

BETWEEN

WEXFORD COUNTY COUNCIL

PLAINTIFF

AND

KEVIN KIELTHY

DEFENDANT

**JUDGMENT of Mr. Justice Tony O'Connor delivered on the 5th day of February, 2019****Introduction**

1. The plaintiff Council ("*the Council*") seeks to recover harbour charges amounting to €106,339.85 under Kilmore Quay Bye-Laws 2004 ("*the bye-laws*") for the laying up of a sea fishing vessel called the M.F.V. Morgensome ("*the vessel*") from July 2006 to November 2009, which was owned by the defendant ("*Mr. Kielthy*"). The principal legal issue concerns the Council's contention that the County Manager can amend a rate of charge set by a bye-law introduced by councillors pursuant to their reserved function.

**History of 2008 and 2011 Proceedings**

2. These proceedings were commenced by way of summary summons issued on 22nd December, 2011. Following exchanges of affidavits, Kearns P. directed on 19th January, 2015, that they proceed to a plenary hearing followed by the hearing of the proceedings entitled *Kevin Kielthy v. Minister for Agriculture, Fisheries and Food, Ireland and Attorney General* ("*the State defendants*") having record number [2008 No. 6263 P.] ("*2008 proceedings*") in which I am delivering judgment also today ("*accompanying judgment*"). Kearns P. gave these directions due to an alleged overlap between the claim of the Council and Mr. Kielthy's claim against the State defendants.

3. The defence in the 2011 proceedings delivered on 23rd February, 2015, pleaded, *inter alia*, the following which became the focus of the hearing before this Court:-

"5. The fees purportedly charged to [Mr. Kielthy] have not been charged in accordance with the relevant bye laws.

...

10. Any purported increase in the fees was not carried out in accordance with the bye laws or in accordance with law.

11. [Mr. Kielthy] has not been treated in a fair and reasonable manner or in a like manner to other boat owners and users who owe harbour charges.

...

16. [Mr. Kielthy] could not scrap the boat of his own accord because the [vessel] was the subject of an application for a grant under a Bord Iascaigh Mhara decommissioning scheme. Under the terms of that scheme, the boat could not be scrapped without the consent of the Department of Agriculture Fisheries and Food (as it then was). A decision was made in favour of [Mr. Kielthy] receiving the grant. The department sought a judicial review of the said decision and was unsuccessful; they therefore appealed to the Supreme Court which found in the department's favour. Throughout this period (during which the impugned laid up fees arose the Department would not consent to the scrapping of the boat)..."

The history and detail of this litigation can be gleaned from the accompanying judgment which clarifies the claims of Mr. Kielthy in those proceedings against the State which are mentioned in this plea at para. 16 of his Defence.

4. Senior counsel for the State defendants also made submissions in support of Mr. Kielthy's defence in these proceedings due to the potential effect on the quantum claim in the 2008 proceedings. Those submissions were adopted for Mr. Kielthy. All of the submissions sought to assist the Court in making a fully informed decision about the issues. I gave a ruling on Day 2 (pp. 84-85 of the transcript) about the cross-examination of witnesses in these proceedings by counsel for the State defendants in the 2008 proceedings. Ultimately, little turns upon that cross-examination other than to ensure a consistency in the portrayal of facts in both sets of proceedings.

**Background**

5. The long-established harbour at Kilmore Quay ("*the harbour*") is controlled by the Council as opposed to the State. It is a small but vibrant harbour and the number of berths is limited. It services sea fishing vessels, has a sixty berth blue flag marina and facilitates a ferry to the Saltee Islands during the tourist seasons. Captain Philip Murphy was appointed in July 2006 as Marine Officer for the Council and he acted as Harbour Master for Kilmore Quay at the relevant time. He also had responsibilities for other piers and harbours within the county. At that time, his office was in Kilmore Quay Harbour which allowed him a very good view of the harbour. At the time of giving evidence to this Court in 2018, Captain Murphy was Senior Marine Officer with the Council based in Wexford Town and had an assistant who was the day-to-day Harbour Master in Kilmore Quay.

6. Captain Murphy outlined how the vessel had been towed into Kilmore Quay in the summer of 2006 by the lifeboat and remained most of the time after that date tied up at the East Wall of Kilmore Quay until it was scrapped at the end of 2009. The vessel took up some 23 metres of one side of the harbour wall.

7. Mr. Kielthy explained that the vessel was laid-up while he was awaiting the result of his application under a decommissioning scheme. The accompanying judgment includes a chronology which outlines how Mr. Kielthy's expectation of a payment under the decommissioning scheme for the vessel was met initially but ultimately dashed by the judgment of the Supreme Court in May 2014.

8. In 2006, there were seven laid-up vessels in Kilmore Quay, which included Mr Kielthy's vessel. Captain Murphy attributed that laying up to the collapse of the scallop fishing industry. Most of those vessels were moved.

9. The letter dated 18th September, 2006, from Captain Murphy to Mr. Kielthy effectively commenced the communications leading to the dispute which the Court will now resolve. That letter allowed Mr. Kielthy until 1st November, 2006, to remove the vessel or face a charge of €0.70 per metre per day laid-up charge. The laid-up rate had been increased from €0.63 to €0.70 by Order No. 25/2006 of the Schedule of Charges of Wexford County Council Register of County Manager's Orders signed on 18th January, 2006. Order No. 14/2007 increased the rate again from €0.70 to €1.00, applicable from the 1st January, 2007. On 1st July, 2007, the charge was further increased to €5 per day by Order No. 405/2007 signed on 31st May, 2007. It is quite apparent that Captain Murphy prompted these increases to free up space in the harbour for working vessels.

#### **Charges sought by the Council**

10. Captain Murphy issued several letters to Mr Kielthy detailing the laid-up fees for which he was liable. After the vessel was scrapped, Captain Murphy wrote to Mr Kielthy on the 18th November, 2009, setting out the final invoice:-

*"Laid up fees 2006 €1,014.98 [applying the rate of €0.70 per metre per day from the 1st November, 2006 to the 31st December, 2006]*

*Laid up fees 2007 €26,170.77 [applying the rate of €1.00 per metre per day until the 30th June 2007, and the rate of €5.00 per metre per day after that]*

*Laid up fees 2008 €43,499.10 [applying the rate of €5.00 per metre per day]*

*Laid up fees 2009 €35,655.00 [applying the rate of €5.00 per metre per day up to and including the 27th October, 2009]"*

The total sought is €106,339.85.

#### **Main issues**

11. There are two issues in this case:-

(a) What is the correct rate applicable for the laid-up charges, i.e. were the increases in the rate for laid-up charges permissible?

(b) Was the Harbour Master entitled to impose the laid-up charges?

#### **Competition Law Issue**

12. During exchanges with counsel it emerged that no case is made that the charges constituted an abuse of a dominant position or were contrary to competition law.

##### **(a) THE RATE APPLICABLE FOR THE LAID-UP CHARGES**

13. Do the managerial orders mentioned, which amended the per metre length fee for laid-up vessels, need to comply with the Local Government Act 2001 ("*2001 Act*") and, more particularly, the procedures for reserved functions in respect of making and amending bye-laws?

14. The net point between the parties is whether the changes in the original rate of laying-up charges imposed by a bye-law constitute an amendment to that bye-law or simply a change in the rate permitted by that bye-law without amendment.

#### **Submissions**

15. The Council accepts that s. 199 of the 2001 Act provides that the making of bye-laws and their amendment or revocation are reserved functions. The Council contends however, that a mere change in the rate of charge does not constitute an amendment to a bye-law.

16. It was submitted on behalf of Mr. Kielthy, with the assistance of counsel for the State defendants, that the County Manager has unlawfully usurped the functions of the elected members of the Council in altering the charges as he did.

17. The Council counter-argued that the County Manager is the delegated executive as expressly provided for by s. 149 of the 2001 Act in respect of every function he performs for the Council that is not expressly reserved to the Council member. As a matter of statutory interpretation, the Council submitted that the relevant canon of construction is *expressio unius, exclusio alterius* ("*to express one thing is to exclude another*"), relying upon the judgment of Laffoy J. in *O'Connell v. An tArd Chlararaitheoir* [1997] 1 I.R. 377.

18. The Council also submitted that local authorities function generally through the authority of the County Manager. He/she is not acting as a person delegated by the Council: he derives his full powers directly from the statute. Much is made of the many functions in a modern society for a local authority when contending that every variation of a charge or levy could not need the approval of the elected councillors. A virtue is sought to be made of the fact that the estimates of the County Manager come before elected councillors when promulgated by the Manager every year.

#### **The Bye-Laws**

19. The Kilmore Quay Harbour Bye-Laws 2004 were made by the Council "*to regulate the use of the harbour, marina and car parking area under its control, custody and management at Kilmore Quay being within its administrative area in the County of Wexford*".

20. The bye-laws were made under s. 37 of the Local Government Act 1994 which was extended by s. 89 of the Harbours Act 1996.

21. Bye-law 50 provides:-

*"Any vessel normally engaged in trading activities in or coming into the Harbour for non-trading purposes i.e. not engaged in the loading and/or unloading of passengers and/or livestock and/or goods, shall be deemed to be laid-up after the expiration of five days from the date of arrival of that vessel in the harbour. A vessel normally engaged in trading in the harbour shall be deemed to be laid-up after the expiration of fourteen days from the date of arrival of that vessel in the harbour when not engaged in trading activities."*

22. Bye-law 51 provides that the master or owner of the vessel which, by virtue of bye-law 50, is deemed to be laid-up in the harbour shall be liable for laid-up harbour fees. Bye-law 51 prescribes a daily rate of €0.63 per metre length of the vessel from the end of the relevant period as set down in bye-law 50. It also states: "... *The daily rate can under Part 111, Article 84 of these bye-laws be changed*".

23. Bye-law 84 provides that:-

*"The Council may impose charges, referred to in these bye-laws as 'harbour charges' at such rates as are from time to time determined by it on:" inter alia, "(a) the owner or master of a boat, ship or vessel which: ... (iv) temporarily lays up in the harbour".*

24. The provisions of the Local Government Act 1994, as extended by the Harbours Act 1996, have now been replaced in all material respects by the 2001 Act.

25. Section 199(1) of the 2001 Act provides that:-

*"Subject to subsection (7), a local authority may make a bye-law for or in relation to the use, operation, protection, regulation or management of any land, services, or any other matter provided by or under the control or management of the local authority, whether within or without its functional area or in relation to any connected matter."*

26. Subsection (3) provides that any bye-law made under s. 199 "may include such provisions as the local authority considers appropriate for its effective application, operation and enforcement" including by way of:-

*"(h) the payment of a fee or charge at a specified time by any person in respect of any specified matter governed by a bye-law."*

27. Section 199 then provides as follows:-

*"(4)*

*(a) A local authority may, subject to this Part, amend any bye-law made by it.*

*(b) A local authority may revoke any bye-law made by it with effect from such day as is specified in the resolution.*

*(5) The approval of a draft bye-law, the consideration of submissions in relation to such draft bye-law and the making, amendment or revocation of a bye-law, are each reserved functions.*

*(6) The power of a local authority to make a bye-law in respect of its functional area includes a power to make a bye-law in respect of the foreshore and of coastal waters adjoining that functional area and with the agreement of any other local authority, of the coastal waters adjoining the functional area of that other local authority."*

28. Section 200 of the 2001 Act provides for the procedures to be adopted by a local authority in making a bye-law including provisions in respect of public consultation and advertisements.

29. Section 209 of the 2001 Act provides:-

*"(1) Every bye-law made under Part VII of the Local Government Act, 1994, and subsisting at the commencement of this provision, shall continue in force as if made under this Part and may be amended or revoked as if made under this Part.*

*(2) Without prejudice to section 20 of the Interpretation Act, 1937, references in—*

*(a) ...*

*(b) section 89 of the Harbours Act, 1996,*

*(c) ...*

*(d) ...*

*to Part VII of the Local Government Act, 1994, or any section of that Part shall be read as a reference to Part 19 of this Act or to the corresponding section of Part 19, as the case may be.*

*... "*

30. Section 131 of the 2001 Act provides that the elected Council of a local authority "shall directly exercise and perform by resolution at a meeting of the local authority or body every function" to which that section applies.

31. These functions are known as "reserved functions". Such reserved functions include every function "[d]esignated as a reserved function by any provision of this Act..."

32. Section 199(5) of the 2001 Act provides:-

*"The approval of a draft bye-law, the consideration of submissions in relation to such draft bye-law and the making, amendment or revocation of a bye-law, are each reserved functions."*

33. It is clear that the bye-laws have provided for a fee or charge payable by the owner or master of a vessel in respect of a laid-up vessel and the fees per metre length of the vessel have been set. Any amendment to bye-law 51 in respect of the daily rate applicable to a laid-up vessel is indeed an amendment of that bye-law. Therefore, that is a “reserved function” on its face.

34. The affidavit filed on behalf of the Council avers that the County Manager has by Managerial Order amended the figure of €0.63 per metre length on various occasions subsequent to 2004. The bye-laws themselves have not been amended. No meeting of the County Council has ever approved an amendment to the bye-laws relevant to these proceedings. There is little controversy on this aspect.

35. The crux lies with the pointing by the County Manager to the provisions of bye-law 84. This states insofar as it is relevant:-

*“The Council may impose charges, referred to in these bye-laws as ‘harbour charges’ at such rates as are from time to time determined by it...”*

The net question is to divine the meaning to be attributed to bye-law 84.

36. I agree with the submission made by counsel for the State defendants that the Council may impose charges but that is no basis for suggesting that “the Council is a reference to the county manager”. The legislation enacted by the Oireachtas expressly makes it a reserved function of the Council to amend the rates stated in the bye-laws which cannot provide otherwise. One cannot delegate what has been delegated to oneself – “*delegatus non potest delegare*”.

37. The canon of interpretation for statutes, “*expression unius, exclusion alterius*”, does not apply, as submitted by counsel for the defendant, because the making of bye-laws is an admitted reserved function which cannot be delegated.

38. The Court appreciates the assistance of counsel in confirming that there are statutory provisions which allow a public body to delegate to its officers the power to take steps to implement policy. The typical formula as cited by Hogan and Gwynn Morgan in *Administrative Law in Ireland* (4th edition) at para. 11-139 is:-

*“[The agency] may perform any of its stated functions through or by any of its officers and servants duly authorised by [the agency] in that behalf.”*

39. The Court further accepts the submission made by counsel for the State defendants, which is adopted by Mr. Kiehlthy, that the Oireachtas has clearly laid down that certain powers exercisable by a County Council are reserved powers and certain powers are executive powers. They continue on to submit that the reason that an issue has arisen in this case is the decision by a County Manager to amend a bye-law. In other words, the enabling legislation does not allow the County Manager to do what he has actually done in this case. The Oireachtas has clearly vested the power to amend bye-laws in the Council. It has also decreed that these powers are reserved powers. The Council cannot by its own act or instrument further delegate the entitlement to make or amend bye-laws which the Oireachtas has vested in the Council. This stands to reason. Bye-laws are, in effect, a type of legislation that can have a significant effect on the manner in which individuals conduct their affairs, not least their commercial fishing activities. In short, the Oireachtas has vested in the elected councillors the sole entitlement to amend or alter bye-laws including the alteration of the bye-laws enacted prior to the 2001 Act.

40. The attempt by the Council to interpret bye-law 84 to vest in the County Manager an executive function is not tenable in my respectful view. It matters not that another statutory framework or in respect of other functions of a local authority, a County Manager may be empowered to set fees or to fix amounts payable by citizens for the provision of a service. This Court is not concerned with such alternative frameworks or provisions. Bye-law 84 does not entitle the County Manager to amend a provision contained in bye-law 51.

#### ***Island Ferries Teoranta v. Galway County Council***

41. The judgment of Cooke J. in *Island Ferries Teoranta v. Galway County Council* [2013] IEHC 587, (unreported, High Court, 18th December, 2013), is useful when trying to understand the background to the enactment of harbour bye-laws. Many of the issues raised in that litigation do not arise for consideration in this case.

42. In para. 26 of the judgment, Cooke J. refers to the fact that the adoption of bye-laws was a reserved function of Galway County Council and that the processes of the County Council involved a consideration by two particular committees of the Council. The process of preparing, consulting and drafting bye-laws took place over a twelve-month period and it involved various meetings of Council Committees, public meetings and meetings with councillors in response to queries from individual councillors in the Connemara area. It is indeed instructive to note the detailed nature of the public consultation process as implemented by Galway County Council preceding the enactment of the bye-laws. A very particular issue related to the amount of the proposed charges, whether per passenger or per tonne of cargo landed. Cooke J., at para. 37 of his judgment, set out the proposal which emerged to reduce the proposed charges to an even lower level. There was a “*heated debate*” (para. 39) but finally the bye-laws setting the harbour charges were adopted by the Council. Cooke J. pointed out that the setting of the harbour charges was, in that case “*obviously the subject of lengthy deliberation, official advices, negotiation, consultation, proposal and counter-proposal before being finally adopted*” (para. 40).

43. At para. 44, Cooke J. continued:

*“In view of the legislative process by which these bye-laws came to be adopted, it is useful to add a passage from the well-known judgment of Lord Russell C.J. in the leading English case of *Kruse v Johnson* [1898] 2 QB at p.99 where, distinguishing between typical bye-laws of railway or dock companies carrying on business for profit and those of public representative bodies entrusted with delegated power from Parliament to make by-laws, he said of the former:*

*‘In this class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said ‘benevolently’ interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction.’”*

44. At para. 63, Cooke J. continued:-

*"The bye-law making power is, however, a reserved function of the members of the County Council who are entitled, as is implicit in the passage quoted from Lord Russell C.J. at paragraph 44 above, as elected representatives, to base their judgment as to the appropriateness of such a measure upon their understanding of how a balance is best struck between such competing interests."*

45. I accept the submission that when the Oireachtas decided that it would be the elected members of the Council who enact and amend bye-laws, this was to view such councillors *"as elected representatives"*, basing their judgment as to the appropriateness of such a measure upon their understanding of how a balance was best struck between competing interests. This was to follow a detailed procedure as provided for in the 2001 Act, including public consultation.

#### **Conclusion**

46. The Oireachtas has vested in the elected councillors of the County Council by way of a reserved function the entitlement and obligation to make bye-laws and to amend bye-laws. Those councillors cannot sub-delegate the power to make or to amend bye-laws to any officer of the Council or to the County Manager unless the Oireachtas so provides.

47. If bye-law 84 had stated expressly that the County Manager could amend the harbour charges set by bye-law 51, this would have been *ultra vires* the elected councillors.

48. Bye-law 84 merely states that the Council may amend the charges referred to in the earlier bye-laws, which is declaratory of the true legal position that the Council must conform to the procedures and processes provided for in the 2001 Act relating to the amendment of bye-laws.

49. The fact that the printed edition of the bye-laws currently available refers to €0.63 per day per metre of length is support for the proposition that the Council has not actually amended the bye-law. The bye-laws have not provided for the alteration of the rate.

50. Thus, if the Council is entitled to recover harbour charges from Mr. Kielthy, it is at the rate set by the elected councillors in 2004.

(b) WAS THE HARBOUR MASTER ENTITLED TO IMPOSE THE LAID-UP CHARGES?

#### **Was the vessel laid-up?**

51. As mentioned at para. 21 above, bye-law 50 deems a vessel normally engaged in trading in the harbour to be laid-up *"after the expiration of fourteen days from the date of arrival of that vessel in the harbour when not engaged in trading activities."* The Council is entitled to impose charges on laid-up vessels by virtue of bye-law 84.

52. Captain Murphy gave evidence that the vessel did not leave the harbour after August 2006, until it was scrapped on the 27th October, 2009. He stated that a daily roll call was done in the harbour *"to mark in, for billing purposes, which boats are in the harbour"* (transcript day 1, p. 37). Captain Murphy stated that he identified Mr. Kielthy's vessel as being in the harbour on each day of his roll call. In fact, Mr. Kielthy did not dispute that the vessel was laid-up for all of this period (transcript day 1, p. 108).

#### **Fairness**

53. Mr. Kielthy further argued that in imposing the laid-up charges he had not been treated in a fair and reasonable manner. He explained that the vessel had stopped fishing in 2000 and was actually laid-up in Kilmore Quay from 2000 to 2005 while he awaited the result of the application to dump at sea, described in the accompanying judgment. In that period, Mr. Kielthy paid the annual harbour fees of €750 and claimed that no laying-up charges should be imposed.

54. Mr. Kielthy readily admitted that he was *"quite prepared to pay the normal harbour charges of a fishing boat"* while the vessel remained in Kilmore Quay (transcript day 1, p. 107). Captain Murphy advised that once the vessel was deemed to be laid-up, the laid-up charges would apply instead of the normal harbour charges, rather than in addition to them (transcript day 1, p. 42). Captain Murphy recalled advising Mr. Kielthy that he did not have the authority to reduce the bill but if Mr. Kielthy put in a submission about it he would forward it to senior management in the Council. However, he stated that he never received such a submission from Mr. Kielthy (transcript day 1, p. 53).

55. Mr. Kielthy made the case that on foot of a conversation he had with Captain Murphy in 2006, the vessel would not be considered laid-up if it was moved every fourteen days (transcript day 1, pp. 88-89). Captain Murphy testified that he could not recall such a conversation although he acknowledged the very many conversations which he had with Mr. Kielthy about the vessel and the predicaments arising. In fact, Mr. Kielthy did not move the vessel every fourteen days in any event.

56. Mr. Kielthy does not feel responsible for the laying-up of the vessel and blames the Department for the appeals concerning the decommissioning grant. He stated that if the fees were held to be legitimate he *"would have no problem passing them on"* to the Department. (transcript day 1, p. 107)

57. Mr. Kielthy described himself as being in a *"catch-22 situation"* as he could not fish because the vessel had no fishing authorisation, he could not dispose of the boat because he believed this would disqualify him from the decommissioning grant and he could not take the boat to another harbour because he would incur charges there as well. He admitted that Captain Murphy had *"some sympathy towards [his] predicament"* but he was told that *"he had to treat [him] the same as everybody else."* This is evidenced by the fact that Captain Murphy gave Mr. Kielthy until November 2006 to get his affairs in order before imposing laid-up charges.

58. Captain Murphy stated that Mr. Kielthy could have moved the vessel to another harbour where there was no fee or charging system.

#### **Conclusion**

59. Having heard the evidence described earlier in this judgment, it appears to this Court that Captain Murphy did exercise his discretion in favour of Mr. Kielthy. However, as noted above, he was under pressure to free up space in the harbour. In all of those circumstances, I invite counsel at a convenient time to address me on the precise amount now owed by the defendant based on this Court's determination that the rate of €0.63 per metre per day laying-up charge from 1st November, 2006, to 29th October, 2009, is applicable to the vessel.

