

THE HIGH COURT

[2010 4573 P]

BETWEEN

STAR MARINA LIMITED

PLAINTIFF

AND

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered on the 7th day of March, 2014

1. In these proceedings the plaintiff is seeking damages for breach of legitimate expectation and/or in the alternative damages for breach of contract arising from a decisions taken by the defendant in February, 2006 not to pay to the plaintiff the second moiety of a grant it had been allocated in respect of the development of an integrated marina, training centre and associated facilities at Derreenacallaha, Kenmare, Co. Kerry. The project had received approval for grant aid in the amount of €752,549.63, subject to conditions, the plaintiff having been notified by letter from the defendant dated 24th January, 2001, that approval for grant aid in the amount of IR£592,681.00 had been given.

2. On 3rd December, 2001, the first instalment, in the amount of €332,312.00 was paid. That first instalment was in fact the only payment that would be made and indeed the defendant by way of counterclaim now seeks its repayment.

3. The case on behalf of the plaintiff is a straightforward one – that it applied for a grant, that it was approved for a grant, that it was told that it was getting a grant in the amount of €752,549.63 (now expressed in euro equivalent), that it proceeded with the project on the basis that the promised grant would be forthcoming but that the second moiety has been improperly and, indeed, unlawfully been withheld.

4. The case for the defendant is that the second phase of the grant was properly withheld and indeed that the amount actually paid over should be refunded in circumstances where it is contended that:-

(a) that the plaintiff had constructed a very different facility to the one that had been originally approved, with the result that, ultimately, a fresh foreshore application, with a full public consultation process, was deemed necessary and still remained outstanding,

(b) that the plaintiff at no time had been in substantial compliance with planning requirements and that substantial planning breaches persisted, and

(c) that state grant monies had been expended on matters that went beyond the scope of the original application and had been expended on an illegal development that later required demolition, and

(d) on the grounds that the funding constituted legal state aid as a matter of EU law.

This last point has been raised in correspondence but has not featured as an issue during the course of the hearing before me.

5. The reference to a foreshore application arises from the fact that the development straddles a public road with a substantial two storey structure on the land side and a slip or pier on the shore side, largely located on the foreshore. The proposed development, therefore, required both planning permission and a foreshore lease.

6. The plaintiff and its principal shareholder, Mr. Daniel McCarthy, applied for grant aid under a scheme for Marine Tourism and Development in the sum of IR£525,000.00 (subsequently revised upwards to IR£592,681.00) by a letter from its accountant dated 7th November, 2000. The letter stated that the project was expected to cost IR£1.6m and would consist of a Marina, training centre and associated facilities. The courses to be offered would consist of sailing, windsurfing, canoeing and rowing. The letter added that the Marina would also offer language classes in conjunction with the listed activities. Students would spend half the day learning to sail and the other half practising their English. Qualified teachers of English as a foreign language were to be employed.

7. Mr. Frank Fahey T.D., then Minister for the Marine and Natural Resources, replied by letter dated 5th December, 2000. The letter set out the criteria that governed projects of this nature. The letter then commented that the initial examination indicated that the proposal which had been submitted, scored highly on these points, that the department was reviewing the papers submitted with the application letter and would be in touch seeking further information. The letter then commented that as a general rule any public grant aid to an infrastructural project had to be based on clear and precise information within a preset framework with a clear indication of specific items such as exact details of costs of each specific element of the overall plan, exact details of all funding sources, detailed building plans, legal and planning requirements, details of operational aspects etc.

8. The letter then concluded that the necessary funds were being made available subject to satisfactory responses to the additional information sought. Mr. Fahey said that he agreed that the project would be grant aided and would go ahead subject to the balance of funding being made available by the promoters.

9. Confirmation that the project had been approved for a grant of not more than IR£592,681.00 came by way of letter dated 24th January, 2001, from Mr. Kieran Grace, Head of the Marine Leisure and Research division at the Department of the Marine and Natural Resources.

10. The letter stated that the decision to grant aid was subject to conditions which were then set out. The first of these is the one

of most direct relevance to the current controversy. It was in these terms:-

"All relevant foreshore and planning requirements shall have been granted by the relevant authorities and shall be in place, and copies shall have been supplied to the Department of the Marine and Natural Resources."

11. On 10th May, 2001, a letter from Mr. Patrick O'Donnell of the Coastal Zone Administration Division informed the plaintiff's engineer that the Minister had approved the granting of a foreshore lease. The letter stated that subject to strict adherence to site specific conditions which were attached that there was no objection to work commencing on the foreshore in advance of the lease being finalised. Attached were seventeen site specific conditions.

12. Conditions 1 and 3 are those most in point. They are in these terms:-

"1. (a) The lessee shall use that part of the foreshore, the subject matter of this lease for a the purpose of constructing, using and maintaining the aforementioned Marine Leisure Facility and for no other purpose whatsoever.

For the purpose of this Lease, Marine Leisure Facility, herein referred to as "the Facility" is defined as the provision of facilities for a sail training school, sail boarding, surfing, water skiing and other water based sporting and leisure activities. The future development of a marina at the facility shall only be undertaken following consultations with and the approval of the lessor and all appropriate statutory authorities.

(b) The lessee may also use the adjacent foreshore but only to the extent necessary for the purpose of maintaining the said Marine Leisure Facility and shall restore the said foreshore to its proper condition immediately after such use.

3. The lessee shall comply with the planning permission granted by Kerry County Council (reference 1514/98)."

Then, on 27th August, 2001, a foreshore lease in respect of a proposed parking area and pier was granted to Mr. Daniel McCarthy for a term of 35 years at an annual rent of IR£1,050.00 subject to five year reviews.

13. So far as the work on the project is concerned, work commenced in April, 2001 and after difficulties were encountered, particularly in the area of planning to which I will be referring in greater detail, work came to a halt in January, 2002. In 2004 the structure which had been erected was demolished and rebuilt and work was eventually finished in December, 2004 and the premises opened in early 2005.

14. On 3rd December, 2001, the defendant paid the sum of IR£261,717. An application for payment of this amount had been made by letter dated 28th November, 2001, from the accountant from the plaintiff. The letter included the statement that all relevant foreshore and planning permissions were in place. In fact, though, a letter from Kerry County Council had issued on 7th November, 2001, stating that the development was not being constructed in accordance with the planning permission. The developer was called on to cease all work with immediate effect and to submit a planning application to regularise the situation within three weeks.

15. In fact, as we have seen work on the project came to a halt and matters were at a standstill for a protracted period.

16. On 6th February, 2004, the accountant for the plaintiff wrote to Mr. Raphael Crowley of the Engineering Division of the Department of Marine and Natural Resources. The letter referred to the fact that the structure on the landside of the road had been removed. The letter explained that the original plans on the basis of which planning permission was obtained, had been changed due to building regulations and health, safety and welfare concerns which had been revised in the intervening period between planning application and construction. Reference was made to the fact that an application was made to Kerry County Council who granted permission for the alteration but that an appeal by a third party to An Bord Pleanála was successful. The letter stated that it was expected that there would be an application for a further drawdown of the grant in March 2004. The letter was forwarded on to the Marine, Leisure and Research Division. Ms. Kilda Taylor of that division wrote on 1st March, 2004, saying that legal advice had been sought on the department's position in relation to the grant already made and the outstanding balance. Until this legal advice had been received and considered, the department would not be in a position to respond to an application for a further drawdown.

17. There was an amount of contact between the parties over the following two years which was somewhat inconclusive, however, on 21st February, 2006, Ms. Taylor wrote again. In the course of that letter she commented:-

"As you are aware, it was a condition of the initial offer that the project would keep within the terms of the initial application. We are satisfied, however, that the grant monies have been expended on matters that go beyond the scope of the original application - i.e. the development of a sail training school. In addition, the project appears not to be in compliance with planning permission and the requirement of the foreshore lease, contrary to the terms of the original offer.

Furthermore, and more seriously the department has concluded, following legal advice received and contacts with the relevant European Commission authorities that the grants envisaged constitute a legal state aid.

In light to the foregoing, I must inform you that it will not be possible to pay the balance of the grant in this case. Pending further consideration, the department reserves its position in relation to the possible recovery of the monies already paid."

This letter has been relied on by the plaintiff as the formal and definitive decision to refuse to pay the grant which has precipitated the present proceedings.

18. There followed further correspondence, which took the form of the plaintiff presenting a document in the nature of a notice for particulars and the defendant, through Ms. Taylor responding. Ms. Taylor made clear that there would be no change in the position adopted which had been communicated in the letter of 21st February, 2006. In the course of a letter dated 15th October, 2007, Mr. Frank Sheridan, Principal Officer of Inland Fisheries and Marine Research Division reiterated the department's position and explained the reason for it. The letter made the point that State funding was originally approved for the development of a sail training centre but that the current facility incorporated significant changes in the nature of the project originally specified. There was also reference to the State aid issue and a reiteration of the fact that it was not possible for the department to provide any further support for the project. It was also stated once more that the department was reserving its position in relation to the possible recovery of the amounts already paid.

19. By letter of 27th March, 2008, proceedings were threatened if the sum of €420,238 was not paid within seven days and thereafter a plenary summons was in fact issued though not until 13th May, 2010.

The Planning and Foreshore Issues

20. Having regard to the dispute between the parties, it is appropriate to look in greater detail at the planning history of the project, at developments in relation to the foreshore also the extent to which the nature of the project has remained constant or has changed.

21. The initial planning application 98/1514 was submitted on 28th June, 1998, to Kerry County Council. The application was to erect a marine store (incorporating a canoe/sailing training centre and associated facilities, install a waste water unit, parking and utility area onto a proposed pier at Derreenacallaha, Kenmare. The site area for the purpose of the application included only the immediate surrounds of the proposed building. No car parking area was proposed to the rear of the building, it did, however, include the pier/car parking area on the shore side of the road. The proposed building was substantially single storey with a part basement utilising ground levels and with a total floor area of approximately 460sq m.

22. There were a number of requests for further information, but ultimately a decision was taken on 31st March, 2000, to grant permission subject to 13 conditions. Condition 2 stated that the permission only related to development work to be carried out within the jurisdiction of the Planning Authority i.e. above the mean high water mark and that all development work below the high water mark should comply with the requirements of the Department of the Marine. The actual permission then issued on 2nd May, 2000.

23. On 28th August, 2001, an enforcement notice was issued by Kerry County Council in relation to an unauthorised access and an area of land that had been levelled for use as a storage/parking area. As we have already seen, a further letter issued on 7th November, 2001, and on 10th December, 2001, there was a request that all works cease immediately until a decision on retention was made. A further letter issued on 21st January, 2002, noting that work was continuing and requiring that work cease immediately and stating that failure to comply with the notice would result in legal proceedings being instituted. It appears that it was as a result of this letter that work actually ceased. It will be recalled that while this correspondence was taking place that the request was made for payment of the first moiety that was by letter of 28th November, 2001, a letter that stated that all relevant planning and foreshore permissions were in place.

24. In November, 2001, an application for retention of what had been constructed was submitted. The building as constructed and which was now the subject of the retention application had over 50% greater floor area than provided for in permission 98/1514 of 2nd May, 2000. Accommodation was on three levels rather than two, and the building also contained larger training areas and changing rooms and new staff quarters at first floor level and there was also additional car parking behind the building.

25. Kerry County Council decided to grant a permission subject to twelve conditions. However, a third party appeal to An Bord Pleanála saw the decision to grant retention permission overturned. It is of some interest that the inspector's report contained a comment that the building for which retention was sought was a substantially different building than that for which permission had been granted. He commented as follows:-

"In my view, the building as constructed and for which permission for retention is sought is a substantially different building than that for which permission was granted under reference 1514/98 and the scope of the application goes beyond simply architectural changes, modifications and extensions as described in the public notices. The building as constructed has approximately 54% more floor area than that granted permission with accommodation on three levels rather than two. The building contains much larger training areas, particularly at basement or lower ground floor level where there are also much larger changing rooms. The staff quarters at first floor level is completely new. The overall layout and design of the building is completely different.

These changes are reflected in the need for a new car parking area behind the building and also, in my view, having implications for the assessment of the proposal not just in terms of visual impact but also in terms of traffic and in terms of foul effluent disposal. The latter issue is not raised in the appeal documentation and is, therefore, a new issue."

26. The next significant development occurred on 28th June, 2005, when Mr. Daniel McCarthy sought retention permission to (i) develop "under floor area" as additional changing rooms, offices and sail training classrooms; (ii) additional car park areas; (iii) retention of boiler house, cold store and smoking shelter; (iv) retention of wheelchair accessible ramp; (v) retention of Porto cabins for a limited period; and (vi) retention of change of coffee shop/sail training classroom to restaurant. In the course of a request for further information, Kerry County Council commented:-

"The initial permission granted on site was for a sail training centre with ancillary coffee shop. There now appears to be a multitude of activities run from the site along with a full public restaurant. Kindly indicate why such intensive change of use was carried out without prior planning permission."

27. The request for information also contained the statement:-

"The proposed car parking as shown in the site layout map will completely interfere with the pier/slipway which is essential to the running of a sail training centre which was what was granted in the first instance."

28. The response to this query, insofar as the question of multiple uses was concerned stated that the activities arose as a result of public demand. Kerry County Council on 24th February, 2006, issued what has been described as a split decision granting permission subject to a number of conditions for items (i) – (v) but refusing permission to retain the change of use from coffee shop/sail training classroom to restaurant. The decision to refuse permission for the restaurant was stated to have been for the following reasons:-

"(1) It is considered that the proposed development of a public restaurant would constitute over intensification of use of the site by reason of excessive activities carried out on site and would result in substandard development and would result in substandard development which would be contrary to the proper planning and development of the area.

(2) It is considered that the proposed development would endanger public safety by reason of traffic hazard, because the site is located on a road where site lines are severely restricted and because the additional traffic movements generated by this development would be likely to cause an obstruction to road users. The proposed development would therefore, be contrary to the proper planning and development of the area.

(3) It is considered that the proposed development would endanger public safety by reason of the location of the

customer parking located across a busy public roadway, which has no safe form of pedestrian crossing. The proposed development would, therefore, be contrary to the proper planning and development of the area."

29. One of the conditions imposed in relation to the permission that was granted required the removal of signage advising the existence of a public restaurant within four weeks.

30. June 2008 saw an enforcement notice being issued by Kerry County Council. Correspondence stated that the premises had been inspected by the planning enforcement officer on 28th May, 2008 and that he had reported that the unauthorised uses had not ceased and that specifically the area of the coffee shop continued to operate as a restaurant and that a bar area was being operated within the restaurant.

31. In November 2008, Mr. McCarthy sought permission to:-

- (i) extend the existing balcony, construction of a storeroom and external stairs; and
- (ii) retain change of use from café to restaurant.

In April 2009, Kerry County Council issued notification of a decision to grant permission subject to a large number of conditions. Condition No. 10 required that the restaurant operate ancillary to the existing water sports facilities/excursions and that no food or drink be served to passing customers not using the water sports/excursion facilities.

32. For the sake of completeness, I should make mention of the fact that 2009 also saw Mr. McCarthy seek permission to extend the dressing rooms so as to include a climbing structure and retention permission for dressing rooms and a playing pitch. Permission was granted in August 2009. August 2011 saw Mr. McCarthy seeking permission to extend the existing centre to incorporate a mountain bike course, a practice cycle track, an obstacle course, paintball area and a crazy golf course. I mention these recent developments only very briefly and as I say really for completeness because the decision not to pay the second moiety of the grant was taken in February 2006 and it is on this period and on the period leading up to it, that one must focus.

33. The overview I have provided does, however, make clear that matters have diverged very significantly from the sailing, windsurfing, canoeing and rowing centre offering language courses that was referred to in the grant application of 7th November, 2000.

34. The planning history of the development is a complex one involving a number of planning applications/permissions over a number of years. The evidence in the case and in particular, the evidence of planning consultant, Mr. Tom Halley has satisfied me that significant aspects of the development were undertaken without planning permission or other than in accordance and compliance with various planning conditions. Indeed, his evidence was that there remains issues in relation to the restaurant. A site visit by him on 3rd April, 2013, indicated that the restaurant continues to serve food/drink to passing members of the public and that it also operates as a bar selling alcohol and that there was also a takeaway.

35. Despite a condition in the May 2009 permission that there should be no signs erected at or near the site advertising the restaurant, the report of Mr. Halley contains photos of signage referring to "hot food and drink, seafood specialities and takeaways (open late)". Insofar as the question of the foreshore lease is concerned, it is accepted that the location of the pier has been changed from that originally indicated in the drawings that were submitted. It is said on behalf of the plaintiff that the original plans were unworkable and indeed unsafe but that the pier as constructed is no larger or certainly not larger to any significant extent than what was proposed. It is said that what was originally proposed was what has been described as a two prong pier, but this would have resulted in boats landing on or near rocks which, of course, would not have been safe, and so a change was made to a single prong pier, but that the footprint of this structure was only 20m sq greater than what was proposed originally.

36. Apart from the question of whether the structures constructed on the foreshore accorded with the plans and drawings that had been submitted, it is clear that the department had concerns about the standard of work on the site which gave rise to safety concerns. It is true that these concerns about the quality of work was addressed in a satisfactory manner. However, the departure from the original plans and drawings provoked an internal debate within the department as to whether a fresh foreshore application was required. The outcome of this debate was that it was concluded that the foreshore structure would have to go through the full application process once more including public consultation.

37. I have had the benefit detailed oral and written submissions from both sides in relation to the doctrine of legitimate expectation referring to cases such as *Glencar Exploration v Mayo County Council* [2002] 2 I.R. 84, *Lett and Company Limited v. Wexford and the Minister for Communications, Marine and Natural Resources and the Attorney General* [2007] IEHC 195, *Curran v. Minister for Education* [2009] 4 I.R. 300 and *McCarthy v. Minister for Education and Skills* [2012] IEHC ----- amongst others. With unfeigned respect to counsel, I am of the view that this is a case which in large measure turns on the factual background. This is not a case where the grant providing authorities changed policy or decided to withhold funding because there was a change of heart in relation to marine tourism, or to redirect funds towards other applicants seen as having greater merit or where a decision was taken to cut back on funding because of deterioration in the State of the public finances.

38. Rather this is a case where the authorities formed the view that the actions and inactions of the promoters of the project was such that it had forfeited an entitlement to the balance of the grant and indeed that what had transpired meant that the expenditure of further money was precluded. It seems to me that the resolution of this case requires not so much a detailed analysis of the doctrine of legitimate expectation, but rather requires consideration of whether that was a justified conclusion.

39. The plaintiff focuses on the language of the grant letter of the 24th January, 2001, with the slightly unusually phrased stipulation that all relevant foreshore and planning requirements *shall have been* granted by the relevant authorities and shall be in place. By reference to the language of the letter, the plaintiff contends that the foreshore and planning requirements extend only to the obtaining of planning permission and the obtaining of a foreshore lease and that any questions regarding ongoing compliance thereafter is a matter for enforcement action of one form or another by the planning authority or by the Coastal Zone Division of the Department of Agriculture Food and the Marine. In effect, the plaintiff argues that once planning permission and foreshore approval has been obtained, then grant aid must be provided even if foreshore and planning obligations are ignored in practice. It must be said that this was a proposition with which some of the witnesses on behalf of the plaintiff did not seem at all comfortable.

40. In *Wiley v Revenue Commissioners* [1994] 2 I.R. 160, McCarthy J. at p. 168 of the report commenting on the suggestion that someone who had incorrectly benefited from rebates in the past had a legitimate expectation that he would benefit in the future commented as follows:-

"Expressed somewhat differently, it may be said that having wrongly persuaded the licensing authority to exempt him and subsequently recoup from the general body of tax payers the excise duty and the VAT to be paid on his new car in 1983 and in 1987, that when the Revenue Commissioners became alerted to possible abuses of the scheme, he should have been notified of their change of heart. Even if this extraordinary proposition were to be accepted, it would mean that the Revenue Commissioners would have to be ordered to pay out of the Central Fund a significant sum of money to someone not entitled to any such exemption. The concept that the Court should order the Revenue Commissioners and the Minister for Finance to pay money to someone plainly not entitled to it I find unusual. If expectation existed it was an illegitimate one."

41. For my part, I find the proposition that the Department of Agriculture should be ordered to pay a grant without regard to whether the development was being carried out in accordance with the proposal that had been submitted to the Department and the terms of grant aid agreed or indeed whether what had been developed was an unauthorised development "unusual" and as amounting indeed to "an extraordinary proposition".

42. It does not of course follow that every difficulty in relation to planning or foreshore permission will necessarily result in a grant being withheld. Clearly the response to any difficulties that emerge has to be one that is rational and proportionate, but it does mean that these are issues to which the authorities are fully entitled to have regard. Put at its most basic, the notion of the State being obliged to continue to grant aid a project and to expend public funds on a project which is being operated without planning permission is incongruous in the extreme.

43. If we look at the grounds relied on by the defendants as justifying the decision not to pay this second moiety of the grant, the first matter that comes to mind is that the first tranche was paid at a time when a valid and effective planning permission was not in place, and in a situation where information was withheld from the Department that enforcement action was under consideration by Kerry County Council which soon thereafter resulted in the cessation of work and thereafter to the demolition of the structure that had been erected and to its reconstruction.

44. The plaintiff has sought to minimise the significance of the departure from the terms of the planning permission referring to "revisions" to take account of building regulations (fire, disabled access and facilities and health, safety and welfare) issues which had evolved in the period between the submission of planning application and date of construction. However, really that does not fully reflect the significance of the departure from the original permission, a layout and design that has been described as completely different to what was originally proposed, three stories rather than two and a floor area 54% greater than authorised.

45. It is true and this is to the credit of the plaintiff that the unauthorised structure was demolished and reconstructed in accordance with the terms of the permission.

46. However, while the construction aspect was addressed, significant issues as to use remained in place. As we have seen these issues remained live up to the time when the decision was taken not to provide further funding and beyond that, and indeed on one view continues to the present day as the restaurant continues to serve the passing public.

47. So far as the foreshore issue is concerned, again there has been a significant departure from what was originally proposed, from the two prong layout to the single prong, with a portion of the pier, admittedly not a very significant portion outside the boundary specified in the foreshore lease. However, so far as the foreshore is concerned, the plaintiffs argue that the variations were made with the full knowledge and approval of the authorities. Whatever about the state of knowledge it is the case that initially no action was taken by the authorities to halt the foreshore development that had been embarked upon. While that is so, it is the case that what has been constructed remains unauthorised and that the Department has concluded that a fresh application with provision for public consultation is necessary.

48. If the foreshore issue had stood alone and given that the Department has indicated that it is ready and willing to consider a fresh foreshore application, then it would have seemed proper for the Department to withhold any final decision to cease funding until after the foreshore application was determined. However, as we know, the foreshore issue does not stand alone.

49. Over and above the planning and foreshore issue is the fact that what has been developed and what is now operated is a very different project indeed to that for which grant aid was sought. Indoor climbing structures, children's playgrounds, sports pitches, crazy golf, paintballing, a mountain bike course are all a long way off the canoe sailing facility with language classes facility for which a grant had been sought.

50. The way in which the project has evolved and really taken on a new character emerges clearly from the history of the onsite restaurant. In the original proposal, catering was clearly subordinate to the marine training aspect. A coffee facility/coffee shop was provided with the sail training classroom. The retention application of the 28th June, 2005, saw an application for a change of use of coffee shop/sail training classroom to restaurant. As we have seen, the split decision of the 24th February, 2006, refused permission to retain the change of use of coffee shop/sail training classroom to restaurant. On behalf of the plaintiff it has been argued that there is no real distinction between coffee shop and restaurant and that this is really a question of labelling.

51. However, from the point of view of someone grant aiding a marine tourism facility, there is the world of difference between grant aiding sail and canoe training facility where students can get a cup of coffee and grant aiding a licensed public restaurant.

52. It is the case that the operation of the restaurant remained controversial even after the decision to cease funding. There were a series of enforcement notices in relation to the restaurant issue in 2007 and 2008. Significantly, the permission of the 4th April, 2009, required that the restaurant should operate ancillary to the existing water sports/excursion facilities and that no food or drink be served to passing customers not using the water sports facility/excursion facility.

53. I accept that with any new project there is likely to be an element of tweaking/refining. However, this goes well beyond tweaking/refining and what is now on place is barely recognisable by reference to what was originally proposed.

54. In my view the departure from what was approved for grant aid explains and justifies the decision to withhold the second moiety of the grant. Indeed, had the full picture been clear to the Department in December 2001, when the first payment was made and had it been appreciated then that an enforcement notice had been served and that the plaintiff had been called upon to cease work, then it seems certain that the payment of the first tranche would not have proceeded.

55. Accordingly, the plaintiffs claim so far as the second moiety of the grant is concerned fails.

Counterclaim

56. The defendants have counterclaimed, seeking the return of the sum of €332,312.00 as money paid under breach of contract and/or by reason of negligent misstatement and/or by reason of misrepresentation on the part of the plaintiff.

57. In a situation where the payment was made on the 5th December, 2001, and the counterclaim seeking its recovery was delivered on the 8th October, 2010, the plaintiff has contended that the counterclaim is statute barred. The plaintiff also contends, without prejudice to the plea that the counterclaim was statute barred, that the money was properly paid and further submits that the defendant's willingness to permit the project to proceed without intervening means that it would be unjust to allow the defendant to alter its position now.

58. The defendant asserts though without great force, that the particular facts relating to the enforcement procedure and the cessation of work was not known until well after 2002. Moreover, it is said that the breach of grant conditions, both in relation to foreshore/planning and departing from the proposal as presented was a continuous one that persisted right up to February 2006, and indeed beyond.

59. In my view, the defendant must have been aware at least in general terms of what had actually occurred since 2002. That there were planning issues emerging was a matter of public record from 2001. That being so, time began to run against a counterclaim from a date not later than the end of 2002. Given that the counterclaim was not presented until the 8th October 2010, it is noteworthy that the letter of the 21st February, 2006, which had refused additional funding, stated specifically that the Department reserved its position in relation to the recovery of the monies already paid. The defendants therefore, had the question of repayment under consideration well within the six year period from the end of 2002 and indeed within the six year period from the end of December 2001.

60. In all the circumstances, I am forced to conclude that the counterclaim is indeed statute barred. In summary then, the position is that both the claim and counterclaim fail.