled to fish from the over 65 ft. allocation of the Spring 2010 Mackerel Fishery. Whether the plaintiff is entitled to a declaration in those terms is the issue which the Court has to determine in this judgment. The plaintiff also claims damages on the basis of loss and damage suffered as a result of the Minister's decision, but the parties agreed that the issue of damages should be left over until the issue of liability is dealt with. Finally, the plaintiff also sought injunctive relief restraining the Minister from excluding the plaintiff from the over 65 ft. allocation in the Autumn 2010 season, but that claim was moot before the action came on for hearing.

2.8 The defendants' defence was delivered on 11th May, 2010. In it, in broad terms, the defendants pleaded that the factual matters narrated in the statement of claim did not give rise to any cause of action known to law. It was specifically pleaded that no assurance, representation, undertaking, statement or promise was given to the plaintiff by the defendants with regard to the entitlement of the plaintiff's vessel to receive authorisations to fish for specific species. The Minister was entitled to exercise his discretion to allocate fishing opportunities on the same basis as they had been allocated in 2009. There are no grounds for contending unlawful discrimination. The Minister did not breach the plaintiff's legitimate expectation and, without prejudice to that, no legitimate expectation could arise in circumstances where no specific promise was made by or on behalf of the Minister to act in a certain way. Breach of the plaintiff's constitutional rights is denied. It is specifically pleaded that the manner which fishing opportunities are allocated to polyvalent fishing vessels continues to be the subject of review by the Minister in accordance with, and within the competence of, his statutory powers and functions.

2.9 It remains to tease out the relevance of the reference to the mackerel authorisation issued to the MFV "Village Queen", which was treated as being in the over 65 foot category for the Spring 2010 season. As I understand the position, the MFV "Village Queen" (which I understand is owned by a person or corporation not before the Court in these proceedings or the related proceedings referred to at para. 2.11 below) is not one of the four vessels referred to in the statement of claim as having been lengthened in 2009 with the intention of fishing for pelagic species in the over 65 foot category of the fleet. In an affidavit sworn by him in these proceedings on 5th February, 2010 to ground the intended interlocutory application, Denis Carbery voiced the plaintiff's grievance in relation to the treatment of the MFV "Village Queen" by averring that he believed that that vessel had been admitted to the over 65 foot category for Spring 2010 but that it had not been in the over 65 foot category for Spring 2009. In his oral evidence, he explained that the vessel came on to the Irish fishing register for the first time in September 2009, never having fished for any pelagic species previously, but had acquired capacity from an active pelagic vessel, which at the time was off the register. Mr. Carbery's point, as I understand it, was that in Spring 2010 the MFV "Village Queen" was given full allocation in the over 65 foot category, although it had not fished in the over 65 foot category in Spring 2009. He contended that the Minister thereby resiled from the "freezing" effect of his decision of 27th January, 2010, which should have applied to the MFV "Village Queen" in the same way as it applied to his vessel, because its position was no different to the position of his vessel.

2.10 In response to Mr. Carbery's averment, Ms. Josephine Kelly, a Principal Officer in the Department, averred in an affidavit sworn by her on 19th February, 2010:

> "The 'Village Queen' was licensed and registered as a sea fishing boat on 14th September, 2009. This vessel is 20.60 metres in registered length. The replacement capacity used to introduce the "Village Queen" was from a vessel 22.23 metres in registered length, which was removed from the Sea Fishing Boat Register on 15 April 2008. This capacity had the necessary track record as an over 65 ft. (19.81 metres) vessel in fishing for mackerel and herring. Thus, the 'Village Queen' was not precluded in its sea fishing boat licence to fish for herring and mackerel. It is because the vessel replaced another vessel that already had an over 65 foot capacity that it was allocated a different quantum of mackerel."

That averment was reflected in Ms. Kelly's oral evidence. While the MFV "Village Queen" had not fished in Spring 2009, it replaced a vessel in the over 65 foot category and, as Ms. Kelly pointed out during her cross-examination, for the purposes of the 2010 fishing season, it was treated the same as its predecessor.

2.11 The position put forward on behalf of the defendants at the hearing was that no point was pleaded by reference to the MFV "Village Queen". However, the Court ruled that the evidence should be taken *de bene esse*. It was argued on behalf of the defendants that, in any event, that vessel's position differed from that of the MFV "Atlantic Quest" and also from that of –

> (a) the MFV "Eternal Dawn", which is the subject of related proceedings which were heard together with these proceedings – *Fintra Trawling Company Ltd. v. The Minister for Agriculture, Fisheries and Food, Ireland and the Attorney General* (Record No. 2010/472P), and
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> (b) the MFV "Buddy M", which was the subject of the Meade proceedings.

As Ms. Kelly pointed out in cross-examination, the MFV "Village Queen" had a different "pedigree".

3. Statutory framework
3.1 As I have stated, the sea-fishing boat licences granted to the MFV "Atlantic Quest" were granted by the Licensing Authority pursuant to s. 4 of the Fisheries (Amendment) Act 2003, as inserted by s. 97 of the Act of 2006. No issue arises on the plaintiff's case in relation to the grant of the licence and, accordingly, I consider that it is not necessary to address s. 4 any further.

3.2 The nub of the plaintiff's case concerns the exercise by the Minister of the statutory power to grant a mackerel authorisation pursuant to s. 13(1) of the Act of 2006. Section 13 is to be found in Chapter II of the Act of 2006, which deals with the regulation of sea fishing. Section 13(1) provides that the Minister may, for the proper and effective management and conservation and rational exploitation of fishing opportunities and fishing effort for Irish sea-fishing boats under the EU common fisheries policy, at his or her discretion, grant an authorisation to fish for a specified fish stock or groups of fish stock. A very broad discretion is given to the Minister in s. 13 in relation to granting, renewing, refusing and attaching conditions to authorisations.

4. The issues
4.1 The issues which the Court has to address, in summary, are:

> (a) whether the Minister's decision of 27th January, 2010 was in breach of a legitimate expectation of the plaintiff to be treated in the over 65 foot category for the allocation of the 2010 Spring mackerel quota;
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> (b) whether that decision infringed the plaintiff's right to property as protected by the Constitution; and
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> (c) whether that decision infringed the plaintiff's right of access to the Court to obtain a *quia timet* injunction.

I will deal with each of the issues separately.

4.2 The Court has had the benefit of comprehensive written and oral submissions from both sides, which will be referred to as necessary.

5. Legitimate expectation
5.1 There is little or no divergence between the parties as to the principles which the Court should apply in determining whether a litigant is entitled to a remedy under the doctrine of legitimate expectation. Both parties cited the classic statement of the relevant principles by Fennelly J. in *Glencar Exploration v. Mayo County Council* [2002] 1 I.R. 84. Fennelly J. stated (at p. 162 – 163):

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that 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 me to be preconditions for the right to invoke the doctrine."

5.2 Both parties referred to the application of those principles in the High Court by Clarke J. in two cases: *Lett & Co. v. Wexford Borough Council* [2007] IEHC 195; and *Atlantic Marine Supplies v. Minister for Transport* [2010] IEHC 104, now reported at [2011] 2 ILRM 12. Counsel for the defendants also cited *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160 and *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20. The principles outlined in the earlier authorities were characterised by Clarke J. in the *Lett & Co.* case (at para. 4.7) as encompassing both positive and negative factors which must be found to be present or absent in order that a party can rely on the doctrine of legitimate expectations. Apropos of those negative factors he stated:

> "The negative factors are issues which may either prevent those three tests [i.e. the *Glencar* tests] from being met (for example the fact that, as in *Wiley*, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall*, legitimate changes in executive policy to take place."

5.3 There was a total divergence between the parties as to the application of the *Glencar* principles to the facts of this case. Predictably, the position of counsel for the defendants was that, as pleaded in the defence, no assurance, representation, undertaking, statement or promise had been given to the plaintiff by the defendants as to the entitlement of the plaintiff's vessel to receive authorisation to fish for specific species. Not only that, it was emphasised that the defendants had expressly warned the plaintiff that the lengthening of its vessel would not necessarily secure an increased mackerel allocation. Further, it was submitted on behalf of the defendants that, having regard to the decision in the *Wiley* case, the doctrine of legitimate expectation could not be extended to restraining the defendants from setting more stringent standards in the exercise of their statutory duty without notice to any person and could not require the respondents to grant a concession to the plaintiff to which it was not entitled. By reference to the decision in *Hempenstall*, it was submitted on behalf of the defendants that the doctrine could not operate to prevent the Minister from exercising his statutory powers and discharging statutory functions or to fetter his discretion in adopting or not adopting policy.

5.4 Before addressing the submissions on the application of the doctrine of legitimate expectation made on behalf of the plaintiff, I think it is worth recalling that the legitimate expectation on the part of the plaintiff which is pleaded is that the MFV "Atlantic Quest" would be treated the same as other vessels in the over 65 foot category and that the declaration sought is that the vessel was entitled to fish from the over 65 foot allocation of the Spring 2010 allocation. Notwithstanding that the bases on which it was submitted on behalf of the plaintiff that it is entitled to such declaration go beyond the case as pleaded, I propose considering all of the arguments advanced by counsel for the plaintiff.

5.5 One basis on which the plaintiff contends that the doctrine of legitimate expectation comes into play is the approval in principle of the lengthening of the MFV "Atlantic Quest", the plaintiff's case being that the *Glencar* principles are complied with and the three

tests set out by Fennelly J. have been met.

5.6 As regards the first test, it was emphasised that the plaintiff formally indicated its intention to lengthen the registered length of the MFV "Atlantic Quest" so as to secure entry into the over 65 foot category and the letter of 18th May, 2009 from the Licensing Authority granted approval for that. While it was acknowledged that the letter pointed out that the application and approval related to licensing rather than quota allocation, the plaintiff called in aid the course of conduct since 2006, under which quota was allocated on an over 65 foot and under 65 foot basis, to support the submission that that approach amounted to the adoption of a position by the Minister, which gave rise to an implicit promise or representation as to how he would act in relation to an identifiable area of activity. Further, while it was acknowledged that the letter of 24th July, 2009 from the Minister warned that modification of a vessel might not secure entry into the over 65 foot category, counsel for the plaintiff, deploying the metaphor as to the pointlessness of closing the stable door after the horse has bolted, submitted that the Minister was too late in issuing the warning because the promise or representation had already been made.

5.7 In my view, those submissions do not stand up to scrutiny. The approval in principle in the letter of 18th May, 2009 related only to the grant of a sea-fishing boat licence. It was made absolutely clear in the letter of 18th May, 2009 that the grant of approval did not concern the allocation of quota. I cannot see what more could have been done by the Licensing Authority to make the position clearer. The Minister's letter of 24th July, 2009 was concerned with, *inter alia*, the allocation of quota. The Minister cautiously, and it might be said, *ex abundanti cautela,* explicitly stated the opposite to the representation put forward by the plaintiff as the foundation of its legitimate expectation. While the allocation of quota between 2006 and 2009 was based on the two categories of vessels, that did not fetter the very broad discretion which the Minister had under section 13 in relation to granting an authorisation to fish for mackerel. Far from adopting a position which amounted to an implicit promise or a representation that he would continue to conform to the two category allocation paradigm as it existed in 2009, so that there was a representation that, if the plaintiff modified the MFV "Atlantic Quest" by lengthening it to over 65 feet registered length before 2010, the plaintiff would be allocated quota on the basis that the vessel was in the over 65 foot category, both the Licensing Authority and the Minister issued unambiguous warnings to the plaintiff in plain language which can only be construed as indicating the direct opposite: the Licensing Authority stated that the approval in principle had nothing to do with the allocation of quota; and the Minister stated, in the context of announcing a review of quota allocation arrangements, that, even if the vessel was modified, it might not secure entry into the over 65 foot category. In my view, the plaintiff has not established compliance with the first principle laid down in the *Glencar* case.

5.8 In the light of the analysis in the preceding paragraph, neither the position adopted by the Minister in relation to quota between 2006 and 2009 nor the granting of approval in principle in the letter of 18th May, 2009, either separately or in combination, could be regarded as having the quality of a representation as prescribed in the second principle in the *Glencar* case.

5.9 Similarly, in my view, the factors relied on by the plaintiff could not have given rise to a reasonable expectation on the part of the plaintiff's directors that the Minister would treat the MFV "Atlantic Quest", if it was modified, the same as other vessels in the over 65 foot category.

5.10 Another basis on which the plaintiff sought to rely on the doctrine of legitimate expectation related to the manner in which the MFV "Village Queen" was treated in the 2010 Spring allocation. As I have stated, counsel for the defendants objected to that submission on the basis that it had not been pleaded. As I understand the plaintiff's submission, the representation relied on in support of the submission was the outline of the Minister's decision contained in the e-mail of 28th January, 2010, which stated that the Minister had "decided to freeze all quota management arrangements as they were in Spring 2009 pending the evaluation and consideration of long term arrangements as part of the current mackerel review", bolstered by an averment made by Ms. Kelly in an affidavit of 3rd February, 2010 on the interlocutory application in these proceedings that the effect of the Minister's decision meant that "all vessels will be treated for the purposes of mackerel allocations as they were in 2009". The plaintiff's argument is that the Minister resiled from the decision of 27th January, 2010, the validity of which was not challenged, in treating the MFV "Village Queen" as being entitled to quota equivalent to that which an over 65 foot vessel was granted in 2009, while not treating the MFV "Atlantic Quest" as being so entitled. 5.11 Even if, in his treatment of the MFV "Village Queen", the Minister resiled from the position adopted in the decision of 27th January, 2010, as reflected in the e-mail of 28th January, 2010, in my view, that does not avail the plaintiff in pursuit of a declaration that the MFV "Atlantic Quest" was entitled to be allocated quota from the over 65 foot category. Being satisfied on the evidence, and in particular on the evidence of Ms. Kelly, that, as of January, 2010, the position of the MFV "Village Queen" in the context of entitlement to quota by reference to the regime in force before Spring 2010, was materially different to that of the MFV "Atlantic Quest", I cannot see how the plaintiff, as the owner of the MFV "Atlantic Quest", can maintain its claim, even if the manner in which the MFV "Village Queen" was treated was inconsistent with the Minister's decision. In the interest of clarity, I should say that I have formed no view as to whether in January 2010 the Minister was correct in treating the MFV "Village Queen" as being entitled to Spring 2009 over 65 foot category allocation, because I consider that it is unnecessary to determine that issue, and that it would be inappropriate to do so in the absence of the owner of the vessel before the Court.

5.12 A further argument advanced on behalf of the plaintiff was that the issuance of the new sea-fishing boat licence to the plaintiff in relation to the MFV "Atlantic Quest" in December 2009 before the decision of the Minister of 27th January, 2010 was significant. Thereafter the plaintiff's vessel was licensed with an over 65 foot registered length. From 1st January, 2010, as had been signposted in the letter of 18th May, 2009, it was licensed without a preclusion from fishing for herring and mackerel. On that basis, it was submitted by counsel for the plaintiff, the vessel was entitled to quota in the over 65 foot category because it had been lengthened to be registered as an over 65 foot vessel and it had a sea-fishing boat licence without a preclusion. Therefore, as I understand the argument, there being two categories available to the Minister in accordance with the position adopted since 2006, the under 65 foot and the over 65 foot categories, and, the MFV "Atlantic Quest" being, as a matter of fact, in the latter category after 1st January, 2010, it should have been treated for allocation purposes as being in the latter category. Counsel for the defendants was correct in submitting that that argument is somewhat different to the case made on the pleadings. He was also correct in emphasising that the plaintiff has not challenged the validity of the Minister's decision; its case is that the Minister's decision was in breach of its legitimate expectation.

5.13 In submitting that the grant of the licence without a preclusion in December 2009 to the MFV "Atlantic Quest" was a watershed which had a bearing on how the Minister could treat the MFV "Atlantic Quest" in relation to the allocation of quota for the Spring 2010 season, in my view, the plaintiff is ignoring a number of factors already alluded to, but which it is necessary to reiterate. First, as I have stated at the outset, the sea-fishing boat licensing regime and the authorisation of fishing for specified fish stock in accordance with the regime for the management and regulation of fishing effort, as provided for in s. 13 of the Act of 2006, are two distinct regimes. Secondly, that factor was clearly and unequivocally drawn to the attention of the plaintiff in the letter of 18th May, 2009 from the Licensing Authority. Thirdly, given the scope of the Minister's discretion under s. 13, it was within his power to revise, from time to time, the rules in relation to the internal allocation of mackerel quota to vessels in the polyvalent fleet, if he considered it appropriate for the proper and effective management and regulation of fishing effort to do so. Fourthly, the review the Minister undertook in July 2009 clearly signposted the fact that the criteria for determination of mackerel allocation might be changed. Finally,

and most significantly, the Minister clearly and unequivocally stated in the letter of 24th July, 2009, in the passage quoted and emphasised at para. 1.8 above, that the modification of a vessel to bring it within the over 65 foot category might not secure an allocation of mackerel quota in the over 65 foot category. The fact that the plaintiff lengthened the MFV "Atlantic Quest" and obtained a licence without a mackerel preclusion under the licensing regime before the Minister made his decision on 27th January, 2010 does not, in my view, mean that the Minister was not entitled, as a matter of law, not to include the MFV "Atlantic Quest" in the over 65 foot category for the Spring 2010 season allocation. In essence, what the Minister did in making his decision was to preclude from the over 65 foot category vessels which had been modified to increase their length to over 65 feet after the 2009 Spring season and to create a new category in relation to those vessels. That was within his power.

5.14 Accordingly, the plaintiff's claim based on the doctrine of legitimate expectation fails on each basis advanced by the plaintiff.

6. Infringement of constitutionally protected property rights

6.1 Although further and better particulars were sought on behalf of the defendants of the factual and legal basis of the plaintiff's contention that its constitutional rights have been infringed, the plaintiff did not elaborate on the basis of this aspect of its case beyond what I have recorded at para. 2.5 above. In their written submissions, counsel for the plaintiff submitted that a mackerel authorisation is a licence and that a licence is a property right, albeit one that is subject to conditions imposed by law and also to an implied condition that the law may change those conditions, citing dictum of Costello J. (as he then was) in *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20 at p. 28. It was made clear that the plaintiff was not seeking to suggest that the Minister did not have power to regulate the mackerel fishery. Nor was it seeking to challenge the allocation of quota for Spring 2010 generally. The only argument made by the plaintiff was that the Minister's decision of 27th January, 2010 not to allocate quota in the over 65 foot category of the fleet to the MFV "Atlantic Quest" amounted to a discrimination between the plaintiff, on the one hand, and other vessels in that category and, specifically, the MFV "Village Queen", on the other hand. The plaintiff's case is that such discrimination amounted to an infringement of its constitutionally protected property rights.

6.2 The very narrow focus of the plaintiff's reliance on constitutional protection for property rights means that the Court does not have to consider the very thorough analysis of the protection afforded by Article 40.3 and Article 43 put forward on behalf of the defendants and the range of authorities cited, including the *Hempenstall* case and the decision of the Supreme Court in *Maher v. Minister for Agriculture, Food and Rural* Development [2001] 2 I.R. 139. In reliance on the latter decision, counsel for the defendants submitted that fishing quotas are similar to milk quotas and consequently "do not attract Community law or Constitutional law protection or infringe the plaintiff's property rights". I find it unnecessary to express a view on that point in the present context. However, as counsel for the defendants pointed out, the power to allocate fishing opportunities and fishing effort, which is assigned to the State as a Member State of the European Union, is conferred on the Minister by s. 13 of the Act of 2006 and the power is discretionary. The defendants' case is that the Minister did act in accordance with s. 13 in making the decision of 27th January, 2010. In any event, it was submitted, as the fishing quota is awarded and assessed annually, any alteration to the allocation for individual operators cannot be seen as an attack on property rights. It is justifiable and required by social justice and the exigencies of the common good.

6.3 All that is necessary for the Court to do is to address the narrow focus of the plaintiff's complaint based on an alleged infringement of its constitutional rights. As a matter of fact, the plaintiff, as the owner of the MFV "Atlantic Quest" was in a different position to the owners of the vessels in the over 65 foot category who had fished from the allocation for that category in 2009, in that the plaintiff's vessel did not fish in the over 65 foot category during 2009. Similarly, the position of the plaintiff was distinguishable from that of the owners of the MFV "Village Queen", which had replaced an over 65 foot vessel, even if it had not fished as an over 65 foot vessel in Spring 2009. Because of those distinctions, in my view, the plaintiff has not established that the Minister discriminated against the plaintiff in treating the plaintiff differently from the owners of vessels in the over 65 foot category who had fished during the 2009 season or the owner of the MFV "Village Queen". Accordingly, it has not been established that, in making the decision of 27th January, 2010, the Minister acted in breach of the plaintiff's constitutional rights.

7. Infringement of right of access to the Court

7.1 The injunctive relief sought by the plaintiff in the plenary summons which initiated these proceedings was a *quia timet* injunction restraining the defendants from discriminating unlawfully between the plaintiff's vessel and other vessels in the polyvalent fleet over 65 feet in registered length in any review of the existing eligibility for mackerel and herring fishing and the internal allocation of mackerel to vessels in the polyvalent fleet. The plaintiff's complaint is that, the plaintiff having obtained short service of a notice of motion to apply for such an order, when the matter came before the Court on the return date, 27th January, 2010, counsel for the defendants sought an adjournment to file a replying affidavit. The Court was not told of the intention of the Minister to make the decision of 27th January, 2010. That decision rendered the plaintiff's application for an interlocutory injunction moot and ultimately that application was adjourned to the hearing of the action. The plaintiff's contention is that the making of the decision of 27th January, 2010 amounted to a breach of the plaintiff's right of access to the Court to have the application for the *quia timet* injunction determined. That argument was advanced in reliance on the decision of the Supreme Court in *Buckley v. Attorney General* [1950] I.R. 67 (the *Sinn Fein Funds* case), on the basis that, by executive action, the Minister prevented the determination of a justiciable controversy by the Court and his action constituted an unwarrantable interference by the executive in the operations of the Court in a purely judicial domain.

7.2 The assertion that, by making the decision of 27th January, 2010, the Minister interfered in the determination of a justiciable controversy between the plaintiff and the defendants is misconceived. The justiciable controversy remained, although it could be regarded as having become refined by reason of the fact that the issue after 27th January, 2010 was whether the decision made by the Minister constituted a failure to respect the plaintiff's legitimate expectation or unlawful discrimination against the plaintiff. The plaintiff, presumably by consent of the defendants, decided that the remedy of an interlocutory injunction was no longer appropriate and the application was adjourned to the hearing of the action. What happened as a result of the decision of the Minister was that the parties pursued the substantive action and, as the 2010 Spring season was passing, the remedies of declaratory relief and damages, rather than an interlocutory injunction, were pursued.

7.3 All of the issues on liability raised by the plaintiff have been determined by the Court in this judgment. If any issue on liability had been determined in favour of the plaintiff, the Court would have been in a position to afford, and would have afforded, the plaintiff the appropriate remedy. Accordingly, the plaintiff has no cause of action for infringement of its constitutional right to access to the Court.

8. Order

8.1 As the issue of liability has been determined against the plaintiff, subject to any submissions the parties wish to make, the plaintiff's proceedings will be dismissed.