Neutral Citation [2013] IEHC 128

THE HIGH COURT

[1995 No. 1988 P.]

BETWEEN

USED CAR IMPORTERS OF IRELAND

PLAINTIFF

AND

THE MINISTER FOR FINANCE, REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 15th day of March 2013

1. The Proceedings

1.1 Plenary Summons of the 15th March, 1995
These proceedings were brought by way of plenary summons issued on the 15th March 1995. Some interlocutory applications followed. Notice of intention to proceed was served on three occasions between October 1999 and October 2010. Notice of trial was served on the 7thApril 2011. The matter was heard over 33 days from March to June 2012. The plaintiff company claimed a mandatory injunction requiring the second named defendant the Revenue Commissioners ("Revenue") to "publish to the plaintiffs the values for Vehicle Registration Tax ("VRT") purposes of the full range of new and used motor vehicles and to publish revised values from time to time as they occur". The plaintiff also sought declarations of unconstitutionality of the VRT enabling legislation, its being contrary to European Community law and that the manner of its implementation was unlawful.

The general endorsement seeks:-

- A declaration that the manner in which and extent to which the Revenue have assessed and continued to assess VRT on motor vehicles imported by the plaintiff is unlawful and contrary to the provisions of s. 133 of the Finance Act 1992, as amended by s. 9 of the Finance (No. 2) Act 1992.

- A declaration that the provision as so amended is unconstitutional in that it fails to vindicate the property rights of the plaintiff and it infringes its right to equality.

- A declaration that provisions as so amended is contrary to the provisions of European Community law and in particular Article 3(a), 3(c) and 3 (g), Articles 7(a), Article 9, Article 12, Article 30 and Article 95 of the Treaty of Rome and the Sixth VAT Directive 388/77.

- A declaration that the manner in which and extent to which Revenue has assessed and continues to assess VRT on motor vehicles imported by the plaintiff is contrary to the Constitution and fails to vindicate the property rights of the plaintiff and infringes its right to equality.

- A declaration that the manner in which and extent to which Revenue has assessed and continues to assess VRT on motor vehicles imported by the plaintiff is contrary to the provisions of European Community law and in Articles 3(a), 3(c) and 3 (g), Article 7(a), Article 9, Article 12, Article 30 and Article 95 of the Treaty of Rome and the Sixth VAT Directive 388/77.

There are further claims based on legitimate expectation, proportionality, equality and legal certainty:

- A declaration that the manner in which and extent to which the Revenue has assessed and continues to assess VRT on motor vehicles imported by the plaintiff is contrary to the principles of legitimate expectations, proportionality, legality, equality and legal certainty.

The plaintiff also sought damages:

- A mandatory injunction directing the return of all excess VRT paid by the plaintiffs and if necessary, an order for the taking of an account and inquiry.

- Damages for conversion, detinue, negligence, wrongful interference with constitutional rights in European law, misfeasance in public office.

- Such further and other relief as the court shall seem fit.

- Costs.

The Chief State Solicitor (CSSO) entered an appearance on behalf of the first, third and fourth named defendants on the 22nd March 1995. The Revenue Solicitor entered an appearance on behalf of the Revenue on the 19th April, 1995.

1.2 Summary of Statement of Claim 28th July 1995
The statement of claim describes the plaintiff as a limited liability company having its registered office at Marina Commercial Park Centre, Park Road, Cork. The business of the plaintiff is the importation and sale of used motor vehicles, particularly from Japan but also from other member states of the European Union.

On the importation and sale of motor vehicles there are two taxes levied, VAT and VRT. VRT was introduced with effect on and from

the 1st January 1993, in accordance with the provisions of s. 132 of the Finance Act 1992, as amended by s. 8 of the Finance (No. 2) Act 1992.

Section 133 of the Finance Act 1992, as amended by s. 9 of the Finance (No. 2) Act 1992 provides that chargeable value of vehicles for VRT shall be the open market selling price ("OMSP"). In the case of new vehicles VRT is further defined as the price, inclusive of all taxes and duties, which in the opinion of the sole wholesale distributor, a model of that make and specification might reasonably be expected to fetch on a first arms length sale thereof in the open market in the State by retail.

In the case of second hand vehicles the OMSP is further defined as the price, inclusive of all taxes and duties, which, in the opinion of the Revenue, the vehicle might reasonably be expected to fetch on a first arms length sale thereof in the State by retail.

The plaintiff complains that the computer system Revenue established for the purposes of calculating the OMSP does not take any account of the actual sale price of a particular vehicle but, instead, applies a chargeable value for VRT purposes obtained by the system. The plaintiff also complains that the declared value of new vehicles and the tables of value of second hand vehicles are not published and that the Revenue refused to supply values to the plaintiff. Further, the plaintiff complains that the Revenue operated a system whereby an estimated amount of VRT in relation to a particular vehicle might be obtained in advance, but Revenue could increase this estimate if it feels that it has been underestimated.

The plaintiff complains that the manner in which the Revenue has operated this valuation system is secretive, arbitrary and lacking in transparency and legal certainty. As a result the plaintiff faces uncertainty when purchasing and selling stock as it is impossible to calculate its eventual VRT liability. Consequently the overall trade of the plaintiff has been in progressive decline. This, the plaintiff claims, has caused it to suffer loss and damage.

The plaintiff states that the values used by Revenue to calculate VRT have been on many occasions well in excess of actual prices capable of being obtained by the plaintiff which results, in those cases, in the VRT being a much higher proportion of the actual sale price than the current rate for the tax. Further, since the introduction of VRT the plaintiff claims that the value of used imported motor vehicles imposed by the Revenue for the purpose of levying the tax have been subject to arbitrary increases, out of line with the actual market price.

The plaintiff claims that the system of valuation, as established by law and as operated by Revenue, discriminates in favour of the domestic car trade and against the trade in imported used cars. This is done, it is claimed, by:-

- Permitting domestic new car trade to determine its values.

- Imposing artificially high values on imported used cars.

- Discriminating against undertakings, such as the plaintiff, trading in imported used cars in that the added value and the dealer's margin in a domestic used car transaction is not subject to VRT, whereas in imported used car transactions importers such as the plaintiff pay VRT on a value which purports to correspond with the retail price.

- Charging VRT on imported used cars in excess of the residual VRT incorporated in the value of domestic used vehicles of the same characteristics; alternatively it is impossible to establish whether the VRT charged on imported used vehicles exceeds the said residual tax or not.

1.3 Defence of the first, third and fourth defendants and defence of the second defendants 26th September, 1995
In identical defences both the State parties and the Revenue say that they have not established a computer system of valuing imported second hand vehicles as alleged. Revenue state that it takes into account all relevant factors and characteristics which affect or influence the price of imported second hand vehicles in forming the opinion required under the legislation. The fact that a computer programme is availed of in the course of such exercise does not take from the fact that the value attributed to a specific vehicle is determined by the price fixed. The defendants are under no obligation to declare the price of new vehicles and the declared price of new vehicles is openly available to the public at large by recourse to the main dealers for each make of vehicle.

The defendants deny that there are tables of value of second hand cars as alleged, and state that the publication of a table of such values would be impractical and pointless. The defendants operate a system of estimates and submit that the administration of the provisions of the said legislation has been conducted on the part of Revenue openly, objectively and impartially on the basis of facilitating importers of vehicles with approximate preliminary estimates for each vehicle followed by the opportunity of individual examination of each vehicle coupled with a further right of appeal against the value attributed upon such individual examination. Revenue denies that any progressive decline or any loss or damage sustained by the plaintiff in its overall commercial trade in which risk is inherent to that such has been caused or contributed to by any facet of the administration of the provisions of the legislation governing VRT.

Revenue notes that the plaintiff's business has been affected by material alterations in market conditions generally in the motor vehicle trade, resulting in a lack of competitiveness in imported Japanese vehicles upon which the plaintiff was particularly dependent. Revenue cites particular factors such as the fact that the single age depreciation table, used by the prior tax system, resulted in lower values for the purpose of excise duty, the depreciation of the value of the then Irish currency as against the Japanese currency, which made it more expensive to buy used vehicles in Japan, the fact that within the single market of the E.C. private individuals find it more attractive to import used vehicles from other Member States without import formalities and without paying VAT, as reasons for the decline in the market competitiveness for imported Japanese vehicles.

The defendants deny that the values applied by the second named defendants for tax purposes are on many, or on any, occasions in excess of the actual prices obtained by the plaintiff for the said vehicles. If such excess occurs, it is attributable to the vagaries of the market in which the plaintiff operates. Revenue does not "impose" values on used imported motor vehicles, but rather they value each such vehicle presented for registration on the basis of its "open market selling price" as defined therein, being the price at which, in its opinion, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the open market in the State by retail.

Revenue denies that they have applied or apply arbitrary increases as alleged, or at all, and that the values applied by the second named defendants are set out of line with actual market prices as alleged. Revenue deny that there is discrimination in favour of the domestic car trade as alleged or at all and deny that Revenue permits domestic trade to determine its values for VRT as alleged.

Revenue denies that VRT, and the manner in which it has been administered, is unlawful or contrary to the provisions of the said Acts as alleged or at all and denies that it is contrary to E.C. law, including the Sixth VAT Directive, as alleged.

Revenue denies that the tax and its manner of administration contravenes the principles of legitimate expectation, proportionality, legality, equality or legal certainty, and denies that it is unconstitutional or that it fails to adequately vindicate the alleged property or other rights of the plaintiff. They submit it is not an impermissible delegation of law making power as alleged, or at all. It is further denied that the plaintiff, as an artificial corporate personality, is entitled to assert the alleged, or any rights, by reference to the constitution.

1.4 Particulars of Accounts
The first reply dated the 20th November 1995, gave the plaintiff unaudited turnover and profit before tax for 1990 to 1994, the last year of which it made a loss advised as £200,000 or more. (Accounts were audited by O'Callaghan and Company for 1991 to 1993. The 1993 accounts showed a gross profit of £254,038 (€261,652)). Increased staff costs resulted in a loss before taxation of £42,773.

Mr. O'Dowling ceased to be a director of and shareholder in the plaintiff in September 1995. Angela Riordan was appointed director. There were no separate accounts for 1994.

Accounts for two years to 31st October 1995, were produced by Crowley and Company. Gross profit for the two years was £915,237. A different and unexplained comparable figure for 1993 of £586,879 was double that audited by O'Callaghan and Company (£254,038). The accounts for 1995 were signed by neither of the directors, Fintan Riordan and Angela Riordan. The first accounts signed by the directors, though not by Crowley and Company, were the 1999 accounts. The 2009 accounts were signed by the directors and audited by Crowley and Company showing a deficit of £1,213,917 (€1,192,393) and indicated that the net assets were less than half of the amount of its' called up share capital.

The director's reports for 1995/1996 and 1997 refers to a major restructuring in 1995 and that "the directors are pleased with the development of the company to date". The directors' report for those years repeated that "the directors did not envisage any developments in the business and are enthusiastic about the future". There is no reference in any of the accounts from 1995 to 2008 of any trading difficulties nor, indeed, to the present litigation.

The abridged accounts for 2009 do not contain a directors report.

The replies indicated that 75 cars were imported from the UK from 1990 to 1994 out of a total imported of about 3,800, of which about 3,500 were sold.

It was stated that "because a substantial part of the plaintiffs trade was wholesale rather than retail it is difficult to show, in relation to each vehicle it imported, the retail price as compared with the Revenue VRT valuation".

By not taking the invoice price the competitive advantage of a dealer supplying vehicles at a lower cost is reduced.

The further reply to particulars dated the 3rd June, 2011, for gross loss of earnings for the period January 1993 to December 2010, was for €131,605.84. This was based on projected incremental loss of earning margins of between £5.1 million in 1993 to £13 million in 2000 and from €5 million in 2001 peaking at €10-11 million in each of the years 2008 to 2010. These losses were based on projected incremental sales of 103,199 units over the seventeen years.

1.5 Discovery Procedure
Laffoy J's decision of the 1st March 2006, on an appeal by the plaintiff of a further and better discovery order of the Master of the High Court, stated:-

> "In May, 1995 the plaintiff issued a motion seeking an interlocutory mandatory injunction directing the second defendant to publish to the plaintiff the values for VRT purposes of the full range of new and used motor vehicles and to publish revised values from time to time as they should occur. An order was made on foot of the motion by Costello P. on 17th July, 1995, wherein, as the order indicates, by consent of the parties a timeframe was fixed for delivery of pleadings. It was further ordered that each side should make discovery within six weeks from the delivery of the defence "of the documents which are or have been in their respective possession or power relating to the matters in question" in the action. Unfortunately, the enthusiasm for a speedy resolution of the matter which obviously inspired that order appears to have dissipated. Three years later, by order of this Court (Geoghegan J.) dated 22nd June, 1998, the first and second defendants were ordered to make further discovery of specific documentation."

1.6 Delay
This case was heard over 33 days between 6th March and 21st June 2012, some 17 years after the proceedings were issued. Counsel for the plaintiff told the court on the first day of the hearing that the reason it had taken so long to get to trial was that the plaintiff had to make repeated applications in relation to discovery and inspection. Counsel told the court that the plaintiff was not satisfied with the extent of discovery but had decided to proceed.

2. Plaintiffs Opening Submissions
The plaintiff was established in 1988 and its business involves sourcing quality used cars from other EU Member States as well as countries outside the EU and, in particular, Japan. The court was told that there was good commercial opportunity involved in importing quality used motor vehicles from Japan. People tended to trade in or dispose of their cars after a relatively short period of time and they tended to be in good condition. The plaintiff saw a market opportunity in Ireland involving the importation of used cars from Japan into the European Community, causing them to enter into free circulation so that imported cars competed with domestic used cars on the Irish market.

Counsel for the plaintiff in his opening submission told the court that issues arose as to whether or not the administration of the tax by the Revenue is *intra* or *ultra vires*.

Vehicle Registration Tax (VRT) has been in operation since the 1st January 1993. It replaced Motor Vehicle Excise Duty (MVED). VRT is a tax on registration rather than importation. This was brought about as a result of Ireland's membership of the European Community and the creation of the Single European Market (SEM), which would have made importation taxes unlawful. The plaintiff claims that the system, either as legislated for or as operated, must be either unlawful according to both domestic law and European

law, but also unlawful in the manner in which the system is operated by Revenue as a matter of domestic law and European law. The plaintiff submits that there is unlawful discrimination between imported vehicles compared with domestic used vehicles.

Counsel submitted that if the administration of the tax was ultra vires, then the system as operated by Revenue was unlawful.

3. Relevant Legislation

Section 132(1) of the Finance Act, 1992 states: "In addition to any other duty which may be chargeable, subject to the provisions of this Chapter and any regulations thereunder, with effect on and from the 1st day of January, 1993, a duty of excise, to be called vehicle registration tax, shall be charged, levied and paid at whichever of such rates as may stand specified for the time being by an Act of the Oireachtas is appropriate on -

(a) the registration of a vehicle, and

(b) a declaration under section 131(3)."

The amendment of s. 132 by s. 8 of the Finance (No. 2) Act 1992, in respect of non converted and exempt motor vehicles is as follows:-

"8. Section 132 of the Act of 1992 is hereby amended –

(a) in subsection (1), by the substitution of "at whichever of the rates specified in subsection (3) is appropriate" for "at whichever of such rates as may stand specified for the time being by an Act of the Oireachtas is appropriate",

and

(b) by the insertion of the following subsections after subsection (2):

"(3) The duty of excise imposed by subsection (1) shall be charged, levied and paid –

(a) in case the vehicle the subject of the registration or declaration concerned is a category A vehicle which has an engine of a cylinder capacity exceeding 2,012 cubic centimetres, at the rate of an amount equal to 31.8 percent of the value of the vehicle or £100, whichever is the greater,

(b) in case it is any other category A vehicle, at the rate of an amount equal to 25.75 percent of the value of the vehicle or £100, whichever is the greater,

(c) in case it is a category B vehicle, at the rate of an amount equal to 13.3 percent of the value of the vehicle or £100, whichever is the greater,

(d) in case it is a category C vehicle, at the rate of £40,

(e) in case it is a category D vehicle, at the rate of nil percent of the value of the vehicle."

"133(1) Where the rate of vehicle registration tax charged in relation to a category A vehicle or a category B vehicle is calculated by reference to the value of the vehicle, that value shall be taken to be the open market selling price of the vehicle at the time of the charging of the tax thereon.

(2)(a) For a new vehicle on sale in the State which is supplied by a manufacturer or sole wholesale distributor, such manufacturer or distributor shall declare to the Commissioners in the prescribed manner the price, inclusive of vehicle registration tax, which, in his opinion, a vehicle of that model and specification, including any enhancements or accessories fitted or attached thereto or supplied therewith by such manufacturer or distributor, might reasonably be expected to fetch on a first arm's length sale thereof in the open market in the State by retail.

(b) A price standing declared for the time being to the Commissioners in accordance with this subsection in relation to a new vehicle shall be deemed to be the open market selling price of each new vehicle of that model and specification:

Provided that where, at the time of its registration, a new vehicle has fitted or attached to it enhancements or accessories which have not been taken into account in the price declared under this subsection, an amount equal to the declared price, increased by the addition thereto of such amount as, in the opinion of the Commissioners, is the retail value of such enhancements or accessories, shall be deemed to be the open market selling price of the vehicle.

(c) Notwithstanding the provisions of paragraph (b), where a price is declared for a vehicle in accordance with this subsection which, in the opinion of the Commissioners, is higher or lower than the open market selling price at which a vehicle of a similar type and character is being offered for sale in the State at the time of such declaration, the open market selling price may be determined by the Commissioners for the purposes of this section.

(3) In this section –

"new vehicle" means a vehicle which is less than 3 months old when reckoned from its first entry into service or which has travelled less than 3,000 kilometres;

"open market selling price" means the price, inclusive of vehicle registration tax, which, in the opinion of the Commissioners, a vehicle, including any enhancements or accessories fitted or attached thereto or sold therewith, might reasonably be expected to fetch on a first arm's length sale thereof in the open market in the State by retail, subject to the provisions of subsection (2)."

The amendment of s. 133 by s. 9 of the Finance (No. 2) Act 1992, in respect of non converted and exempt motor vehicles is as follows:-

> "9. Section 133 of the Act of 1992 is hereby amended –
>
> (a) in subsection (2) –
>
> (i) in paragraph (a), by the substitution of "the price, inclusive of all taxes and duties," for "the price, inclusive of vehicle registration tax,", (ii) in paragraph (b), by the deletion of the proviso,
>
> (iii) by the insertion of the following paragraph after paragraph (c):
>
> "(d) Where a manufacturer or sole wholesale distributor fails to make a declaration under paragraph (a) or to make it in the prescribed manner, the open market selling price of the vehicle concerned may be determined by the Commissioners for the purposes of this section.",
>
> and
>
> (b) in subsection (3), by the substitution of the following definition for the definition of "open market selling price" –
>
> "'open market selling price' means –
>
> (a) in the case of a new vehicle referred to in subsection (2), the price as determined by that subsection,
>
> (b) in the case of any other new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, would be determined under subsection (2) in relation to that vehicle if it were on sale in the State following supply by a manufacturer or sole wholesale distributor in the State,
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> (c) in the case of a vehicle other than a new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, the vehicle might reasonably be expected to fetch on a first arm's length sale thereof in the State by retail and, in arriving at such price –
>
> (i) there shall be included in the price, having regard to the model and specification of the vehicle concerned, the value of any enhancements or accessories which at the time of registration are not fitted or attached to the vehicle or sold therewith but which would normally be expected to be fitted or attached thereto or sold therewith unless it is shown to the satisfaction of the Commissioners that, at that time, such enhancements or accessories have not been removed from the vehicle or not sold therewith for the purposes of reducing its open market selling price, and
>
> (ii) the value of those enhancements or accessories which would not be taken into account in determining the open market selling price of the vehicle under the provisions of subsection (2) of the vehicle where a new vehicle to which that subsection applied shall be excluded from the price."

4. Correspondence with Revenue in 1994

4.1 Following a meeting of traders, including the plaintiff, with the Revenue in Dublin Castle in September 1993, a letter was sent to the plaintiff on the 18th January 1994, stating that after a review of the open market selling price of used cars imported directly from Japan, the values had been upwardly adjusted on Revenue's computer system and the new values would come into effect on the 7th February 1994.

4.2 The plaintiff's solicitor wrote to Revenue on the 2nd February 1994 in response stating that an arbitrary change such as the one proposed in the chargeable value of imported vehicles for the purposes of levying VRT would have near disastrous consequences for the financial viability of the plaintiffs business and that it was not open to Revenue to make arbitrary block adjustments of values of the kind proposed. The letter finished with a request for an undertaking from Revenue that it would abandon the proposal, and warning that the plaintiff had instructions to take whatever legal steps were necessary to safeguard its business. There was no response to that letter.

4.3 On the 2nd March 1994, the solicitors for the plaintiffs wrote again to the Revenue noting that the increases had taken effect. The letter notes surprise at the fact that "at a time when the Minister for Finance announces a decrease in VRT rates in the budget, against a background of very strong lobbying by the Society of the Irish Motor Industry (SIMI) against used car imports from Japan, that the [Revenue] should introduce an increase in the open market selling price of such vehicles thereby resulting in the increase in the amount of duty paid on such vehicles while the amount paid on new vehicles has presumably decreased". The full details of the system by which the open market selling price of imported vehicles is arrived at was sought, as were details of the values determined for all types of imported vehicles since the introduction of VRT and finally full details and actual values before the increases took effect were sought. The plaintiff's solicitor stated that while awaiting a response from Revenue, his client was forced to "pay the tax under protest".

By letter dated the 11th March 1994, the plaintiff threatened proceedings if the information was not provided.

4.4 On the 21st March 1994, the Revenue responded, referring to the letters and regretting the delay in response. The letter quotes the definition of the open market selling price. It states that "the basis of the valuation treats all similar vehicles in the same way. In particular it is designed to ensure that an imported second hand vehicle of whatever origin will not be discriminated against". An examination of each imported second hand vehicle was made and the value determined by reference to an established norm of values of similar vehicles sold in the State, whether imported or not. The letter denies that any arbitrary block adjustments were being made, stating the system is subject to continuous adjustments based on the prices achieved for all used car vehicles sold in the State and any adjustment is part of that process.

4.5 The plaintiff's solicitor responded on the 25th March 1994, seeking certain information as to the "established norm of values" referred to by Revenue in its letter. The plaintiff would continue to pay the tax under protest. This letter and a reminder of the 11th April 1994, was not responded to.

4.6 The plaintiffs appealed a decision in mid 1994 in relation to two cars. This appeal was allowed, with the details communicated to the plaintiff in a letter dated the 29th June 1994. By letter dated the 19th July 1994, the plaintiff's solicitor informed Revenue that his client would not be accepting the refund because his client was "not prepared to accept any valuation and VRT levied thereof over invoice value" and returned the cheque being monies due on foot of the successful appeal.

4.7 On the 31st August 1994, the plaintiff's solicitor wrote to Revenue noting a lack of response to the letter of the 25th March 1994 and reiterating his client's position.

4.8 On the 24th October 1994, Revenue responded in relation to the car which was the subject matter of the successful appeal in mid 1994, referred to above, stating that they had had difficulty in valuing the car to establish a precise open market selling price as it was rarely traded and there was divergence of opinions among the experts they had consulted. Because the transaction price quoted by the plaintiff was not markedly out of line with some of the lower valuations suggested to the Revenue and, in absence of evidence to the contrary, it informed the plaintiff that it was prepared to accept that the transaction price was *bona fide* and it proposed to use it as the open market selling price for the purposes of charging VRT in that case.

> Having consulted with the Revenue solicitor, (Revenue) was satisfied that:
>
> > "(i) The manner in which we determine OMSPs is correct and in accordance with the law.
> >
> > (ii) We are not obliged to have a formal appeals procedure in which the appellant and his/her solicitor could make oral submissions to a deciding officer."

Revenue further stated that the submissions in the plaintiff's letter of the 31st August 1994 were being dealt with by the Principal Officer in the Indirect Taxes Division at Dublin Castle.

5. Revenue Correspondence with SIMI

5.1 A letter dated the 8th August 1992, from the Revenue to the Chief Executive of the Society of the Irish Motor Industry (SIMI) referred to the new system which would be taking effect as of the 1st January 1993. It stated that

> "In the case of second hand vehicles this price – again the open market value for the market as a whole and not a transaction value – will be determined by the Revenue Commissioners using a procedure which has already been described to you in some detail . . ."

5.2 A letter of the 11th September 1992, from the Chief Executive of SIMI to the Revenue, expressed disappointment that the concerns and proposals of SIMI on the introduction of VRT were not included in the procedures proposed. It sought transparency in the valuations placed on second hand and new cars. The letter went on to state that the proper valuation of second hand cars was of vital importance to its members' survival as most imports came from countries where taxation levels were substantially lower. The letter contained other complaints and submissions, many of which amount to concerns that local industry would be adversely affected by imported second hand cars.

The Chief Executive also sent a letter to the then Minister for Finance, dated 15th September 1992, referring to a concession made by the Revenue in favour of SIMI. This was that:

> "Data on values of used imports will be provided for SIMI periodically. The Society will be given the opportunity to discuss valuations of used vehicles and Revenue will investigate specific complaints about undervaluation."
>
> ". . . given the E.C. court requirements for fair and indeed transparently fair tax systems the declared OMSP values will be available to the public."

6. Evidence of Niall O'Dowling

The principal evidence of fact was that of Mr. O'Dowling a director of the plaintiff which formed the basis for the expert evidence.

Niall O'Dowling and Fintan Riordan incorporated the plaintiff company in 1988, having both previously been involved in car repairs. Both were directors and equal shareholders. Both identified an opportunity to import used cars for the Irish motor market because of a chronic shortage of good quality second hand cars available for sale, despite the fact that such cars were in high demand. The plaintiff operated from the old Ford factory in Cork city which, being proximate to Cork port, was accessible for car imports. The plaintiff sold mainly to dealers and also to the public.

Finance was organised by way of a credit facility with Allied Irish Finance which was secured with personal guarantees from both directors, as well as a facility from Anglo Irish Bank for deferred VAT payments. Factory finance was organised with the Sanwa Bank in Japan, which was the principal source of imports. From an early stage the plaintiff formed a business relationship with Mr. Kazumasa Murakami, the president of Yuwa Shipping and first secretary of the Nagoya Used Car Exporters Association. Recommendation from reliable Japanese sources was key for foreigners doing business in Japan. Mr. Murakami introduced the directors of the plaintiff company and Mr. O'Dowling in particular to the car exporters in Japan through Nagoya Used Car Exporters Association.

The plaintiff, unlike the franchised Irish distributors, was not tied to buying specific models of cars. All imported cars were inspected before shipment from Japan both by the plaintiff's staff and by the Japanese Auto Appraisal Institute. Inspections were carried out by way of mutual agreement between the Department of the Environment in Ireland and the Japanese authorities in a test equivalent to the subsequent Irish National Car Test (NCT).

The largest auction house in Japan sold approximately 80,000 units per week through a system of daily auctions. On purchasing stock the plaintiff had an extended credit arrangement from the Japanese agents of 45 to 120 days from the date of landing in Ireland.

By August 1992, the plaintiff had £208,000 on deposit and £900,000 in working capital.

The taxes payable by all car importers before 1993 were the European Common Custom Tariff ("CCT"), Motor Vehicle Excise Duty ("MVED") and Value Added Tax ("VAT"). No taxes or duties had to be paid until cars were removed from the bond.

Excise duty (MVED) was imposed on motor vehicles up to 1992 at the point of importation into the State and was calculated on the

basis of the recommended retail price of the car as indicated by the manufacturer. The duty for used cars was calculated by depreciating the recommended retail price in accordance with a single statutory depreciation schedule.

The depreciation table or sliding scale had been published for imported used cars from January 1985 to December 1992. This scale enabled the plaintiff and any other importer to calculate tax liability for excise duty. There was one scale, which did not change. That significant aspect of the MVED system was crucial to their business as it allowed an importer to know, both prior and post purchase, what the eventual tax liability would be.

The MVED system was restrictive and he imported older cars generally.

To calculate the MVED the plaintiff had used the single age depreciation scale which did not reflect the true depreciation in the earlier years of the car. In addition, air conditioning and catalytic converters were added to the recommended retail selling price which added an additional £2000 per car. He instanced a new Nissan Micra with the recommended retail selling price of £7,000 having an addition of £2,000 for such extras. The plaintiff considered such extras as a cost rather than a value as the purchaser would not pay more just because the car was more environmental. However, under the MVED system he knew his tax liability and was able to calculate backwards and had a ceiling of what he should pay for each vehicle when they came up at auction.

The MVED system was replaced from the 1st January 1993, by the Vehicle Registration Tax ("VRT") in the context of the introduction of the single European Market.

The plaintiff hired the late Colm O'Herlihy, a former custom and excise Principal Officer in the motor vehicle duty area, to advise them on the new system in July 1992. Mr. O'Herlihy had been a director of Irish Vehicle Importers, the first Irish company to import used Japanese cars, and acted as a consultant to the main Japanese car importers including the plaintiff.

Mr. O'Dowling said that UCII were selling 700 to 800 units per annum before the introduction of VRT in 1993.

In 1992, there was very little information on the proposed VRT and it was very difficult to get any reasonable sense of how the system was going to operate. They had severe difficulty in actually defining how the open market selling price would be calculated and what it would be based on. He said they could get no clear definition of what the open market selling price would be or what the basis of the calculation was.

Mr. O'Dowling said that in the build up to the introduction of VRT they felt that there was going to be huge opportunities for the car market and they were willing to expand into newer type vehicles. In order to be prepared for the huge increase and influx of relatively new cars, the plaintiff acquired a seven acre site in Ford's which had the capacity to hold up to 2,100 cars in bond. They had built up a network of 82 dealers throughout the country. They were making preparations at that stage for a huge influx in 1993. They had arranged finance and had already negotiated a contract with the Nazak Line in Japan, which had the carrying capacity for between 5000 and 8000 units, and they were looking forward to a fair taxation system and an opportunity for huge business growth.

Unlike under MVED, where they could calculate and have a higher or upper level of what they would pay for any one type of vehicle, with the new system they could not do so. He said they were effectively purchasing blind, because they did not know the eventual tax liability, they had to base the liability on the estimates or the payments of registration.

After the purchase of the vehicles, he was in a position to get an estimate for VRT in respect of the vehicle from the details of the logbook which he would fax to the Central Vehicle Office in Rosslare.

The Revenue official would take the logbook and the VRT4 form and look up the computer to register the vehicle. He said the only inspection the Revenue official could carry out would be to check the chassis number, the mileage and condition of the vehicle. In the early stages Mr. O'Herlihy had filled out the VRT4 forms which Mr. O'Dowling described as containing a unique code in relation to the car. Tax had to be paid to enable the registration number to be given to the purchaser. He agreed that the Revenue could have worked out what the selling price of the vehicle was in relation to the VAT payable.

From June 1995, the statistical codes were made available to the plaintiff.

Mr. O'Dowling said that the Revenue did not seem to have a clear and precise system in place in 1993. It seemed as if they were trying to build a system. There was very little information available. The plaintiff did not even have the basic information to fill out a simple form with the vehicle registration and depended on information that they had received from a third party, Mr. O'Herlihy. In January, 1993, they noticed an increase of upwards of 23% on their best selling models. It was only in late 1993, nearly a year later that they got some sort of understanding as to the system that was in place, how it operated and the effect it had on their business.

At a meeting between the car dealers and Revenue on 22nd September 1993, Dr. Lennox informed the dealers present that should they continue to be unhappy about the system of taxation, then the Revenue Commissioners would be quite prepared to carry out an audit on their company records. Mr. O'Dowling said that Dr. Lennox had asked if any of them had ever experienced a Revenue audit, adding that the Revenue Commissioners would "live in their offices". Mr. O'Dowling perceived the reference by the Revenue to an audit as being a threat. The Revenue Commissioners had come to the plaintiff's office and had taken the invoice prices of certain cars that were sold.

At the meeting in September 1993, he first learned of the depreciation scales under the VRT system. Paddy Dunne of the Revenue had told him that the Revenue were using a sliding scale. They were not allowed to discuss the sliding scale or what it was attached to. There was very little information available. He made complaints to John Kerrigan in the Central Vehicle office in Sullivan's Quay, Cork and made complaints to Liam O'Mahony who was their control officer in Parnell Place and they also made complaints to Rosslare.

It was correct that in January 1994, the Revenue wrote a letter to the plaintiff saying that the open market selling price of used cars imported directly from Japan had been adjusted on the computer system. That was a reference back to the meeting of September 1993, but that the Revenue had agreed to postpone that adjustment.

There was no clear explanation, nor indeed any explanation as to how in fact the open market selling price on used imported vehicles was arrived at. He said it was untrue that the plaintiff knew precisely or with sufficient detail how the system operated to allow them to conduct their business. He said he still did not understand how it was calculated as the principal key elements were kept secret i.e., the allocation of the cars to each depreciation table.

He had since been provided, as a result of a Freedom of Information application, with 25 tables and agreed that there were another

1,043 of which he became aware of in the previous few weeks before the hearing.

The two factors for working out VRT was the declared open market selling price and the application of appropriate depreciation table. He had never been supplied with the open market selling price (of the equivalent new vehicle) and he recalled that under the old MVED system they were supplied with those details as SIMI published recommended retail prices.

He was not in a position to apply depreciation tables to a particular vehicle. If the plaintiff wanted to bring in a new or a different model he would have to bring in a test model to find out what VRT was. That did not prove to be reliable. If the estimate was favourable, then they increased numbers and imported more of that type of unit.

Mr. O'Dowling was referred to conflicting estimates that he received from the Revenue Commissioners in respect of a large number of vehicles between the 31st January, 1994, and the 22nd February, 1994. The first page of the document listed the make, model, chassis number and statistical code of a range of vehicles being 80 units which were due on the 2nd February, 1994. He had obtained a copy of the VRT estimates from the Revenue's office at Sullivan's Quay in Cork, on the 31st January 1994, and got a separate set of estimates for the same vehicles on the 22nd February, 1994. There were increases in the amount of tax that they had to pay.

There was a change in the VRT rate which occurred on the 27th January, 1994, and agreed that those changes had nothing to do with the VRT which had dropped from 25.7% to 23.2%. He was so informed on the 18th January 1994 that the value of cars had been adjusted in the Revenue computer system.

The length of time it would take to obtain an estimate of VRT depended on whether the Revenue had statistical codes for the units. It would vary from a week to weeks. When he was in Japan, at an auction or at wholesale dealer's premises, it was impossible to get a quick estimate. The only way to get an estimate was after the purchase of the vehicle. That meant they were purchasing blind as they did not know their eventual tax liability which was a key component to their overall price. When he sold a vehicle it had to be a fixed price and not a price plus VRT.

He could build up a database of statistical codes, but could not build up a database of estimates because they were continually changing on a monthly basis. One could not appeal an estimate. An appeal would only be considered once the tax had been paid and therefore only a retail sale could be appealed.

It was correct to say that the higher the VRT the bigger the impact on their margin. In many cases UCII sold cars to the trade at £6000, but the VRT would then be based on £8000 by the Revenue Commissioners.

There were no published rules or procedures in respect of appeals. He had appealed a number of valuations in early years, but the system, his written statement had said, was unworkable and unfair because of the lack of published guidelines.

The appeals first of all went to the Vehicle Registration Office in Cork who passed it on to Rosslare. An official in Rosslare would ring three dealers in Dublin to see what they would expect the particular car to fetch. No inspection of a vehicle took place.

He was referred to an appeal on the 13th May, 1994. Mr. O'Dowling was dissatisfied with the appeal process and the outcome of the appeal. His solicitor wrote to the Revenue on the same date complaining that the process was a "sham". He agreed that the VRT was reduced in both instances, but as far as he was concerned it was not reduced sufficiently in respect of a Toyota Aristo.

On the 24th October, 1994, the Revenue wrote as follows:-

> "Subsequent correspondence regarding the above on behalf of your client. It has proved to be somewhat difficult to establish a precise OMSP for this model as it is rarely traded in and, allied to this, there was some divergence of opinion amongst those experts whom we consulted. However, as the transaction price quoted by you is not markedly out of line with some of the lower valuations suggested to us and in the absence of any evidence to the contrary, we are prepared to accept that the transaction price is bona fide and propose to use as the opening market selling price for the purpose of charging VRT in this particular case."

Mr. O'Dowling agreed that there was never any instance where it was suggested that the selling price to a third party was other than *bona fide*. The Revenue did not accept the invoice price as a basis for calculating VRT.

He said the appeal process was too time consuming and that a commercial enterprise could not constantly be appealing valuations. UCII never got a favourable answer and their invoices were never accepted. He was asked whether he could put in a meaningful appeal and replied "No". In the early days the Revenue Commissioners were "judge, jury and executioner", and that their decision was final.

On the 21st October, 1993, the plaintiff complained (1993/4521) to the (European) Commission. On the 14th February, 2012, the Commission wrote:-

> "Acknowledge and receipt of a letter of request from the 9th February, 2012, when you applied to receive a copy of the reasoned opinion of the Commission in respect of Irish VAT proceedings issued on the 26th January, 2012.
>
> At this delicate stage of the infringement procedure, publicity of the document you have requested would be premature and would have the effect of jeopardising the friendly settlement of the dispute."
>
> The letter continued:-
>
> "Please note that there is no overriding public interest disclosure in the document which would outweigh the need to protect the purpose of inspections and investigations. You are entitled to have a revision of this decision."

Shortly beforehand on the 27th January, 2012, Ireland's permanent representative wrote to the Commission, Duties Taxation and Custom Union referred to the present proceedings. The letter stated:-

"I refer to the above infringement concerning issues relating to Ireland's VRT. Ireland's Revenue Commissioners, and the Department of Finance and the Attorney General are currently involved in a long running legal case brought by Used Car Importers of Ireland in relation to the introduction of VRT and its method of application. This case started in 1995 and has now been listed for the High Court starting on the 6th March.

In a witness statement provided by an officer of the Revenue Commissioners mention was made of two documents in relation to the valuation aspects of the above infringement, namely (i) the original letter of formal a notice of 14th May, 2009 and (ii) additional letter of formal notice of the 20th May, 2011. UCII's legal team have now requested access to those documents. Ireland understands permission should be sought from the Commission before releasing these. I would be grateful therefore if you could grant the appropriate permission for their release to UCII's legal advisors."

A response was received on the 3rd February, 2011, in relation to the request. The reply stated:-

"The requested documents indeed form part of the file on infringement procedure which is still ongoing. As a general rule the Commission does not disclose to the public documents relating to the ongoing infringement procedures. The reason for this is to safeguard a climate mutual trust between the Commission and the Member State concerned and to preserve the possibilities for an amicable settlement in this matter. This approach has been consistently confirmed by the Court of Justice. Therefore, at the present stage access to the requested document would be refused if the request for disclosure was directly filed with the Commission. In line with the consistent law of the European Courts, refusal would be motivated by the exception laid down in Article 4.2 Third Indent of the 2001 Regulation according to which the institutions have refused access to a document where disclosure would undermine the protection of the purpose of inspections, investigations unless there was an overriding public interest disclosure."

Mr. O'Dowling said that he had not been able to identify or discover the terms of the Commission opinion.

He said that since 2010 it was correct that the Revenue could appoint approved persons to carry out inspections and this is now undertaken by the National Car Testing agency.

He had witnessed such an inspection with an imported car from England, and observed the process. He asked the inspector whether he valued the car. The inspector said he did not – the valuation came from Rosslare and had nothing to do with the inspections. He did not ask for the invoice price of the vehicle. He was given the price but he did not use as a basis for taxation or VRT assessment.

Mr. O'Dowling said that it was correct to say that under the old excise duty scheme the new cars seemed to more heavily taxed than the older cars. The newer cars were available in Japan and, given their own estimations, they would have been very competitive in the Irish market. Their new premises had facility for 2100 cars and they had increased credit from the Sanwa Bank which would give them a total amount of funding in the region of £4 million. They were ready in 1992 to "flick the switch" and had everything in place.

When VRT increased there was continual interference in the market through introductions of scrappage schemes, reductions of the rate of tax with increases in OMSP which led to higher payments of VRT. He referred to an internal memo from Mr. Butler on the 21st February, 1994, to the VRO/VRT officials which stated:-

> "As of Thursday, the 24th February, 1994, revised depreciation tables will be released 'live' in the VRT system.
>
> Also, in conjunction with these revised tables, over the next number of weeks the OMSP's of certain models of vehicles will be revised to more accurately reflect market prices. One of the effects of this revision will be to increase the open market selling price of smaller type motor vehicles (1000cc or less).
>
> Officials should therefore when giving VRT quotations to the public, emphasise particularly strongly over the next few weeks that the quotations given are likely change without any further notice."

No notification was given to them of the proposed level or scope of increases, other than the letter in February which affected the viability of purchasing vehicles in Japan.

They continually asked for details in relation to how the system operated but that, even to this day, they still did not know which vehicles applied to each depreciation table. He said that they had to guesstimate and that nearly all the time they got it wrong. The tax was continuously on an upward trend, which exposed their company to severe financial risk. It turned their assets into liabilities. They were left with cars on their hands which they could not sell.

He said he ceased to be a shareholder and director in late summer or autumn of 1995 and the break up was amicable.

He was asked why he ceased to be a director and shareholder and he said:-

> "It came about due to the introduction of Vehicle Registration Tax, the financial strain that put on our business and the pressure that it put on our business. It was totally leaning towards the new domestic car trade and it was totally discriminatory as against our company."

He said there was no other reason. He had, and still has, other business interests.

He was giving evidence on behalf of the plaintiff with the authority of Mr. Riordan with whom he met every week or every couple of weeks. They worked together in compiling the information (for these proceedings).

Had VRT been applied to either the landed price of the vehicles or the retail selling price they would have been able to quantify the likely level of tax they would have to pay in relation to newer cars. He agreed that they effectively imported cars of approximately five years old, but would have purchased younger vehicles if VRT had been applied differently. They were only touching the tip of the iceberg in the five year old cars and that they could have achieved additional sales through all of the years given that they had 82 dealers and if an additional ten units per month were sold by each of 80 dealers this would generate an additional 9,600 units per annum.

He was referred to the suggestion by the Revenue that he knew how the system worked and said he did not know how vehicles were allocated to the depreciation codes and still did not know that to the present day.

The 2002 VRT 1 document, under the heading "How is the Tax Calculated" says:-

> "In the case of cars and small vans, the tax is a percentage of the expected retail price, including all taxes in the State. The price is known as the Open Market Selling Price or OMSP. The VRO will calculate this tax for you."

He agreed that from 1999 to 2001 a CD had been issued by the Revenue Commissioners enabling the calculation of estimated values

of VRT. Subsequently an online VRT calculator came into existence in December 2004. Prior to that there was no depreciation code on any document given by the Revenue Commissioners to the public or made available publicly. That affected the operation of a commercial business such as the plaintiffs.

They continually had problems. They could not estimate or calculate the tax. They were coming up against stone walls and they could not operate their business.

He was referred to a document prepared and dated 12th March 2012, entitled "UCII Sales and VRT Statistics for Passenger Vehicles". He, DKM Consultants, the plaintiffs expert and Mr. Donal O'Boyle had extracted the figures from all the sales of vehicles on which VRT had been paid bu the plaintiff to the Revenue from 1993 to 2009, detailing the Euro cost equivalent of the pound cost in the earlier years and the landed cost plus the custom tariff and VAT together with CIF.

The document total the costs, VRT, sales price and margins to deduce an implied additional or excess VRT of €2,125,313 paid from 1993 to 2009.

Mr. O'Dowling said that DKM and Mr O'Boyle would seal with the analysis of those figures and the consequential effects on demand resulting in a loss of opportunity.

The loss of profit after tax was some €85 million,, if investment income of some €35 million making a total of approximately €120 million (See tabele 3.8 p. 230 below).

In cross examination by counsel for the defendants, Mr. O'Dowling said he was not a director of, or shareholder in, UCII at present.

He was asked to look in the book of pleadings at his affidavit of the 21st July, 2011, wherein it was stated at para. 1, that he was a director of the plaintiff company. He said that proceedings were originally initiated back in 1995 when he was a director of UCII.

It was put to him that in every other affidavit sworn in the proceedings, he carefully avoided saying that he was a director of the company. Mr. O'Dowling said that he had full authorisation from his partner, Mr. Fintan Riordan, to act on their behalf. He said he was not a director of the company at the time of swearing those subsequent affidavits.

Prior to establishing UCII he had fifteen years experience in the car body repair business. He was involved in valuations for insurance companies, loss adjusters and assessors.

He had visited United Kingdom before he went to Japan just prior to August 1989. There were very few vehicles available in the UK. They were predominantly Ford and Vauxhall and, at that time, VAT was charged on their importation. He said they imported about 40 units from Northern Ireland in 1993/1994. Apart from those units from Northern Ireland throughout the period they were talking about, all the other vehicles were imported from Japan. The Japanese cars were more viable because of the VAT situation at that time.

He agreed that it was correct to say that all the estimates and projections of loss were based on imports from Japan. All the instructions given to the experts and the material before the court in the case concerned, direct imports from Japan to Ireland.

From 1989 to 2000, he was in Japan two weeks out of every five, but not in the later stages. At first he dealt with wholesalers and agents. About six months later, he started attending auctions.

From 1990 onwards, the majority of vehicles were purchased at auctions. He was the first foreigner to be allowed in. The variety was bigger at auctions on different days with different volumes. It was a very sophisticated system which was computerised and it was correct to say that one had ten seconds to make up one's mind. He had inspected the vehicles, which were on the list prior to the auction, and worked back his sums as to the purchase ceiling. He agreed that he had time to prepare and time to check to see the cars he was interested in, but he did not necessarily purchase. Some vehicles might go over his budget but he was paying on average 100,000 to 250,000 Yen at time or IR£700 pounds. He was looking at manual vehicles with low cc and middle of the range cars as well. He agreed that he had stated in his written statement that the purchase price of the cars and the agent's fees were the only real currency risk as both were paid in Japanese yen but he said the purchase price and the car exporters were low and formed only a small fraction of the final retail price.

Mr. O'Dowling agreed that the gross margin on the sale was roughly £3,000 before VAT and VRT for a car which had been bought for £700 and the cost of the vehicle and transport was less than 25% of the retail price.

It was put to him that the margins were so great on the vehicles that whatever way he looked at it, there was significant room for manoeuvre regarding increases or decreases in VRT. Mr. O'Dowling said that under the VRT system, they did not have scope because in some instances he said "we have increases of between 50% to 80%".

Mr. O'Dowling agreed that if the car was sold for £800 rather than £700 in Japan, that that would have had a knock on effect but that there was still room for manoeuvre.

It was put to him that he had consistently looked for estimates from 1993 up until late September 1995 when his dealings with UCII came to an end. He was referred to the affidavit of discovery of John Leonard and agreed that he regularly sought estimates in respect of vehicles that he had already purchased in Japan and were in transit. He was referred to the Nissan March cars listed in the detailed schedule which were assessed for similar amounts of VRT of £1,033. He had a reasonable idea as to what the VRT would be in relation to each of them, but said that the estimates were not binding, they were subject to change. It was put to him that the Revenue's evidence would be that they would stay open for 14 days. He was asked whether the Revenue would ever have withdrawn the estimates before 14 days and he said they had done so when there was an increase in the VAT or in the VRT rates.

It was put to him that there was no evidence to show that there was any withdrawal within 14 days. He replied that in his experience the estimate would not stand and he referred to the increases in 1994 where the Vehicle Registration Office in Sullivan's Quay in Cork would not accept the estimates.

He agreed that the rates of VRT were set by the Oireachtas.

It was put to him that in relation to the cars he actually did purchase it was fair to say that he had a fairly good knowledge of how the market operated. He had very wide margin and took account of possible variations of VRT but he said he still could not calculate the tax which was always a financial risk for any business. He said he could not guess what the VRT would be on other type of

vehicles and that is why he stuck to the five year old vehicles.

The vehicle stayed in bond until such time as he identified a purchaser and that that would be more than 45 days – it could be a period of up to 90 days and even longer.

He was asked why he did not import three year old cars. He said that they would have imported some of them at a later stage but said that even if they had imported three year old vehicles, they would be more expensive and the VRT would be greater. He said that they did import different models to test the water. The earlier models, the Nissan Micras, they were more or less carried over from the old system into the new system. He did not import more three year old vehicles because he could not calculate the VRT assessment. He claimed that was discriminatory.

Mr. O'Dowling said there was more financial risk in the import of newer cars because VRT was only an estimate and he could not run a business on an estimate. He could never be guaranteed on his eventual tax liability.

He said that in 1989 there were three companies involved in importing used cars from Japan: Irish Vehicle Importers, UCII and High Grade. By 1992/1993 there were roughly 15 to 20 companies and he said that he supposed they felt that the Japanese (cars) was good business. They were competitors but the plaintiff was importing larger numbers. It was put to him that none of them ever sued the Revenue and he replied that nobody would be willing to take on the 20 years to do it.

He was referred to a chart in Kieran Coyle's witness statement which was the Revenue's record of registration figures for the year 1984 to 2010. In 1989 over 10,000 used cars were registered as imports into Ireland, 22,000 in 1990, 21,000 in 1992 and 17,637 in 1992, just before the introduction of VRT.

In 1993, there was an increase to almost 34,000; over 40,000 in 1994, and 48,000 in 1996 which was the peak. In the year 2000 there was reduction and a significant increase in the number of new vehicles registered.

The percentage of the total number of used cars was 35% in the year VRT was introduced and 34% in the two years afterwards. In 2000 it was 10% and decreasing. It was put to him that in 1990, 22,000 vehicles were imported and that UCII imported 858. In 1991 out of over 21,000, UCII imported 818. He agreed that in the years after the introduction of VRT, the number of cars imported increased and he agreed that other people in the business who were importing cars were able to make a profit, enjoying the highest share of the market in the years 1993 to 1995. He said that there had been an increase in English cars at that time as will with the introduction of the internal market.

He was referred to Dr. Bacon's statement for used Japanese market share from 1996 to 2010. In 1996, over 48,000 used vehicles were imported, being 35% of the Irish market, and the Japanese share was 23% increasing in the following two years to 36% and 53% and in 1999 to 52% and 46% in 2000. Mr. O'Dowling agreed the year 2000 had a major impact on the car industry in Ireland as people wanted do buy new rather than used vehicles with the 2000 registration.

Mr. O'Dowling said that the cars could be re-exported out of Ireland without being registered. It was put to him that they were figures taken from the Revenue Commissioners. He said that that was not say that they were registered in Ireland.

He said that Dr. Bacon was wrong in reference to the data on imports of used Japanese cars.

It was put to him that in 1996, UCII imported 396 cars in 1997, 597 cars, in 1998, 614 cars in 1999, 353 cars and in 2000, 228 cars as compared to a total import figure from Japan of 11,423, 16,311, 23,904, 19,506 and 11,683 in the same years. He was asked whether he accepted that UCII was a very small player on the market for importing used Japanese cars into Ireland. He replied that they were a small player as a result of the introduction of VRT. He was asked how his competitors were not similarly injured and he answered that it was because they could come in and take it at a different direction. The problem with UCII was that they:

> "Were affected with severe restrictions back in 1994 and 1995 and 1996 with rate reductions, rate increases, introduction of scrappage schemes, all of these had a severe effect on VRT and the amount of tax that we, as a company, had to pay. The increases were so severe it stunted the growth, it left us with stock that we could not sell which took years to sell. We could not appeal estimates, we had to sell the vehicles. As a result of the increases, we had to retail most of the vehicles".

He was asked whether there was not an opportunity at that stage for UCII to continue in the market and he responded by asking how he was going to finance it. He agreed that at that time he was not a director or shareholder and was not in a position to give evidence as to what UCII's position was in those years.

The possibility of the company coming back into the market was put to him. He replied by saying that it was carrying residual stock. If the plaintiff was starting anew and had not been affected by VRT increases, it could have done so.

A letter of the 21st October, 1993, sent to Mr. Limo Facco, Director General Secretariat of the EC, by UCII made certain complaints to the Commission some ten months after the introduction of VRT. The letter referred to a number of complaints and to correspondence and meetings with Commission officials.

The plaintiff's letter stated: "we have been trading successfully and our success has in itself meant our expansion". Mr. O'Dowling said that that was the overall story to date.

The letter continued:-

> "The used Japanese car industry in Ireland has generated revenue for the Irish Government in the region of £50 million. Our company's contribution of that same amount is a sizeable proportion of that figure that is approximately £10 million."

He was asked whether he would agree that that figure was probably slightly on the generous side. Mr. O'Dowling said that they were probably looking at the overall market with everyone else included.

The letter continued:-

> "In January this year our Government introduced a Vehicle Registration Tax, replacing the customs and excise duty, which was abolished throughout the EEC with the removal of borders/frontier barriers. Whilst we fully understand and appreciate

that an alternative form of taxation had to found, we are now facing a disastrous situation if our Government are to proceed with their new legislation to increase the Vehicle Registration Tax."

Mr. O'Dowling agreed that the legislation was already in place at that stage.

The letter referred to the previous rate of excise duty of 20% compared to the VRT rate of 25.75%, which required UCII to restructure their pricing and their buying. Reference was made to the meeting of September 1993 where the Revenue informed UCII that they were receiving directives from the Department of Finance increasing the OMSP by a further 20% effective from the 1st November, 1993 which was to be postponed until the 1st December. Mr. O'Dowling said that there was also an increase in January 1994 with the change in the rate of tax.

The letter also referred to a number of examples and said that UCII could not see how it could be viable to import any cars, new or used. It said that it was necessary for UCII to project market trends and demands and thereby the buying programme had to reflect the additional time span for the actual shipping from Japan. They found themselves committed to 600 units over the next four to five months.

It was put to Mr. O'Dowling that in 1993 UCII imported 608 cars and 613 the following year but that the letter appeared to say that 600 units were being shipped in a half year period. Mr. O'Dowling said that they were carrying stock from the old MVED system, they would have had stock as dealers, they would have stock purchased in Japan and they would have stock in transit at that stage.

Counsel said that his understanding from Mr. O'Dowling's evidence was that VRT was paid only when a buyer was identified and therefore there would not be any stock with dealers. Mr. O'Dowling said that there was stock in the compound and in transit and that they had already committed to purchasing cars.

When pressed, Mr. O'Dowling agreed that there was no complaint made about secrecy or lack of transparency at that stage.

The letter drew attention to examples of VRT charges. Mr. O'Dowling said that these were based on VRT that they had paid at that time. He said that in 1993, there was an overlapping system from the old MVED system and that the real system as far as he was concerned kicked in after the increases in February 1994. It was put to him that that his own letter, and the plaintiffs claims, that VRT brought in on the 1st January, 1993, in compliance with the creation of the internal market was discriminating.

Mr. O'Dowling agreed that he knew what VRT was on a particular model, but would not have known for a complete range of cars. He agreed that at that stage the secrecy and transparency did not show itself as they were dealing with the Revenue Commissioners through Mr. O'Herlihy. He said that it was correct to say that Mr. O'Herlihy may have been in complete knowledge of what was going on. Mr. O'Dowling said that Mr. O'Herlihy was their agent, but, as he was deceased, would not be giving evidence in the case.

Mr. O'Dowling was asked to consider the reply from the European Commission of the 6th December, 1993, following the plaintiff's letter to the Secretary General. That letter stated:-

> "It may be that you have already taken professional advice, but for clarity perhaps I should explain that there is no harmonisation of law on car taxes and therefore, Member States are, in principal, free to tax as they chose.
>
> There is, however, one major proviso to this: there must be no discrimination against the products of other Member States and no tax advantage given to the national product.
>
> Thus, second hand cars which you "import" from the other Member States (including Japanese cars which have been produced or entered free circulation in other Member States) must not be taxed more heavily than the equivalent cars in Ireland. For this purpose it is, of course, necessary to value the second hand car already in the Irish market and calculate the residual tax element contained in its price."

Mr. O'Dowling was asked what he understood from that sentence.

Mr. O'Dowling said that that obviously referred to Japanese cars from Member States which had been made or imported into the Member States. He agreed that you could look at it as there being no issue about Japanese cars imported directly into Ireland.

> Mr. O'Dowling was asked to consider the memorandum from Dr. Lennox dated the 14th December, 1993, one week after the letter from the European Commission. The memorandum referred to a letter received the previous day, the 13th December and stated:-
>
> "At the outset of the VRT project this office was given to understand that VRT was chargeable on the OMSP of a vehicle. It was my clear understanding that the Revenue Secretariat had obtained this information from Brussels. The attached letter from Mr. Venturi (Brussels) to Mr. O'Dowling would appear to be suggesting somewhat something quite different.
>
> In my dealings with SIJI and Used Car Importers of Ireland Limited they accept fully that customs and excise are implementing the law correctly. However, they hold the view that the law discriminates against their operations.
>
> Perhaps it is time that a definitive clarification of the law could be obtained."

Mr. O'Dowling did not agree that it was a fair statement of Dr. Lennox in saying that the Revenue was implementing the law correctly. He said that at the meeting in September 1993, the dealers had expressed their views regarding their dissatisfaction of the VRT system. He felt it was discriminatory of the Revenue increasing the OMSP of Japanese vehicles because they felt they had been undervalued in the past. He said that the dealers had requested the meeting because they had severe problems with the way VRT was implemented. They had difficulties with secrecy, transparency, paperwork and it was total chaos when the system was introduced.

He said it was correct to say that the implementation of the law that was not the focus of his complaints to the Commission or to the State at that time, but rather the complaints were of discrimination.

He was referred to a letter from the Commission to the Irish Government on the 28th September, 1993, from Mr. Venturi which said:-

> "The Commission have received a number of requests for information concerning the new arrangement for collecting and

calculating the Irish Vehicle Registration Tax. It would seem it is difficult to obtain such information directly from the Irish tax authorities.

Mr. McCartan MEP has also asked a number of parliamentary questions relating to this tax and the Commission would like to be able to respond fully and accurately to any further questions put to it by members of the European Parliament or by private individuals.

I would therefore ask you to request the competent authorities in your country to transmit to me the legislation currently governing this tax."

A draft reply was referred to for onward transmission to Mr. Venturi that all imported used vehicles were examined by a customs officer in order to determine the OMSP, taking into account the exact model specification and comparison with a similar vehicle for sale in this State. On that basis the value and exact amount of tax payable is determined and detailed instructions have been given to assist staff to determine valuations. If the taxpayer was dissatisfied a re-examination could be requested. While the number of used car vehicles being imported into Ireland rose sharply during 1993, less than 1% was subject to appeals about the amount the VRT payable. Mr. O'Dowling said that the criteria for an appeal was that it had to be a retail sale and an estimate could not be appealed.

Mr. Venturi replied in February 1994, saying that, as indicated in his letter of the 16th December, 1993, that some of the complaints centred on the question of how second hand cars produced in other Member States were valued for the purposes of VRT and how that valuation compared to a residual VAT or earlier tax in existing Irish second hand cars in terms of recommended or current sale prices. He asked for extracts of relevant national legislation in relation to how OMSP was calculated on second hand cars from other Member States.

Mr O'Dowling said that the plaintiff also had this problem when they tried to import cars from other Member States. It was put to Mr. O'Dowling that no complaint was submitted by UCII with regard to cars from Member States. Rather, their claim for damages was based on direct imports from Japan as was stated in cross examination.

Mr. O'Dowling said that he also made those claims on the basis that they were bringing cars in from Member States and did find problems.

He was referred to Mr. Reid's memo of the 23rd May, 1994, which referred to a letter from the Commission dealing with the calculation of OMSP. He agreed that it was an established published list of guide prices for dealers and importers on which the open market selling price was based. Mr. O'Dowling said that that was not published to this day.

He was referred to what was received from Mr. Venturi in May 1994, after the Commission came to Ireland, in which Mr. Venturi said that he was satisfied with the method used to calculate the OMSP.

Mr. O'Dowling said that was not exactly true that the Commission was satisfied. He had discussions with Mr. Malcolm Bevan, who informed him that when he went back to Brussels, he handed the Irish file to the internal investigation branch as he was not happy with system. Mr. Bevan said that "the way the Irish are calculating taxes is illegal". He said that under the EC regulations, "they are in breach of Article 12" and that "they should base it on the Belgian system, on an invoice value but then they would be in breach of Article 95. They are caught between two stools". Mr. O'Dowling said that Mr. Bevan had said that the use of depreciation scales was illegal. He said he had got that in writing. He had a copy of his telephone conversation.

He was asked whether the Commission ever took Ireland to court in relation to any of those matters. He replied that he went to visit Brussels in 1995 with UCII's solicitor, Mr. Whelan, and he spoke to Mr. Venturi and Mr. Bevan who told him that the matter should be dealt with in the national courts. He said that Mr. Bevan was not giving evidence in the case.

Mr. O'Dowling agreed that the letter to him from Mr. Venturi of the 3rd May, 1994, was discovered and said:-

> "Following your telephone conversation today with Mr. Bevan, I am writing to confirm that as you already apparently knew, we are indeed visiting Dublin to meet with the national authorities early next month."

Mr. O'Dowling said that he had sent copies of the depreciation scales to the European Commission and that they had decided to come to Ireland to speak to the Irish authorities regarding the VRT system. He agreed that they were going to review the mechanism and conformity with the EC rules. He said that they were not happy with the Irish System and agreed that it was correct to say that no action was taken against Ireland up until 1994.

He agreed that the references made were to vehicles imported from another EC Member State.

The statement given by Ms. Scriviner on the 11th November, 1994, appearing in the Official Journal of the European Communities, was referred to in the letter to Mr. O'Dowling:-

> "According to the information currently at the Commissioners' disposal concerning Irish registration tax on motor vehicles, it would appear that the imposition of this tax on new vehicles cannot be deemed to infringe Article 95 of the EC Treaty."

The letter continued:-

> "As regards used vehicles, community law does not require the Member States to apply the real value of the vehicle as the taxable amount for this type of tax is not harmonised to European level."

Mr. O'Dowling said that that was correct, that it was the Commissioner's view.

The letter of Mrs. Scriviner continued:-

> "The use of scales for assessing the value of vehicles will always be somewhat arbitrary, but this is often simple method of determining the taxable amount given to the wide variety of taxable goods. An assessment of this nature is based on an average value for vehicles. Only by examining taxable values in relation to selling price on a model by model, indeed vehicle by vehicle basis, can it be determined whether, overall, the assessment criteria are in line with this average rule."

Mr. O'Dowling agreed that a sliding scale was being used.

He believed that it was correct that if there was discrimination in relation to the importing of vehicles from another Member State it would be in breach of the rules.

Mr. O'Dowling referred to the depreciation tables he had received from the Revenue Commissioners which he got on request from the Revenue Office in Sullivan's Quay, Cork and which he sent on to the Commission. He agreed that the Commission did not take any action against Ireland as a consequence of that.

He was referred to a letter of the 24th January, 2000, from the European Commission acknowledging receipt of a complaint made by Mr. O'Dowling following extensive correspondence between his solicitors and the Commission regarding "this infringement notice". He agreed that the response was from Niall O'Dowling's Sports Car Centre Limited, but added that he would have been acting on behalf of UCII as well. He agreed that the Commission had addressed the correspondence to Sports Car Centre and that the correspondence came to an end in 1994 and began again in November 1999, with Niall O'Dowling on behalf of Used Car Importers and Sports Cars Centre Limited.

Counsel for the defendants pointed out that papers from Sports Car Centre Limited would have been undiscoverable in the present proceedings.

Mr. O'Dowling said that his solicitors did not send any complaint to the Commission on his behalf. It was put to him that his witness statement referred to a number of complaints pursued down through the years by correspondence and meetings with Commission officials and in May 2009, "our solicitor received a letter from the Commission stating that the Commission had instituted infringement proceedings under Article 226 of the EC Treaty against Ireland in relation to the VRT system".

Mr. O'Dowling said that he initiated the original complaint and, after a couple of years, his solicitor communicated with the European Commission to explain the secrecy, non transparency and everything that was wrong with the system in Ireland. He said there would have been extensive correspondence between the Commission and the solicitors. He did not have the file in front of him. He did not know what documents were sent with the correspondence.

Counsel for the defendants submitted that this constituted a difficulty in cross examination and in relation to the basis on which the defendant's expert witnesses would give evidence. Mr. O'Dowling had placed great weight upon the Commission's intolerance of a breach. It was something that would require intervention as could be seen from the many repeated infringement proceedings brought against France, Greece and Denmark. The defendant was entitled to see what correspondence the Commission had in relation to complaint D200/152.

Mr. O'Dowling said that VRT was a very restrictive regime and the manipulation of the depreciation codes and administration of the system could put a person out of business overnight. If the correct scale were not assigned, Revenue officials, with no trade experience, who were valuing cars for the whole of Ireland, could put a particular, or a particular group, of cars on the wrong scale, therefore overvaluing those cars. The cars would not be viable to import into Ireland. He said that back in 1994, UCII's growth was stunted and its assets were turned into liabilities overnight (because of VRT).

The plaintiff was put under considerable financial strain. Mr. O'Dowling asked how could they then just turn around and start re-importing cars and go into a newer market or go into a different range of cars when it would have been financial suicide given the non transparency and the secrecy and the overvaluation of the Revenue Commissioners on all cars. He stated that UCII could have been as big as any distributor of imported cars in Ireland – as big as all of them put together, because there was the opportunity there at the time.

Those opportunities could not have been taken by UCII because they did not have the advantage of the new car distributions to declare their own values. If UCII had been able to declare their own values, they would have had a much better system. They would have opened up, going into the new car market and they would have been able to tell their dealers what the car sold for. They would have been able to determine their own taxable value.

Mr. O'Dowling said that the market had changed and by 2003 more opportunities had opened up.

It was put to him that he had completely abandoned UCII which could have taken advantage of the opportunity if he had chosen to continue with them. He said he was not competing against UCII and that he did not abandon them. The reason he left was because obviously they were put under severe financial pressure. They could not sell the cars and they could not wholesale the cars. They actually had to retail all of the cars to get rid of them. They could not put the cars into auction because they would lose too much money.

In May 2009, the Commission had instituted infringement proceedings under Article 226 of the EC Treaty against Ireland in relation to the VRT system. He was asked what the background to that letter was. Mr. O'Dowling said it was a series of letters sent to the Commission and to DG21 in 1993 regarding VRT in Ireland where UCII had complained about the level of taxation, the non transparency and the secrecy of the system. He had those other letters (which were not discovered) had told the Commission the objective of UCII to provide good quality used cars for a market in recession.

He said it was correct to say that the proceedings had been commenced by Sports Car Centre Limited on his instructions to Mr. Whelan, who was also the instructing solicitor in the UCII proceedings.

He agreed that the Revenue Commissioners served a notice for particulars on the 20th October 2000. It was put to him that there was no reply. He thought that his solicitor could confirm whether there was a reply or not.

He agreed that nothing had happened in relation to Sports Car proceedings since then.

He was referred to the plaintiffs' solicitors' letter (dated 19th July, 1994) to the Revenue which stated:-

> "In this age range the distortion in the depreciation scales is not so obvious but is substantial nevertheless. There are many incidents where the administrative price is higher than the actual sale price. For instance to take one vehicle which the client imported from the U.K., a BMW 318i. The administrative value in that case was £4,283 and the actual sales price was £3,320. There are many such incidents and we can furnish an excel file containing 2,469 cases of over valuation (80% of all appeals from 1993 to 2003) from the Revenue's own records."

Mr. O'Dowling agreed that the example given to the Commission of a BMW 318i which a client imported from the UK was of an inter-community import. He also agreed that the overall valuation was from the Revenue records.

It was put to him that there were appeals in 1% to 2% of cases with a high percentage rate of success. He agreed but said that there were severe delays with appeals. He said that that was a problem with cash flow in so far as VRT had to be paid before an appeal was taken. He asked why new car dealers were not appealing.

He was referred to an email from Antonio Blanco Dalamu of the 21st December 2005, relating to complaints which stated that the Commission continued to monitor registration taxes across the community and exercised its prerogatives under Article 226 of the EC Treaty (infringement proceedings), when it considers such taxes infringed community legislation.

Mr. O'Dowling said it was correct to say that the Commission would bring member states to court if it considered that the taxes infringed community legislation. He also agreed that it was correct to say that the Commission was monitoring the situation on an on-going basis. He was referred to a letter of the 21st December 2005, referring to Antonia Victoria's telephone call of the 23rd September 2005. The plaintiff's letter referred thereto the Commission having been seriously misled about the true nature of VRT system as operated by the Irish Authorities and asked that the Commission continue its investigations and pursue the complaint of the plaintiffs.

Mr. O'Dowling agreed that the reply of the 7th February 2006 to their solicitors stated that the scope of the Commission's enquiry was to determine whether Ireland, in levying registration taxes on second hand cars originating in other member states, was infringing Article 90 of the EC Treaty.

Mr. O'Dowling was asked were it not clear that he had led the Commission to believe that his complaint was in respect of the internal market. He replied that he was also talking about EU member state cars. He agreed that the Commission was investigating his complaint on a certain basis and that he had given an example of a member state car, the BMW referred to previously. It was put to him that he misled the Commission and made them believe that that was a matter of internal market trade. He replied that the example was of an internal market purchase.

He agreed that the complaint of Sport Cars Centre Limited had a specific private nature interest that there was no public interest there. Such interest was what was claimed in relation to the request to have access to the correspondence between the Commission and the Irish Authorities in the plaintiff's letter of March 13th 2006.

Mr. O'Dowling took counsel's word that the decision of the Commission had not been appealed.

He also agreed that the scope of the Commission's inquiry was to determine whether any VRT was applied to second hand cars originating in other member states was consistent with Article 90 EC.

Reference was made to complaints received by the Commission that Irish OMSP was higher than that paid for the car abroad. The Commission wrote to the plaintiffs' solicitor dated 16th October 2006 with reference to Sports Car Centre Limited's complaint.

> "This in itself does not constitute an infringement of Article 90 EC. Prices of new and second cars in Ireland are consistently more expensive than in other member states (in particular those with lower VRT or no VRT such as the United Kingdom). However, the case law of the Courts requires that comparison be made to the residual registration tax included in the price of cars present and in the target market (Ireland) and the amount of registration tax levied upon registration of similar second hand cars coming from other member states."

The letter continued:-

> "OMSP of used cars are not determined by applying a standard depreciation rate to the price of a car when new."

Mr. O'Dowling agreed that that complaint related to Sports Car Centre Limited's complaint of 2006, whereas in 1993 to 1997 there wasn't any internet available and the fastest means of communication was by fax. He agreed that the system changed over the years with different CD ROMs but he said he still couldn't determine the OMSP in 2004, and the Revenue hadn't distributed the depreciation tables at that stage.

The reply of the Commission of the 7th February 2006 continued:-

> "As I have stated above the services of the Commission will need a great of factual evidence in order in a position to demonstrate that Community law has been breached. I would be grateful if you could provide your views within a two month deadline.
>
> If you are unable to supply that information or if you do not deem it useful to respond to this letter, I would have to propose that the Commission close the file."

Mr. O'Dowling agreed that that was correct and that they responded in a letter of 12th December 2006, asking the Commission not to close the file saying that they would make contact shortly with a view to setting up a conference call.

Mr. O'Dowling agreed that the Sports Car Centre Limited case, at that stage, had not gone beyond a notice for particulars. He was asked to which case his solicitor was referring to in the letter and he replied that "they would be referring to the UCII case". It was put to him that the letter didn't say anything about the UCII case but rather, it just referred to him as principal in the complainant company. He agreed that the complainant company was Sports Cars Centre.

Indeed it appears to the court that there is confusion between the plaintiffs and the Sports Car Centre claim. The booklet of correspondence in these proceedings between the plaintiff and the Commission from 2003 to 2012 all refer to complaint in 1999/5321, which is that of the Sports Car Centre Limited and not the plaintiff.

Mr. O'Dowling agreed that it was correct to say that he had persuaded the Commission to take up infringement proceedings against the State as evidenced by a letter dated the 18th May 2009, addressed to the plaintiff's solicitors and to complaint 199, being infringement proceedings under Article 226 of the EC Treaty.

Counsel referred to a number of letters that followed, in which Mr. O'Dowling confirmed sending to the Commission the Cars

Salesman's Guide, the plaintiff's data base of cars and the reports of Brendan Dowling of DKM, economics expert, Sean O'Callaghan, computer expert, and of Rick Yarrow, motor trade expert.

It was put to Mr. O'Dowling that the complaint was from Sports Car Centre Limited and that the solicitor's letter referred to a complaint "prepared by our client" for their case against the Irish Revenue Commissioners and having taken instructions from our client. Mr. O'Dowling said that the European Commission had no problem with the Japanese cars and that they knew that "we were bringing in Japanese cars". They provided a data base of the plaintiff's cars which was accepted. He agreed that the client referred to in that letter was Sports Car Centre Limited.

He was asked to show evidence that he had of any imports from member states of the European Union. He replied that he had imported about 40 units from Northern Ireland in 1993/1994 and did not import any prior to 1993.

In relation to the appeals process, Mr. O'Dowling said the problem was that OMSP's were not determined by an examination even of "observed" prices –they were determined by applying a standard depreciation rate to the price of a car when used. He said that new car dealers never appealed because new cars are valued by the main importer and that, perhaps, somewhere in the region of 75% may have been overvalued.

He agreed that it was open to the plaintiff and the other importers to appeal the OMSP of second hand imports.

Much later on the 9th November, 2009, the Department of Finance gave the times for the success of appeals measured by refunds being made from the 1st January, 1993, to the 15th October, 2009, (203 to 1497 appeals) which slowed in all years a majority of cases being successful.

Mr. O'Dowling agreed that he was set up in business in terms of his financial arrangements, his shipping arrangements and his involvement in Japan. He was asked if he was set up in such a manner so as to import cars directly from Japan and he replied that that the opportunity arose to import from Japan. From their research in the United Kingdom and Japan, the Japanese cars were more viable because of the VAT situation at that time.

He agreed that it was correct that when he made complaints and claimed damages in these proceeding that all of the plaintiffs' estimates had been based upon imports from Japan. All the instructions he had given to his experts and all of the material before the court in the case concerning imports were direct imports from Japan into Ireland.

7. Evidence of Mr. Fintan Riordan

Mr. Riordan confirmed he is a director of the plaintiff and that Mr. O'Dowling was a fellow director and shareholder until September 1995. He said that he started in the motor trade in the early 1970s, operating a general garage on the Mallow Road as a sole trader which carried out mechanical work and he got to know Mr. O'Dowling during that time. They built up a mutual trust and towards the end of 1988 decided to look into the availability of sourcing good quality used cars on the Irish market for resale. He stated that the quality available of such cars was pretty bad and "shocking" and because the barrier for importing cars from outside Ireland was lifted, the directors explored the idea of importing Japanese cars.

Mr. Riordan confirmed that the plaintiff had a bonded compound which could hold 300 cars. The business plan was originally to sell to traders. They then opened a retail yard some three to six months later but continued to sell to wholesalers. Some dealers purchased the cars outright and with others they would give them a number of cars for a deposit as security. He said they began to expand their dealer network in 1990. He gave evidence that the Japanese cars had low mileage, had been driven on superior roads and had no rust problems and he said there was no comparison between the used Japanese cars and the used Irish cars.

Mr. Riordan said that the best selling car for the Irish market would have been a two to three year old car as it would have depreciated 40 – 50% after three years and most people would buy a second hand car rather than a new one. The plaintiff had initially imported cars under MVED system to which he pointed out there were both advantages and disadvantages. The main advantage was ability to calculate the actual end tax because of a sliding scale issued by the Revenue. They applied the sliding scale to the recommended retail price of the car and then applied the depreciation scale to it. Evidence was submitted that being able to calculate the MVED was important as it was pointless to buy a car, bring it over from Japan and make no profit. The disadvantage of the MVED system was the scale given tended to value newer cars higher than they were and it meant that the plaintiff had to go for an older profile car.

In cross examination Mr. Riordan stated that UCII dealt with some newer cars and were building up a network of dealers who were requesting them all the time. He said it was possible to import newer cars under MVED system but it was expensive. The dealers bought their existing stock and requested newer models. He said that the margin was so small it wasn't worth it for UCII or the dealer. He said they were non-profitable cars as they duty was too high. He stated that the dealers were threatened by the main distributor that they would lose their agency.

He said that they had stock sheets for the dealer network, some dealers would get cars on credit because they knew them. He said they didn't write up contracts like new car distributors but they would interview a dealer, visit his garage and make sure he had a TAN number and was regulated. He said they retained the certificate of assembly which they wouldn't release without a cheque. UCII maintained control of the vehicles at all times.

Mr. Riordan stated that they did not receive any tables from the Revenue before January 1st, 1993 with regard to the new VRT system. Revenue issued TAN numbers to all the registered dealers and this enabled garages to retain a car unregistered as long as they were registered with the Revenue. When dealers came to purchase cars, the dealer would have to pay the Registration Tax and put number plates on the cars. If a car was sold to a private individual then the plaintiff would pay the registration tax.

In relation to estimates, Mr. Riordan said they received estimates from the Revenue which were binding for "12 days or something". He said it was not a satisfactory system as the prices could move up and down and VRT affected the retail trade because of "guess calculating" the tax. After the estimate expired he said that many deals were on a 'knife edge' and they could lose deals because of an argument on price. In relation to wholesale trade, he said that when they gave cars to dealers they wanted to know the VRT amount. When the dealer sold the car and paid the VRT, if it was above what the plaintiff had said, the dealer would cont look for a cheque or credit note for the difference. The plaintiff would compensate them and he said this strained relationships with dealers.

Mr. Riordan confirmed that in 1994 the VRT rate in the budget went down but the amount of VRT that the plaintiff paid on each car increased because Revenue revised their calculations. He said that the plaintiff took a hit in the retail yard and the dealers sought a claw back. He said he thought the actual valuations were totally out of line with the valuation of cars at that stage and that they

didn't know how they were making the valuations as there was no information how the Revenue worked out VRT.

He gave evidence that if the plaintiff wanted to try a new model on the market they had to test it one at a time which was a three month cycle by the time it arrived from Japan. Even then he had no assurance that the OMSP would be the same if you imported more models further down the track. He said OMSP's for the same models varied even though the models were the same year and that cars were overvalued in certain age brackets, particularly newer cars. He submitted that the plaintiff would not import three year old cars as VRT was too high and the OMSP did not reflect the real OMSP in the market and that the difference could be between 20 to 30%. He said that if VRT had been charged by the Revenue on the basis of actual OMSP on the Irish market then UCII would have liked to have traded in the market for newer used cars.

Mr. Riordan said that new car dealers never had to appeal valuations. His experience of the appeals system was that it would be a huge administrative burden on the company to appeal all the valuations. He said that the process was too long and that their first one had taken three months. In cross examination it was put to him that UCII's first appeal had, in fact, been lodged on 16th February 1993 and was responded to on 18th March 1993, which was only a period of a month. Mr. Riordan's response was that UCII's business was to sell cars and not be weighted down by administration with the tax system.

He said that the overestimation of value put them at an uncompetitive advantage over the domestic cars because the final price would be higher and if they were quoting high prices all the time the sales would decline and that is what happened.

He said UCII had not achieved its original ambition to become a major car importer because they could not calculate the VRT and because the VRT valuation system was overvalued.

In relation to imports from member states, he gave evidence that between 23rd September 1993 and 7th February 1996, UCII imported 44 cars from Northern Ireland. He said that valuations assigned to cars coming from Northern Ireland were high as well but not as high as those placed on Japanese cars. He said if they had not been as high, UCII would have increased the numbers of imports from the UK.

Mr. Riordan said that Mr. O'Dowling left UCII in 1995 as the company could not afford to pay two salaries of that calibre. He said that the assessment of the damages suffered to UCII was reasonable because of the huge potential for business UCII could have had if the tax system had been fairer.

Mr. Riordan also agreed that he had invested his own money in UCII, as evidenced in the 1996 accounts, to keep the company afloat. He said they had diversified into container hire and sales in 2003 which was not part of the original plan but was necessary to keep the business going. He agreed that the profit in 1992 was £165,245 but that in 2009 the equity was negative (1,230,917). Mr Riordan attributed the financial failure of the company was a result of the VRT system on the used car market.

In cross examination Mr. Riordan agreed that he and Mr. O'Dowling had travelled to England to source cars initially when they set up in business but they were unhappy with the quality and choice of cars available. He said the cars in England would be "harder to get probably". He agreed to accept Mr. O'Dowling evidence in relation to the UK market.

Mr. Riordan said that he had dealings with Mr. Murakami after Mr. O'Dowling's departure from UCII in 1995 but not in regards to purchasing cars, merely in terms of shipping and golfing with him when he visited Ireland. Counsel directed Mr. Riordan to Mr. Murakami's transcript on day 8, page 25, where he stated he did not have dealings with Mr. Riordan after 1995. Mr. Riordan maintained he had dealings with Mr. Murakami's company post 1995 but agreed he stopped dealing with him directly at that time.

He said that Mr. O'Dowling continued doing business with Mr. Murakami after leaving UCII in 1995 and he had gone his own way. He relied on Mr. Peter Butterly of Quality Cars to go to Japan as he himself did not want to travel all the time. He said that he later established Munster Car Importers Limited as he needed money for UCII and that that company never sold cars retail, just imported them and sold them on to UCII.

Mr. Riordan gave evidence that UCII had been in receipt of the statistical codes from April 1993 but they had no manual as to how to apply them. They received the required manual in July 1995, two and a half years after VRT was introduced. He said they relied on Colm O'Herlihy to do the stat codes up until that point and agreed that, while the point of the code was to make it easier to obtain an estimate, there was "nothing in stone to tell them that". He said that in all of the time he had not been privy to how the OMSP was reached.

He said that in 1991 and 1992, 80% of UCII's sales were to the trade as their original intention was wholesale. He said by 1993 the percentage of sales to trade was down to 50%. They had to change their model and so in 1993 they hired an extra salesman and went more into retail which wasn't their original plan.

He referred to a meeting which took place with Dr. Lennox from Revenue and the car dealers. He said the suggested proposal to issue double invoices was a problem as it would not work commercially. It wouldn't work for a leasing agreement as all the documents had to be right for VAT and it would be at a different rate, i.e., VAT would be 10% for the service and 21% for the price of the car. He approached a bank to clarify the position and the bank said that they would only give finance for the car price so the service would have to be paid for by the plaintiff. He said such a system would have been impractical and they would have lost a lot of sales. He said UCII left the meeting dissatisfied.

He refuted suggestion by counsel for the defendant that he could have exercised 'commercial muscle' over the dealers saying that they had to operate as well at a fixed price and it meant UCII had to underwrite that fixed price. He disagreed that he was in a strong position to bargain with the dealers. He said that he didn't have figures for the return made to dealers in relation to overpaying VRT and said the liability would be offset against the next lot of cars.

He was asked why the 1996 UCII accounts and report state that the directors were pleased with the development of the company to date, given that VRT had been in operation for three and a quarter years at that point. He said that UCII were not put out of business (by VRT) but that their expansion plans were put out. By 1994 he realised that UCII was not going to expand in the way he had thought and so he resorted to "making do" and continue on with the VRT system. He said they were only running a small company compared to what they should have ran if the actual VRT system was not overpriced.

He accepted the contents of the directors' report stating that overhead costs were lower in 1996. It was put to him that the stock position improved in 1994 / 1995 insofar as the closing stock figures for the year had decreased. He agreed that on 31 October 1993 UCII held £1.9 million worth of stock and on 31 October 1995 it was reduced to £777,000. He said that it was because they didn't

import many cars in the 1993/1994/1995 period. He agreed that the directors' report for 1997 stated that "the directors are pleased with the development of the business".

Mr. Riordan was asked to refer to a document indicating years and figures. He confirmed that the document was a record of sales rather than of imports as had been stated by Mr. O'Dowling. He was directed to a second document which he confirmed to be a sales chart prepared by Mr. O'Dowling. He agreed that the figures when compared between both charts were different but said it depended on which month they were tallied at. He did not accept that the documentary evidence gave the court no reliable figures upon which to make an assessment as to precisely how many cars were sold by UCII between 1990 and 1994. He said the document gave an insight to the sales and the imports.

It was put to him that there was a discrepancy of roughly 10% between the documents for the year 1993 and that this document was also contradicted by other materials in UCII's discovery. Mr. Riordan said it was an internal thing and not an accounting process because some cars would be "half sold" from the year before. He accepted that the discrepancies in the documents meant it would be more difficult for the court to assess losses that might have been suffered.

Mr. Riordan confirmed that he told Mr. O'Boyle, who was estimating the overcharge of VRT for the plaintiffs, to apply the same rate as the Japanese overcharged VRT to the Northern Ireland imports.

In relation to the allegation of overstocking, he said that the company accounts for 1993 showed purchases of £1.76 million and the accounts for 1995 the figure was £2.12 million. As the 1995 figure applied to two years, the actual gross figure per year was £1.06 million which represented a reduction in the level of stock. He said the reason they were reducing their stock was to reduce overheads, cut their margins and "put up with the VRT". He said the VRT was probably 30% above the domestic car in Ireland in terms of the OMSP and it was still the situation at that stage that they were guessing the VRT so they didn't know the price of the car until it was actually sold. He said they didn't know when the Revenue would change the calculation of the OMSP as they were never kept informed.

He confirmed the plaintiff paid the legal costs in 1994. In 2010 / 2011 legal costs were funded from Mr. O'Dowling's Sports Car Centre by way of a loan from the Sports Car Centre Limited to UCII.

8. Evidence of Mr. Mitsuo Murakami

Mr. Murakami, in evidence via video –link, referred to his witness statement which he confirmed represented his evidence in the case. Mr. Murakami agreed that he had formed a shipping company for used car exports from Japan in 1981, having spent 20 years working in the shipping business.

His company was involved in exporting used cars to Bangladesh, Sri Lanka, Singapore, Malaysia and Hong Kong. Between 1985 and 2007 he was First Secretary of the Nagoya Used Car Export Association, which was formed with 33 different companies, with the aim of regulating the quality of used cars for exportation. He said that when the market in New Zealand opened in 1987 he began to export cars there. He originally shipped between 4,000 to 5,000 cars per month and finally as many as 89,000 per year to New Zealand.

Japanese cars were assessed and inspected by a governmental authority before they were quality assured. Used cars were sold through auctions but, back in the 1990's and 2000's there weren't many big auction houses so cars were sold through small retailers, wholesalers and car dealers. Mr. Murakami agreed that there were three-year old used cars available on the Japanese market in 1993 onwards.

Mr. Murakami visited Ireland in 1988 to assess the market situation and look for parties who might be interested in his shipping services. He advertised in the newspaper. His assessment of the Irish market was that there was movement and something new was going on. He received a fax at his hotel to say that the plaintiff was interested in importing Japanese cars. Mr. Murakami could not recollect whether he had met Mr. O'Dowling or Mr. Riordan on that occasion. He said they first communicated through fax and then they visited Japan.

Mr. Murakami agreed that it was easy for anyone to come into Japan and start buying second-hand vehicles without local assistance. He said anybody could buy used cars. The service he provided, as President of a shipping company, was to fill the vessels with cars for exportation. He introduced the plaintiffs to many used car companies. Mr. O'Dowling came to Japan once a month and he shipped his vehicles to Ireland. He said that the plaintiffs business grew in terms of them exporting more cars to Ireland.

He trusted Mr. O'Dowling and could not think of anyone more reliable. When Mr. O'Dowling first came to Japan, the Japanese traders did not trust foreign companies so a letter of credit was issued and, at the time the cars were loaded, the bank would automatically make the payment. There was a custom in Japan that where someone buys a car it has to be paid for within a week, so when Mr. O'Dowling purchased cars, Mr. Murakami's company made a payment to the car dealers or retailers on Mr. O'Dowling's behalf. He said that because the plaintiff was a foreign company, it would not have been eligible for financial help from institutions and therefore Mr. Murakami used his own company, YUWA Shipping, to get finance from the banks in Japan. He found his relationship with the plaintiff very satisfactory and one which lasted "for years and years".

Mr. O'Dowling had told him in 1992 that there would be a new tax system introduced and they should be able to ship more cars. Mr. Murakami said regardless of the new tax, he was expecting a lot of business in Ireland because of the similarities to New Zealand. He started arranging further finance for the plaintiff so that it would be able to purchase more cars once the new tax was in place. He was expecting the number of cars shipped to double. There would have been sufficient supply of cars in Japan.

In cross examination Mr. Murakami agreed that his company was involved in shipping goods, rather than cars specifically. He did ship cars to Ireland for other companies as well as for the plaintiff but he could not recall the percentage of cars that were shipped for UCII because the ship stopped in the UK and Holland on the way. He could not remember but he thought he was still shipping cars to Ireland up to 2008. He could not remember when he stopped shipping cars for the plaintiff. He could not recall if he had ever shipped cars to Ireland for Munster Car Importers Limited. He did recall shipping cars to Ireland for Sports Car Centre Limited.

He said as far as he could remember the letter of credit was not issued for Sports Car Centre Ltd. He said because his company was a big company, it was quite easy to get financial backing from banks and, for Sports Car Centre Limited, he borrowed money from the bank to pay the dealers. When the cars were loaded and left Japan, it would take 45 days for them to reach Ireland at which point, Sports Car Centre Limited would make a transfer, so effectively they had credit from Mr. Murakami for between 50 and 60 days.

Mr. Murakami said in terms of shipping fees they had a credit arrangement with a lot of other companies but, for the purchase price of

the goods shipped, the arrangement he had with Sports Car Centre Ltd was not typical. He said this was because he trusted Niall O'Dowling and felt he was a very reliable, remarkable person. He respected him and wanted his business to grow. He said he felt a letter of credit was unnecessary for Niall O'Dowling when he established Sports Car Centre Limited because there was already a mutual trust between them.

Mr. Murakami said he was not aware that Mr. O'Dowling ceased to be a director and shareholder with the plaintiff in 1995. He did not have any dealing with Mr. Riordan after 1995. He wanted to be clear that what he did for the plaintiff and Sports Car Centre Limited was just ship used cars. He did not sell cars to them – he allowed Mr. O'Dowling to meet dealers, auction houses and retailers in Japan and then make a payment to those dealers. It wasn't possible for foreign companies to get credit from the banks in Japan in the early 1990's.

Mr. Murakami agreed that he had stated in his report that there was the potential to ship between 6,000 to 8,000 cars per month into Ireland. His judgment was based on potential demand and from his experience in New Zealand. It was put to him that his figure meant that used cars would be selling at a rate of 72,000 to 96,000 vehicles per year. Counsel pointed out that the numbers of new registrations in Ireland between 1991 and 1993 were 89,586, 85,492 and 98,215 and therefore, according to Mr. Murakami's estimation, the entire car market would consist of only used cars. Mr. Murakami said the estimation was based on the New Zealand experience in either 1987 – 1988 or in the early 1990s. He could not be sure of the statistics.

Mr. Murakami said he did not know that VRT was being introduced because of the creation of the single market in the EU. He assumed the new tax would make prices lower. He said that after the early 1990's they shipped a lot of cars to the UK. Mr. Murakami agreed that his estimation of shipping between 72,000 and 96,000 used cars a year to Ireland might have been a "miscalculation" but said his business is shipping so therefore it doesn't matter if it is new or used vehicles.

9. DKM Economic Consultants Report & Evidence of Brendan Dowling
The court has considered the two reports prepared by Brendan Dowling, economist and chairman of DKM Economic Consultants Limited, of the 20th February, 2009 and of the 7th September, 2011, and the response to Dr. Bacon's report. The court has also considered the examination and cross examination of Mr. Dowling.

The first report, which examined the alleged breach of law, was delivered on the 20th February 2009 and dealt with the economic assessment of Irish Vehicle Registration Tax.

Mr. Dowling was of the view that SIMI had expressed a concern regarding the level of used car imports, which had risen from virtually zero in 1984, to 23% of new registrations by 1991. SIMI believed that used cars were undervalued in the MVED system and wanted to ensure that this "under valuation" would not condone in any resistance. They were also concerned that a VRT system based on actual transaction prices would lead to a different tax for each vehicle sold. They sought an amended version of the MVED system, which was based on recommended retail price, as the basis for VRT on new cars.

Mr. Dowling regarded the VRT system, described by the Revenue as a market based system, to be simply a tweaked version of the MVED regime, with collection being at the point of first registration. A major change was that the single statutory depreciation schedule used under MVED was replaced by 14 schedules in 1993 and, a year later, by 23 depreciation schedules, of which only 1 represented a special case of zero depreciation. He believed that the price was neither an open market price nor selling price but a discount from the recommended retail price. The vehicle was allocated by the Revenue to one of the depreciation schedules, which had been devised by the Revenue, but not publicly disclosed.

By way of summary Mr. Dowling said that VRT on the retail price of used cars in the Irish market discriminated against imports and, effectively, applied the VRT tax rate to the used car dealers' margin when an imported car was involved. He believed that that this discrimination was "clearly in breach of a number of European Court decisions relating to the taxation of imported vehicles".

He argued that if, as claimed by the Revenue, the price was generated by the combination of the original OMSP and then allocated to the appropriate depreciation schedule, which was continuously compared with actual market prices, then there would have been no need for the model because the continuously updated price data would form the basis for valuing the used car retail price. It was precisely because continuously updated prices were not available that the Revenue relied on a model to generate notional retail value. The random allocation of a particular model to a depreciation schedule combined with the capricious nature of the schedule, made the determination of used car values for VRT purposes entirely arbitrary.

Mr. Dowling said that he had examined the deprecation schedules used by the Revenue, which were discovered to the plaintiff as part of the action taken against the Revenue, and a number of points became clear.

First, although there were 14, later 25 schedules, most of the cars imported by the plaintiff were allocated to just 4 schedules. All of those assumed higher retail residual values for used cars than the original single statutory depreciation table under MVED would have generated for the declared OMSP. His research could find no international support for the depreciation curves created by the Revenue. Almost without exception, the Revenue understated depreciation on cars in the early years. There was an element of catch up in the later years, which was inevitable as used cars must depreciate to zero or near zero. He said that every single example of depreciation curves he had found showed, both from international experience and from an analysis of the actual market in Ireland, a much higher deprecation of values in the early years.

His research tested the depreciation schedules most used by the Revenue and found them to be linear. In *Commission v. Greece*, C-74/2006, the European Court of Justice ruling on the use of depreciation schedules for valuing cars for registration tax purposes condemned linear schedules for not reflecting the higher deprecation of values in the early years.

Although the Revenue deprecation schedules were wildly at variance with international experience, they could, conceivably, generate accurate retail prices for Irish used cars if Irish consumer behaviour was wildly different to international consumer behaviour. However, when they tested the prices that the plaintiff achieved on the market for their cars, which they assumed would be the highest prices attributable, they found them to be consistently below the retail value assigned to cars by the Revenue under five years of age. Thus, the model test confirmed the international comparison test which showed that the VRT model consistently understated the depreciation of newer used cars and overstated the value for VRT purposes.

This pattern was confirmed by DKM's own market research based on collecting data for used cars in Ireland. Prices achieved at auction, which were probably closer to wholesale than retail prices, were less than 60% of the Revenues estimation of value. Prices available from both dealers and individual sellers on websites were around 86% of the Revenue value and even prices in the Car Sales Guide, which appeared to be the main source of market data available to the Revenue, were almost 2% below the values generated

by the Revenue model.

Mr. Dowling's report found that even if the Revenue model generated accurate retail prices, there would still be problems with regard to the determination of the correct level of VRT. European law required the VRT on used cars imports to be no greater than the VRT embedded in a domestic used car by the residual VRT remaining in the price of the domestic car. The report showed that this residual is properly measured by looking at the ratio of the used car price to the dealer relative to the original purchase price. A correct measure of VRT has to apply the original VRT rate and original transaction price to generate the correct embedded VRT. A rise in the VRT rate had no effect on the embedded VRT rate in a car taxed at the lower rate. Similarly a rise in prices of a model had no impact on the embedded VRT of a car sold at a lower price. However the DKM Report contends that the Revenue applied the current VRT rate to used cars to derive a tax liability and not the rate that applied when the car was new. Similarly the model permitted the OMSP to rise (and the VRT accordingly) if the new price of the model rises.

The DKM report found that the VRT system, as applied to used car imports, discriminated against those imports, was in breach of the neutrality requirements of EU law and substituted an administered system for a market system. This had the effect of reducing price competition for both new and used cars and provided protection for domestic car dealer margins. DKM looked at the experience from New Zealand and found that a neutral market based system would lead to a much higher penetration of used car imports in the Irish market.

Mr. Dowling placed considerable emphasis on the European Commission's creation of the Single European Market on the 1st January, 1993, which set out to create "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" in accordance with article 14 of the E.C. Treaty. The MVED system, although nominally an excise duty, was levied at the point of importation and was therefore not consistent with the full implementation of the Single European Market.

The Report referred to the Revenue Commissioners working papers and to the Department of Finance and suggested that they wished to maintain the Revenue yield from the pre 1993 MVED system.

The European Commission indicated that it would be opposed to a system of tax which was added to the VAT system because the base of VAT was harmonised across the European Union within permitted bands. They accepted that a registration charge could meet the requirements of the Single European Market even if that meant enforcement problems for the Irish Revenue. Reference was made to the letter from Mr. Venturi, the head of division of the indirect tax section of the E.C. to the plaintiff on the 6th December 1993, where it was stated:-

> "There must be no discrimination against the products of other Member States and no tax advantage given to the national product.
>
> Thus, second hand cars which you "import" from the other Member States (including Japanese cars which have been produced or entered free circulation in other Member States) must not be taxed more heavily than the equivalent cars in Ireland. For this purpose it is, of course, necessary to value the second hand car already on the Irish market and calculate the residual tax element contained in it."

The report referred to concern within the Revenue. Reference was made to a memorandum from Dr. Lennox to Mr. John Reid, both of the Revenue Commissioners, who noted that applying VRT to the OMSP, presumably as adjusted by the depreciation schedule, was not the same thing as valuing "the second hand car already on the Irish market" and calculating "a residual tax element contained in it". Reference was also made to the letter of the 11th November, 1993, where the European Commission, in reply to a question in the European Parliament, indicated that:-

> "Only by examining the taxable values in relation to selling prices on a model-by-model, indeed vehicle-by-vehicle basis can it be determined whether the assessment criteria are in line."

The report is based on the assumption that the European Commission were insisting that any registration must be neutral between used car imports and used car values in Ireland and referred to the European Court judgments regarding registration taxes in other Member States.

Reference was made to an affidavit sworn by John Leonard, Surveyor of Customs and Excise in July 1995, referring to the Edge Anderson Report. None of the schedules contained in the Butler report were actually used by the Revenue Commissioners in determining VRT calculations from 1st January, 1993. In other words the Edge Anderson Report provided a "fairness" opinion on a system which was not adopted by the Revenue Commissioners. The Edge Anderson report also acknowledged that the value of used cars, under the system proposed in the Butler report, was greatly influenced by new car distributors. At the beginning of the report, Edge Anderson made the following admission:-

> "In relation to the report (Butler) our comments on the open market selling price only reflects values in the twenty six counties and does not reflect the much lower selling price in other member countries as obviously this is due to the control of the price by the distributors and the subsequent excise duty".

That report stated that, given the complexity in the value of cars in the market place, it was a "tall order to obtain a best fit" as had been claimed in relation to the 25 depreciation schedules. There was no evidence as to when that complex task was undertaken.

The DKM report at table 4.6 calculated the revenue collected from VRT.

VRT clearly raised considerable amounts of revenue for the Irish Government. The report said that in 2006, €1.287 billion was raised in VRT, which was 23% of the total funds raised through excise duties and equivalent to 2.4% of the total revenue collected. The report is critical of the use of a series of depreciation curves and noted that in July 1997, Mr. O'Leary had indicated that 37% of statistical codes had not been reviewed for at least twelve months and a further 20% of codes had not been reviewed in the previous six months. In his view this would indicate that 57% of codes had been inaccurate (Report entitled "Enhancements required to improve the VRT Valuation System" by John O'Leary of the 7th July, 1997). The DKM report suspected that Mr. Leonard was describing the system as it ought to have been, but that Mr. O'Leary was describing the actual situation in the CVO.

Reference was made to Revenue's method of depreciation, to the Yarrow depreciation curve and to the discrepancy between the maximum and minimum deprecation schedules over time, which was referred to as the "zone of arbitrariness".

The DKM report compared Revenue's depreciation on the A1 depreciation scale from 1993 to 2003, with the Yarrow depreciation

curve. Mr. Dowling found that one main feature stands out - the Revenue schedule is virtually linear. Later adjustments in 2002 marginally reduced its linearity. The European Court of Justice in the Finnish case C-365/02, made it clear that a linear depreciation schedule was not acceptable as a proxy for actual depreciation. It noted that new cars depreciate more rapidly in the early years. This had not been reflected in the main schedule adopted by the Revenue for the calculation of VRT.

In the September 2011 report, DKM presented their analysis of the loss of opportunity of the plaintiff arising from the application of VRT in Ireland from 1993 to 2009.

The court notes that the introduction at para. 1.1.1, refers to DKM being asked to examine the extent to which (the plaintiff) "were negatively affected by those aspects of the VRT system applied in Ireland which were not consistent with the requirements of the legislation, both Irish and European".

However, while referring to the discrimination being clearly in breach of a number of European Court decisions related to the taxation of imported vehicles, Mr. Dowling did not subsequently refer to any Irish legislation in the reports.

DKM referred to problems with the lack of information for all imports of used cars in that it "reflects the consequences of the excess tax burden imposed by VRT (especially on Japanese imports of cars) in the zero to five year range". While Mr. Dowling refers to Japanese cars especially, there appears to be no analysis on cars imported from Member States (which would appear from the evidence of Mr. Riordan to have been limited to the 44 cars imported from Northern Ireland). Indeed at p. 15 of his report, Mr. Dowling refers only to direct imports of used Japanese cars and refers to the assumption that the rise in the value of the yen against the Irish pound would have had a major impact on the price of the car that could be sold in Ireland.

Later in the report, at p. 20 at para. 3.1.21, Mr. Dowling deals with the Japanese import share and says:-

> "The main focus of our concern in this analysis is the impact of the VRT regime on imports of cars from Japan. Clearly the uncertainty created by the VRT regime differentially affected imports from Japan as contracts had to be entered into many months in advance and shipping and other services committed. In contrast, an Irish resident could import a car from Northern Ireland at very short notice and have relative certainty of the rate of VRT likely to be levied.
>
> Thus, the introduction of VRT increased uncertainty for all importers, but particularly for importers in Japan."

11. Evaluation of DKM/Mr. O'Dowling's Evidence

Having regard to the non exclusive language of Mr. Dowling in relation to the Japanese direct imports (his qualification of "especially" of such imports and "particularly" for importers from Japan), the court has considered whether Mr. Dowling has referred to or, more importantly, quantified the loss arising from intra-community imports. However, the court has not been able to find any express reference to grounds by the plaintiff other than discrimination under European Union law, which is contrary to Article 95 EC.

The court also considered the evidence of Mr. Fintan Riordan in relation to the analysis of vehicles imported by the plaintiff from Northern Ireland over the period of sixteen years from 1993 to 2009.

Fintan Riordan agreed that he had analysed the vehicles imported by UCII from Northern Ireland and that his estimated VRT overcharge was given to Mr. O'Boyle for analysis. He said that he had instructed Mr. O'Boyle to apply the same rate as the Japanese overcharge.

In direct examination, Donal O'Boyle said that he had applied the same rate of 37%, which was a purely arithmetic calculation on the basis of the schedule on the computer.

This, of course, does not provide the court with any reliable evidence of the actual overcharge, which was agreed by Mr. Riordan to be less than that on Japanese cars. It also demonstrates the lack of seriousness and precision in relation to a claim that might otherwise have formed the basis for discrimination within the Member States.

There was no evidence of any complaints being made or any appeal process being availed of in relation to the 44 cars imported over the four years. Mr. O'Dowling's evidence was that the appeal system was too long, they never got a favourable answer and that their invoices were never accepted. However, the evidence of Mr. Campion was that the plaintiff made an appeal in February 1993, within a month and a half of VRT being introduced, and that appeal was dealt with in favour of the plaintiff within a month.

The DKM Report is purely based on the assumption of discrimination against vehicles imported directly from Japan. Mr. Riordan referred to an overvaluation of Northern Ireland imports. Mr. O'Boyle calculated this as 20%. However, Mr. Riordan's evidence of a £14,997 overcharge on a VRT total of £37,289 in respect of the Northern Ireland imports represented a 40% overcharge.

The court is not satisfied as to the quantification of this estimated overvaluation of Northern Ireland imports. It is not appropriate to extrapolate figures on the basis of overvaluation of Japanese imports whether this is invoice or landed cost, wholesale price or retail price.

Moreover, the legislation provides for open market selling price in the opinion of the Revenue.

Further, there is no EU provision that even in intra-community trade the amount of duty be linked to the price of the vehicle.

The registration tax imposed by the State is something which falls outside the scope of EC law in principle as Member States are sovereign when it comes to imposing taxes (other than VAT which is a community tax).

The Advocate General's opinion *Nádasdi and Németh,* C–290/05 and C-333/05, states as follows:-

> "52. In the context of a system of registration duty, criteria such as engine type, engine capacity and a classification based on environmental considerations constitute objective criteria. They may thus be used in such a system. On the other hand, there is no requirement that the amount of the duty be linked to the price of the vehicle.
>
> 53. However, a registration duty must not burden products originating from other Member States more heavily than similar national products.

> 54. A new vehicle in respect of which registration duty has been paid in Hungary loses, with time, part of its market value. With the depreciation in value, the amount of registration duty included in the residual value of the vehicle also diminishes. Since it is a used vehicle, it can be sold only for a percentage of its initial value, which contains the residual amount of the registration duty."

It is clear that this judgment establishes residual value as a proportion of the value of the vehicle. The registration tax should not burden products *originating from other Member States* more heavily than similar national products.

Tatu C-402/09 dealt with the neutrality of tax as regards imported second hand vehicles and similar second hand vehicles previously registered in national territory and subjected to registration on that tax.

Paragraph 39 of the judgment stated:-

> "39. According to settled case law, there is a breach of Article 110 TFEU where the amount of tax levied on an imported second-hand vehicle exceeds the residual tax incorporated in the value of similar second-hand vehicles already registered on national territory.
>
> 40. The Court has stated that, when a tax on registration is paid in a Member State, the amount of that tax is incorporated in the value of the vehicle. Thus, if a vehicle registered in the Member State in question is subsequently sold as a second-hand vehicle in that Member State, its market value, including the residual registration tax, will be equal to a percentage of its original value, determined by depreciation. (Nádasdi and Németh, para. 54) Therefore, to ensure the neutrality of the tax, the value of the imported second-hand vehicle taken as the basis of taxation must reflect the value of a similar vehicle already registered on national territory."

It is clear from that judgment that the market value is a percentage of the original value determined by depreciation. It is not a fixed sum. This was the approach of Dr. Bacon in his evidence

The position of the Commission is based on the decision of the court. The residual value of the tax diminishes proportionally with the depreciation of the vehicle.

It was alleged by the plaintiffs that discrimination resulted in an overvaluation of imports. In *Commission v. Greece*, C-74/2006 at 6 of 12 it was stated that:-

> "24. The court has held that Article 90/EC seeks to ensure the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products. (From other EU Member States).
>
> 25. It is settled case law that the first paragraph of Article 90/EC is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, even if only in certain cases, to higher taxation being imposed on the imported product.
>
> 26. The court has thus held that the first paragraph of Article 90/EC is infringed when a Member State charges on second hand vehicles from another Member State a tax, the amount of which, calculated without taking the vehicles actual depreciation into account, exceeds the amount of the residual tax incorporated in the value of similar second hand vehicles already registered in the national territory.
>
> 27. In applying Article 90/EC, and in particular where comparing the taxes applicable to imported second hand cars with those applicable to second hand cars purchased at home, which are similar or competing products, it is necessary to have regard not only to the rate of direct or indirect internal taxation on domestic or imported products but also to the basis of assessment and the detailed rules for levying the tax in question.
>
> 28. More specifically, a Member State may not charge tax on imported second hand vehicles based on a value which is higher than the real value of the vehicle with the result that they are taxed more heavily than similar second hand cars on the domestic market… The taxable value imputed to the imported second hand vehicle by the revenue authorities should faithfully reflect the value of similar second hand vehicle already registered on the domestic market.
>
> 29. In that regard, the court has held that the taking into account of the actual depreciation of the vehicles need not necessarily involve an assessment or export examination of each of them. To avoid the administrative burden inherent in such a system, a Member State may establish, by means of fixed scales determined by statute, regulation or administrative provision and calculated on the basis of criteria such as the vehicle's age, mileage, general condition, propulsion method, make or model, a value for second hand vehicles, which, as a general rule, would be very close to their actual value."

It follows that a Member State can establish a fixed scale in relation to models and makes of cars and that there is no requirement for an assessment or expert examination for each car.

In this regard the evidence in relation to the 44 cars imported from Northern Ireland cars does not establish that the values as a general rule were not very close to their actual value. The mere assertion of a 20% differential as stated by Mr. Riordan and Mr. O'Boyle was not substantiated. Mr. Dowling was simply asked to apply the same figures as in the Japanese direct imports.

The *Commission v. Greece* Case C-74/06 further says at para. 30:-

> "30. Such scales must, in any case, take account of the fact that the annual depreciation in the value of cars is in general considerably more than 5% that that depreciation is not linear, especially in the first years, when it is much more marked than subsequently, and that vehicles continue to depreciate more than four years after being put into circulation. Moreover, a vehicle starts to depreciate as soon as it is purchased or brought into use.
>
> 31. According to settled case law, in order for a system of taxation of imported second hand cars which takes into account the actual depreciation of the vehicles on the basis of general criteria to be compatible with Article 90 EC, it must be structured in such a way, making allowance for the reasonable approximations inherent in any system of that type, as to exclude any discriminatory effect."

That is of course, the argument of the plaintiff but it is based, in my view, on direct imports from a non member State.

Further, the judgment at para. 33 allows for the basis for calculation of the taxable value by reference to a guide indicating the average process of second hand vehicles in the national market or to a list of average current prices used as reference in the sector.

The defendant relied on the Car Sales Guide. The evidence given also related to reliance on newspaper advertisements and conferring with dealers in the trade.

The court is satisfied that the Car Sales Guide is the reference guide used in the sector for average current prices of new vehicles.

It would appear from Mr. Yarrow's Report that in the Hellinic Republic, as in Ireland, the prices of new vehicles are determined by the manufacturers and distributors. That was also acknowledged in the *Commission v Greece* judgment which did not find that such determination discriminated against used car dealers.

The court also takes into account that an appeal procedure was available and, indeed, was used by the plaintiff to its advantage at times.

The court is not satisfied that the Irish system did systematically overvalue the OMSP of second hand vehicles. Whether, on occasions, it was not "very close to their actual value" is a matter which could have been attested by way of appeal, which, in turn, would have formed part of the basis of the valuation system. It is significant that the decision in *Commission v. Greece* did not, nor had the Commission sought to, quantify the phrase "very close to their actual value" in percentage terms.

It was further argued by the plaintiffs that VRT did not take into account subsequent changes in tax rates.

Article 110 of the Treaty of the Functioning of the European Union was not intended to prevent a Member State from introducing new taxes or from changing the rate or basis of assessment of existing taxes as the court had stated in para. 49 of *Nádasdi and Németh*. The court further held in para. 51 of that case, that while the tax applied after the entry into force, it may differ from the rate of tax previously enforced and that circumstances cannot in themselves be regarded as discriminating between earlier situations to those subsequent to the entry into force of the new legislation. This court is of the view that there this no discrimination arising out of the fact that tax rates may change from year to year.

DKM believed that by examining international evidence of the relationship between overall demand for cars and price levels and the extent to which relative price moves affect the market share, there was strong indicative evidence of the impact of the tax discrimination on the plaintiffs' profitability.

It stated that as income rises, car ownership will increase, though the relationship is complex. Price is a factor in determining the overall stock of cars for any given income level and a fall in the relative price of new cars of 10% is likely to lead to a smaller, less than 10%, increase in the overall demand for cars.

Price elasticity, the impact of demand of one brand caused by a change in the price of a competing brand, is in the range of minus 4 to minus 6. That suggests that if the price of a compact car rose by 10% relative to all other compact cars, then demand for that model could, holding all other factors constant, fall by 40% to 50% to 60%.

An examination of the VRT depreciation schedules of the more popular Japanese models showed a near constant overvaluation of 25 percentage points over the first few years of life. This led to an increasing relative overvaluation of the market price. For example, a three year old import of a Japanese model could be overvalued by the Revenue by a much as 52% compared to an expert view of the depreciated market price. The MVED depreciation schedule, which VRT replaced, involved a lower level of devaluation of market prices, so the price overvaluation of a similar car was around 37.5%.

The proper calculation of VRT for the restricted range of cars the plaintiff actually imported would have led to a reduction of VRT paid of 23%. Over the entire range of ages, VRT imposed by the Irish Revenue was nominally 30% to 40% higher and could be justified by landed prices of imports from Japan. This would have allowed price reductions of 7.5% to 10% in used cars imported from Japan. From DKM's analysis they assumed a potential price reduction of 7.5%, the lowest end of the possible range. Such a fall would have had two effects: it would have pushed up overall demand for cars as the decline in the price of imported used cars would have led to a decline in all used car prices. Based on international evidence from the price elasticity of overall car demand, the potential increase in total car demand would have been in the order of 5%.

More importantly, DKM believe that the decline in the price of used cars would have taken significant market share from new car imports. The international studies show a high cross price elasticity base and suggest that a 7.5 % fall in used car prices could lead to a 30% to 37.5% fall in the market share of new cars, as nearly new cars were imported as an alternative. DKM assumed a 30% fall for their analysis.

They assumed that half of the new car market was relatively insensitive to competing offerings of nearly new cars. Thus, that market share would not be affected by the decline in used car prices. For the purposes of their simulations they assumed that 60% of the incremental demand for used imports caused by the lower prices, would have been supplied by Japanese imports, with the balance coming mainly from the UK. The plaintiff was a major importer of used Japanese cars. Accordingly, any taxation policy designed to discriminate against Japanese imports affected the main business of the plaintiff. DKM adopted a conservative approach and assumed that the plaintiff could broadly maintain its average 1992 market share of Japanese imports in the face of more favourable conditions for importing used cars.

They estimated that if the VRT scheme had applied to actual car prices of imports, then the plaintiff could have been expected to sell an additional 93,633 cars from 1993 to 2009, or 5,508 per annum. These incremental sales would have achieved a gross margin equal to the actual average margin achieved, on a portfolio of relative old cars, adjusted by the improved ability to sell new cars. Around 81% of the additional margin earned by the increased volume would be retained as profit. These sales would have yielded an aggregate incremental gross margin of €134.2 million before indirect costs and €108.7 million after, allowing for incremental overheads and selling expenses.

The calculation, based on relatively conservative assumptions drawn from international research into the car market, is that the proper application of VRT to the market value of used cars would have resulted in a 7.5% reduction in used car sales, a 5% increase in the total stock of cars registered in Ireland and a 30% increase in the market share of used car imports in terms of the total annual demand for new cars and used cars. Some 60% of this incremental demand for used cars would have been met by direct Japanese

imports, as Japan was the main international source of used cars with right hand drive. The plaintiff could have anticipated broadly maintaining its pre VRT share of the market in directly imported used Japanese cars which would have substantially increased its scale and profitability. The loss of opportunity to the plaintiff was, in present value terms, €119.5 million.

The court accepts the contention of the defendants that both DKM reports appear to be based exclusively on tax discrimination under EU law.

The court also notes that Mr. O'Dowling made infringement complaints to the Commission in over 20 years. The first was closed by the Commission. The second, which commenced on the 26th January, 2012, was investigated and, given that there were proceedings before this Court, were left on hold. No evidence was given to the court regarding the first complaint.

In relation to that second complaint the Commission was supplied with the first DKM Report, the Yarrow Report and the O'Callaghan Report as evidence of Irish VRT system being inconsistent with EU law.

Notably, the Commission has commenced proceedings against a number of Member States, including Denmark, France and Greece.

11. Evidence of Mr. Sean O'Callaghan
Mr. O'Callaghan, an IT expert with 17 years experience, prepared a report on behalf of the plaintiff and had attended an inspection, in June 2007, at the Central Vehicle Office (CVO) in Rosslare.

He analysed the database of vehicles imported by the plaintiff between 1993 and 2003. For those ten years, his report suggests that over 3,600 cars were imported by the plaintiff. He found there was a bias to using the highest category of depreciation scales by the Revenue which he called the "A category scales". The table used most often was the A category table. Tables A1 to A6 carried the lowest levels of depreciation. Therefore the tax return to the Revenue would have been at the highest level.

In relation to the inspection of the CVO, they were told that the OMSP's and depreciation codes were determined by the CVO staff in Rosslare. When they raised questions relating to this, answers were refused and "terminated consistently" by the Revenue representatives.

He agreed with Ciara Quinlan's evidence of the inspection in Rosslare. They were given as little information as possible and were told a number of times that certain questions asked were outside the scope of the meeting.

He looked at the application of the depreciation scales to the cars depending on their age and found that the depreciation scales applied the most to cars in the five to eight years category. He referred to the consistency of the scales applied. He used a Toyota Corolla as an example because there were 75 units in the database which would give an accurate answer. He found that five different scales were applied to the same model. For 25 units that were three years old, 3 different scales were applied, and for 24 units that were four years old, 4 different codes were applied.

In the database it was possible for vehicles to have different depreciation codes but the same statistical code.

He did not have the opportunity to find out why vehicles with different descriptions were given the same statistical code. Where a new vehicle was introduced, Revenue allocated it a separate statistical code number.

Revenue's failure to keep accurate records was a serious flaw in the archival policy of a nationally important system. He was missing data and codes, not just on depreciation but on the condition of the cars as well.

Since writing his report he had been to inspect the Revenue premises in Dublin in January 2012 with Dr. Tony Murphy and Ms. Ciara Quinlan, along with five Revenue officials, including Mr. Pat Mullins.

The original equipment used for the mainframe pre 2007 was available but was not in use. There were backups available but, as they were stored offsite, Revenue would have to revert with further information. Pat Mullins said the customised codes were statistical codes that had separate depreciation values put against them. He was told by Mr. Mullins that 50 or 60 were associated with Japanese cars. He asked for a copy of the codes and was sent an Excel spreadsheet with 1043 statistical codes, which contained 213 Japanese customised codes.

He analysed the spreadsheet and found that it had a statistical code for every vehicle, which was unusual when the database was missing other data. He found a unique set of 838 statistical codes used across all cars. This averaged about five to a car. If a car was imported that didn't fit into the statistical code, he understood it was put into a customised code where percentages would be placed against it. These customised codes had been applied in 116 instances.

It was his opinion that there should have been one database which would pick up all of the information without having to specify certain cars. He could not understand why Revenue would not explain openly the methods of calculating the OMSP.

He questioned the fairness of the system because the information was entered into the database by an officer in Rosslare who had not seen the car being presented. Their job was essentially to maintain and update the system over time to ensure the information was accurate. During the inspections the officer did not have access to any data that listed actual sales prices or landed prices of vehicles.

Following his analysis of the data supplied to him by the Revenue and his two inspections of their premises, he still does not know how the VRT system works.

In cross examination Mr. O'Callaghan accepted that an OMSP and depreciation code applied to a statistical code, which was put in place by Revenue in Rosslare. He agreed that OMSP is the dealer's price for the new equivalent car but said he did not know how that was determined.

His report was based on a database which contained, he was told, all the cars the plaintiff had been involved with. He found statistical codes did not vary because of the year of the car but rather because of the attributes of the car. Counsel suggested that, based on his analysis, maybe half or more of the cars imported by the plaintiff were similar types of models. He could not answer that question other than to say that the multiple statistical codes on the system suggested that the VRT of the cars was different.

Mr. O'Callaghan could not answer whether similar cars imported would be on the same depreciation scale. It was hard for him to

answer because the clusters of cars were by make, not by model. He disagreed that his conclusions about Revenue's overuse of certain depreciation tables was unfounded because he had not gone into enough depth when analysing the clustering of imports. He could not answer the question based on the data he had.

It was put to him that the excel sheet used in compiling his report was incomplete as one column was capable of being expanded which contained further information in relation to the statistical codes. He said the database was as he received it and that he didn't add any extras into it.

He did not know why the codes were different. It was down to the experts who created the codes to explain why they were different. He looked at the information given to him and, without having a detailed understanding of the codes, he could not have pieced the conclusion together. He agreed that had he used the additional column of information relating to the body type then, possibly, he could have differentiated between the vehicles.

In relation to the appeals system, he was told by Frank Burns the relevant period was 21 days. This corresponded with the evidence of Mr. Fogarty. That information was subsequently corrected by Dr. Bannister. The period was actually 30 days. The relevance of the extra nine days to appeal showed there was a flaw in the system. Data inside a system should, over time, modify actions relating to it. He compared it to being overcharged by banks and being compensated some years later. The whole point of using mainframes was their resilience and redundancy.

Counsel said the reason for the contradictory evidence on the length of the appeal process was because both were, technically, correct. Between 1993 and 2000 the appeal window was 21 days but this changed, with the introduction of the Finance Act 2001, to 30 days. Dr. Bannister had stated that if an applicant did not make an appeal within the period outlined, no further right of appeal could be taken. Therefore Revenue would have had no reason to retain the depreciation rate information used to compute the valuation.

Mr. O'Callaghan said that statement contradicted that of Mr. Frank Burns. From the point of view of profiling and understanding if the right depreciation codes had been applied Revenue should have retained the information so they could review the practice and answer any questions raised.

Counsel directed him to Dr. Bannister's report where he had stated it was his understanding that financial transaction records were kept on-line by Revenue for five years and then archived. Mr. O'Callaghan made no comment.

Following on from the 2007 inspection he did not contact anyone in the Revenue with queries about the materials he had received. The only other thing that would have been of interest to him was accessing the Revenue PC in Rosslare. They had been told that what they had been given in discovery was everything that Revenue had in relation to the matter.

When asked why he had posed the question as to why there was a distinction between high and standard specification for Japanese cars and not, for example, on UK cars, he said he had been told by the Revenue that was the case. He agreed there was no evidence in his report to back up that comment.

The only criticism he had, following the meeting with the Revenue in 2012, was having to read Frank Burns affidavit to clear up a point about the data on the PC. He understood the reason for the initial inspection in 2007 was to allow the plaintiff representatives to see what was available in the office. His impression was that they were being brought to Rosslare to see something more than they should have been able to see from Cork.

He was directed to letters written by the plaintiff and defendants solicitors. The first, of 4th October 2004, related to the plaintiffs taking up the offer to inspect the Revenue office in Rosslare. Mr. O'Callaghan disagreed with counsel's interpretation of the scope of the inspection saying that the Revenue solicitor's reply letter, dated 27th August 2004, referred to "a database" whereas the plaintiff's solicitor's had referred to the "mainframe database". He agreed there was a considerable lapse of time between August 2004 and February 2007 just to organise an inspection of the mainframe database.

He reiterated that there was no good reason to go to Rosslare other than to meet people and view equipment. He said they had been told in the affidavit of Frank Burns that there was a PC in Rosslare involved in the whole procedure.

Counsel referred to a letter written by the plaintiff's solicitor on 20th April 2007 stating that they were reserving their position in relation to the PC. He agreed that, according to the documentation and correspondence, it seemed that his understanding of the inspection in Rosslare was wrong. He agreed that the OMSP and depreciation data were entered into the system by humans. Therefore it was irrelevant to the operation of any inspection of the mainframe computer system as to how the human inputs data into that system.

13. Evidence of Dr. Tony Murphy

Dr. Murphy, computer specialist, said his services were retained to look at the overall operation of the VRT system, not just the computer system, but also the human interaction with the system. There was a requirement to look at whether the information sought by the plaintiffs was reasonable, if the response from the Revenue was reasonable, to look at Mr. O'Callaghan's work and methodologies, the processes he used and to do some validation on that. His role was not to do statistical analysis. The final issue he was asked to look at was the extent to which the inspector on scene inspecting the car was the key determinant in working out the VRT.

Revenue provided a CD in August 2004, which was updated in 2006, with additional data. He conducted a short analysis of the 2006 CD on a small basis to test some of the results that Mr. O'Callaghan had reached. He found there was a heavy bias towards the depreciation codes for cars with a low value. He would have assumed it would have been more evenly distributed.

He had prepared his report in September 2011 prior to attending the inspection of the Revenue offices in January 2012. The 2012 inspection had taken place because of changes made to the system. He had hoped to establish the basis upon which depreciation codes were changed, who made the decisions and how they were made. He got some answers but did not really find what he was looking for. He wanted to know if there were written procedures governing who could change a depreciation code. He also wanted to know why there was a separate segment for Japanese cars in terms of the kiosk system accessible to the public.

At the inspection in 2012 he asked a lot of questions that were, for the most part, answered. There were a number of specific issues raised and while he got some updates, there didn't seem to be a formal procedure for managing and changing the codes. There was a master file of statistical codes which represented all the common models for sale in the country. On that master file were also

depreciation codes which related to the statistical code in question. The other component of the system was a constant computational element which took into account not only the depreciation code but made adjustments for mileage, condition, age and the plus or minus 5%, depending on the month of the year.

Following the 2012 meeting he learned that there wasn't a written formal set of protocols and that the depreciation codes had not been copied onto the archives. The explanation for having a separate calculation mechanism for Japanese cars on the kiosk screen, accessible by the public, was that it was for user convenience. He found this surprising and wondered why then there wasn't one for German or British cars.

He said that financial transaction information should have been retained for review. There was a blank field in the record section that could have held this information. The plaintiffs were looking for data that would enable them to calculate or check how the VRT they were charged was calculated. He could not understand why the Revenue was taking an obstructive approach instead of providing what was basic elementary data to enable a company to calculate its VRT exposure.

It would have been possible for Revenue to redact any confidential information contained on the system in order to allow the plaintiff access information. He emphasised that this would not have been difficult to do. The claims by Revenue that providing the data sought would require substantial complex systems and programming, rendering it inaccessible, were not accurate. They were not dealing with hugely complicated data resources. The Revenue had a data extraction programme ("Clipper") which would provide the data required in a couple of hours. He could not recall any discussions at the January 2012 meeting as to difficulties in copying data or providing data to the plaintiff.

Dr. Murphy said that the Revenue IT section would know exactly what was required. When they said it would not be possible to provide a working copy of the mainframe system on a PC that was correct but it was also misleading because, for what the plaintiff wanted to do, the information was easily available and could have been provided. It was almost impossible for the plaintiff to calculate what his liability should have been.

Dr. Murphy said that a distinction had to be made between archiving and back-up. A back-up is a short-term record of the data which is kept available in case there of an emergency, such as a fire. The archive is a completely different requirement as it is historical data that is generally kept for audit and analysis purposes. In this case, given the large amounts of money involved, there was potential for collusion and, for that reason, a good internal or external auditor should have wanted to validate that the transactions were all correct and above board.

The information which was not archived was the depreciation codes for individual transactions. The transaction file contained the specific details relating to individual cars. What struck him very clearly was that the depreciation code, which is a fundamental requirement for calculating the VRT, had not been copied over – it was just a set of zeros. It struck him that Revenue had copied practically everything else including, as he saw them, irrelevant details, such as colour. That the depreciation code was missing from the file was inexplicable.

He stated that Revenue had told them that depreciation code changes were maintained in hard copy. It would have been helpful if Revenue had given that data to the plaintiff when they had originally looked for it. He said that it would have been possible for the Revenue to regenerate depreciation codes from the hard copies. This was actually what they had done for 1994 onwards. Revenue had said they could not regenerate the codes for 1993 but their reasons were never fully explained.

Dr. Bannister said storing financial transactions for six years was normal but, in this case, the process was not a financial transaction but a price computation. Dr. Murphy that was semantics. There was no information given at the inspection he attended in January 2012 which addressed the concerns he had in relation to the non-archival of the depreciation codes.

In cross examination, counsel said Revenue had no need to retain the information after the expiry of the appeal period. Dr. Murphy said this was correct from an operational perspective. However, from an audit perspective, Revenue would need to retain the information. It was his understanding that Revenue kept financial transactions online for five years.

Counsel submitted that there was never any demand made by the Comptroller and Auditor General that Revenue should retain back-up materials of the records referred to by the plaintiff. Dr. Murphy said he could not speak for the internal auditors but if he were an auditor, he would be looking for the information.

It was his evidence that the only discretionary element open to the Revenue inspector, in deciding whether or not to apply the depreciation code, was the quality of the vehicle. The analysis in Sean O'Callaghan's report showed that the quality was found to be 'good' in 90 – 95% of cases. This shows that there was literally no discretion open to the inspector. He agreed that Mr. O'Dowling and Mr. Riordan had given evidence that they imported good quality vehicles into Ireland and that therefore it was not surprising that such a high proportion of vehicles were classified as 'good'.

Counsel said that the Clipper programme could not be used on the Revenue's mainframe database because it was on a server based utility in Monaghan and that Revenue had made it clear, at the January 2012 meeting, that Clipper was used in this way. That was not the recollection of Dr. Murphy. He said Clipper was capable of going into mainframe files as it has adapters to do that. Regardless, all the back-up data or the archived data had been downloaded onto the PC in Rosslare. Certain information was taken off and given to the plaintiff but they were not given the depreciation codes.

He did not accept the possibility that the programme gave data which was current but not on the mainframe at the time the programme was run which meant three further processes were necessary. It was his contention that at the time the transaction was created, it would have taken from the master file of statistical codes the relevant data it needed, it would have recorded the details of the transaction and it would have posted the transaction into archives. Even if the data on the mainframe subsequently changed, which he agreed could happen, it would be of no relevance to the transaction file because things like the price and depreciation code would have been saved on the transaction file.

He agreed that decollated data had to be extracted from the access database but said that the programme that could be used to get the data for the plaintiff would have been the same database and there would be no need for a third database to do the calculations. The data the plaintiffs were looking for was lying on a database in Rosslare. All Revenue needed to have done was to select UCII data, press a button and they would have the relevant material. The protracted discussion about the mainframe was irrelevant. The data was accessible from the very beginning in exactly the form the plaintiff needed.

Dr. Murphy accepted that there was a separate database for each of the decollated data but said that it wouldn't have had to be

interrogated had the depreciation code been maintained as it should have been. From an operational perspective Revenue may not have needed to retain the information but that it should have been the practice from an archiving and audit perspective. He could not comment on the assertion that no one, apart from the plaintiff, had ever requested the information from Revenue. Technology had changed a lot from 1993 but it would have been very easy, even back in 1993, 1994 or 1995, to provide the data sought to the plaintiff.

14. Evidence of Ms. Ciara Quinlan

Ms. Quinlan, solicitor, with the plaintiff's firm of solicitors in Cork, made a witness statement dealing with the inspection of the Revenue on 21 June 2007. She also attended a further inspection in January 2012 and took notes. She said Mr. Burns and Mr. Sherlock refused to furnish the plaintiff's representatives with a response to any of their questions relating to OMSP's or depreciation scales on the basis it was outside the scope of the inspection.

When they asked to inspect the paper record of valuations inputted into the system, they were told it was outside the scope of the inspection. They had been told beforehand that they would not be able to access the PC but, as they were there, they thought it would be remiss not to ask. They were refused access.

Ms. Quinlan referred to conflicting information they had been given by two of the Revenue officials. They had been told by Frank Burns that the decision to archive depreciation codes was made on a year on year basis. Kieran Coyle then told them that the reason some of the depreciation codes were not archived could have been the result of a programme default. Pat Mullins confirmed that Revenue had a paper record for the depreciation code which applied to particular vehicles. They asked if he might have the records for 1993 and he said he would check in due course, however Kieran Coyle said he doubted the records existed.

She had written to Mr. Sherlock outlining her dissatisfaction with the narrow and restrictive manner in which the inspection had been conducted. The reason for the 2012 meeting was Revenue had advised they were operating a new system and the plaintiffs wanted the opportunity to see it. From a technological, administrative and legal perspective the system looked different but it was still calculating VRT in the same manner.

In cross counsel referred to a letter of 16th February 2007, from the plaintiff's solicitors to Revenue requesting access to the Revenue database for their expert witness. She said the matter had been raised in 1997 when the plaintiffs had first heard about the OMSP database and they had indicated to the Revenue that it would be helpful if they were allowed to examine it.

She said there were three letters concerning the matter in 1997, the last of which the Defendants did not respond to. The matter was again raised in 2004. The letter to which counsel was referring was the result of ten years of correspondence. The mainframe system was all that Revenue was prepared to show them. She said the scope of the meeting and inspection was not agreed but the Revenue's position was accepted as they had no alternative.

Michael Loftus, representative for the plaintiff, had asked at the inspection if he could obtain reports from the mainframe system and Revenue said that the system would not allow for that.

She did not agree that the reason Revenue had not granted them access was because they deemed it unnecessary. Her understanding was that a year later Revenue was willing to show them the PC. It was her evidence that both her witness statement and evidence amounted to an allegation that Revenue was deliberately obstructing the plaintiff from obtaining information.

Counsel said that Revenue only brought IT people to the inspection. Ms. Quinlan pointed out that Kieran Coyle was not an IT expert but Head of Policy and Legislation. If Revenue had nothing to hide then why didn't they allow the plaintiff access the full system.

Revenue wrote to the plaintiff's solicitors on 10th October 2007, responding to criticism of the inspection. She said that not being given access to inspect the PC in Rosslare was not their chief criticism. Revenue had said an explanation was given by an officer regarding how the OMSP and depreciation characteristics of high versus standard specification were determined and that if the plaintiffs had failed to take a note, the explanation could be given again. She had taken a note of the inspection and Frank Burns had specifically refused to give information relating to OMSP.

What had been agreed was that Revenue would give the plaintiffs a 'record dump' with statistical codes and the associated OMSPs and depreciation codes. They had been given a sample file in 2003 / 2004 but, when they asked at the meeting if they could have the statistical codes with all the OMSPs and the depreciation codes, they were refused. She did not know why Revenue had initially agreed to give them the information and then refused at the meeting.

Counsel referred to requests for details as to how monthly adjustment regime for calculating depreciation was maintained and updated. She said it was incorrect to say that this position was clarified because they were told at the meeting that the monthly adjustment figures were only changed twice, not every nine months. It was put in place when the legislation was introduced in 1993 / 1994 and was then changed once to the plus or minus 5% monthly system sometime in 2000. When they asked why it changed to the plus or minus 5% system and when it happened they were refused the information. They subsequently received a response but it did not correspond with what they had been told at the meeting, i.e., that it changed every nine months.

On the day of the inspection Revenue said that they had never heard of an initialisation file. That claim was refuted in a letter dated 27 July 2007. They were told at the meeting that monthly backup's of the system were carried out without a specific date. The plaintiffs subsequently received a letter saying that the systems were backed up every night.

In relation to accessing the PC in Rosslare, Ms. Quinlan confirmed that no arrangement was made on foot of the offer to inspect the PC, outlined in the letter of 16 October 2007, prior to January 2012. That letter stated that the experts for the plaintiff could inspect the VRT mainframe further as Revenue was willing to allow them access to the PC. She did not know whether an offer to meet with Revenue to discuss exactly what was needed to be inspected in order to progress matters was ever taken up as she stopped dealing with the matter. She did not know if a response had been furnished from her firm to Revenue on foot of a letter of 14th February 2008, outlining the panel of Revenue experts who would be prepared to meet the plaintiff's experts without legal representatives present.

Ms. Quinlan agreed that the issue of discovery had been determined by Laffoy J. in 2006. In relation to inspection, no order was made because Laffoy J. noted that it had been agreed among the parties. Prior to the letter received from the Revenue on 27 March 2007, there had been no reference to the access to data held by them being confined only to the plaintiff's data.

15. Evidence of Mr. Rick Yarrow

Counsel submitted that Mr. Yarrow had been retained by the plaintiffs to examine and advise in relation to the system of valuation adopted by the Revenue for the purposes of assigning VRT to vehicles.

Mr. Yarrow is an expert in the analysis of European vehicle pricing issues. In 2002 he founded Experteye AG which provides benchmarking services for the European automotive leasing industry, collecting data from major leasing companies in six European countries and compiling reports comparing their position relative to market averages.

Mr. Yarrow stated that the information available in relation to how the VRT system works in Ireland is unclear. He said he had seen depreciation tables but the exact basis upon which VRT is calculated is not clear. He conceded the system was a bit more transparent because of the on-line calculator but that had only been available recently. Prior to that the system was very opaque.

With regard to the current system he said that it works on a vehicle by vehicle basis, one single vehicle in isolation which makes it difficult to get a full picture of the whole pattern as to how the workings of the on-line system work. He did not recall any reference to what scale a particular vehicle was applied to.

Figure 1, para. 13 of his report showed a typical depreciation curve for Europe. New cars always lose significant percentages. He said that standard practice in the industry is to quote residual value as a percentage of the original new price.

He concluded from the analysis of used car values that there was no reason why depreciation trends should be any different in Ireland compared to any other market-place, because the factors that drive depreciation remain the same. Based on the new car guide values were slightly higher than the European average but not significantly. Throughout Europe, as far as he was aware, the taxation of vehicles is based on the actual price paid for the vehicle. He found the principle of levying taxation based on the price of an equivalent new vehicle to be illogical because the older the car is, the more difficult it will be to find an equivalent new vehicle available in the market place.

Referring to his graphs, Mr. Yarrow said that the most commonly used depreciation curves were not what he would normally expect to see for depreciation. He found it strange that the most commonly used scale should change over time when, as was his understanding, the mix of cars has been similar over time. He said that from 1994 to 1997/1999 the A1 scale was near a straight line or linear in terms of depreciation. He said he did not know of any cars which depreciated in line with that sort of trend.

Mr. Yarrow said he had made estimations based on what he thought to be the most commonly used scales but he accepted, following Mr. O'Callaghan's evidence, that there were other more commonly used ones. He compared the excise tables with actual depreciation trends in Ireland. The excise tables were based on a percentage of the equivalent new vehicle price and, therefore, to compare them accurately with his analysis of the Car Sales Guide values, he had to adjust them to allow for inflation in new car prices. He allowed for inflation at 2% per annum. A 2% rate of inflation per annum was a reasonable assumption for increase for new car prices because, over the period of his index, increases ranged from 0.7% to 4%.

In relation to the 2006 A1 scale, he said it appeared the scale was inaccurate because there were differences of 30% in some cases. The Car Sales Guide median value for a three year old car was 60% but the A1 scales had a residual value of 84%, a difference of 24%, making it highly inaccurate. He said he had read a lot of documents which indicated that the Car Sales Guide values are high and, looking at the depreciation curve even without that information, he tended to agree with that. He agreed that the Car Sales Guide was tracking retail rather than trade-in prices as it tracked main dealers rather than all sales of second-hand cars.

Mr. Yarrow agreed he had the opportunity to witness the process of paying VRT for two vehicles in Cork in 2007. He said one was purely a paper driven process in an office where the vehicle was not presented for inspection and for the second one the official did not actually examine the vehicle being valued. There was no badge on the vehicle and he wasn't sure what the vehicle was. He said the documentation showed the official identified it as a five door model when it was apparent that it was a four door saloon. There was no evidence that the official had any real experience or understanding of the motor industry or any ability to identify what the vehicle was. The vehicle was not driven or mechanically examined for the purposes of the test. Its condition was not inspected.

Mr. Yarrow carried out an exercise using the online VRT calculator. On the 1st of May 2012, he entered similar vehicle details into the VRT calculator with different mileages. In the first case he entered 40,000km and in the second, 1,500km per month since registration which, from January 2008 to May 2012, equalled 78,000km. He found that VRT in May 2012, for a car registered in January 2008 which had 40,000km on the clock, was €1,525.00 with an OMSP of €9,535.00. He entered the same vehicle details, but changed the mileage to 78,000km, and got exactly the same OMSP and VRT. He found that putting the registration date as December 2008 but with mileage of 40,000km yielded the same VRT of €1,525.00 and it remained €1,525.00 even if you upped the mileage to 61,000km.

He submitted that this experiment confirmed that the Irish system does not use true market valuation. It is totally illogical that two vehicles can have the same value and same rate of VRT when there is an 11 month difference between them.

The tables used by the Revenue to calculate excise duty did not reflect the actual level of depreciation of a used vehicle and this had the effect of overestimating the value of a used vehicle by as much as 40%, more typically 30% with a resultant increase in excise duty. In summary, he said that the depreciation tables used by Revenue for the purposes of calculating VRT since 1993 did not in any way reflect the real depreciation of vehicles and they were a long way away from the reality of true depreciation.

In cross examination Mr. Yarrow said he was aware it his report had been sent to the European Commission. Counsel asked if he knew what the outcome of the infringement proceedings against Ireland was and he said he did not and that he could not comment on the fact that the Commission decided to take an infringement proceeding against Ireland to require it to change the way it taxes vehicles of less than three months or which have less than 3,000km on the clock.

Mr. Yarrow said he only relied on one part of Mr. O'Callaghan's report when preparing his own – the section in relation to the most commonly used scales. He assumed Mr. O'Callaghan's sample related purely to imports by the plaintiff.

Mr. Yarrow agreed he had said the Car Sales Guide was a meaningful benchmark for the market. Mr. Yarrow said he had no comment to make on Mr. Dowling's findings that Revenue OMSP's and the guide prices were very close. He carried out a rigorous analysis of 40 vehicles which is statistically relevant of typical vehicles.

The document "Vehicle Registration Tax Section 8 Manual Valuation System for New and Used Vehicles" was referred to. Counsel submitted that had Mr. Yarrow read it while completing the online VRT calculator exercise, he would have discovered that the scales change from time to time because Revenue are trying to reflect market prices. Mr. Yarrow said it was outside the scope of his report and, accordingly, he could not comment on whether or not Revenue changed the depreciation scales occasionally. He looked at

depreciation trends only and questioned the accuracy of Revenue's interpretation of market conditions.

16. Evidence of Mr. Moore McDowell
Mr. McDowell, consultant economist with ECU Limited, prepared a report on the issues raised by the plaintiff. He also prepared a second report responding to issues raised in Dr. Bacon's report.

In relation to his initial report, his understanding was that intra-community trade was affected by the imposition of VRT. VRT was introduced because the Government of the time wanted imported cars that were of a similar value to pay similar rates. Instead of relying on the price at which the car is sold, the method became to base VRT on the OMSP, a figure provided by the importer and one which Revenue is comfortable with.

He gave an example of the difference between VRT on an Irish bought car and the same model as a UK import. A car of equal value to the Irish car minus the VRT in the UK would pay a higher VRT entering Ireland than the same domestic car. By charging VRT on an OMSP, imported used cars are effectively taxed more expensively than domestic used cars. This distorts trade and is a tariff.

If Revenue relies on a depreciation schedule, which is supposed to capture any fall in value in Ireland relative to the new price of a vehicle, it is simple logic that if the depreciation rate isn't correct, the basis for charging VRT will be incorrect. In his experience, rates brought in under VRT to calculate the VAT base were much too high when you compared them to the prices in the Car Sales Guide. The system relies on a depreciation rate which *could* be correct but you have no guarantee that it is correct.

He produced graphs to the court on identical models of Japanese cars imported into Ireland at six-monthly intervals which had three or four year sales prices from the Car Sales Guide. The graph showed that in the first year, the quantity of depreciation was much higher than in the second year. The data in the Car Sales Guide was only produced every six months and the implicit depreciation in the Vehicle Excise Tax, which was carried over into the VRT, was a fairly linear one.

It was his view that Revenue had failed to provide a rationalisation for the numerous schedules, the method of allocating a car to a schedule and the underlying depreciation function being used. The new car equivalent price was not an ideal system because it could be perceived as an example of information source bias or regulatory capture. If Revenue had an independent source of information, they would be likely to do a tougher job than if they are depending on people upon whom they will be imposing a price cap to tell them what the price should be.

In relation to extras, if air conditioning was installed at a cost of €1,500 to €2,000, four years later when they sold the car, it was as if there was no air conditioning at all as it had no effect on the price. Effectively the car is worth something but the extra is not. The VRT base price of the car is increased by virtue of the existence of an extra which has no commercial value.

He did not see the point of depreciation tables or their function if the Car Sales Guide is the source of information for the valuation of OMSPs. Assuming one trusted the Car Sales Guide he could not understand why it was not the only scale used.

Counsel referred to his second report.

Mr. McDowell said that the analysis upon which Dr. Bacon relied in his 2011 report did not justify the conclusions drawn. Dr. Bacon's criticisms of the basis for the DKM projections were based on a serious misspecification of what the underlying market is. He believed Dr. Bacon's defence of the structure of estimating depreciation was flawed and does not stand up.

In both Bacon reports the approach taken to define the market was to look at imports of new and used cars over long periods and treat them as being, in principle, dependent on income levels. What Dr. Bacon was looking at as the demand for new cars was actually the number of cars joining the existing stock. The key thing to look at is what determines the equilibrium stock of cars. If one just looked at cars coming into the country they miss the point. That was his most fundamental quarrel with Dr. Bacon's approach. It was not difficult to find literature on the market. Dr. Bacon's approach was a misspecification that vitiated the whole model.

Mr. McDowell said that when specifying the relationship between income and car ownership you have to allow for the possibility of saturation effects. The test to see whether the linkage between income and quantity being demanded was stable is the 'Chow Test'. Dr. Bacon did not appear to have carried out this test.

He also criticised Dr. Bacon's econometrics presentation. In some cases in the 2009 report he used instrumental variables but did not explain what effect they had. He was using a proxy for prices and did not give coefficients. There was no reported value for a constant term, which is very unusual. The only diagnostic test offered by Dr. Bacon was 'R Squared' and the problem with that is that with time series analysis you always get an abnormally high R Squared so it is not very persuasive.

There was no 'Durbin-Watson' statistic. One way to test whether error terms are random, serial or auto correlated is to use the Durbin-Watson test. The lack of this test amazed him.

His conclusion was that the specification was wrong, or there were missing variables which hadn't been tested, or both. The results of a Durbin-Watson for this sample would have said something was badly wrong with the model and if a Durbin-Watson test was carried out it would show a positive over-correlation.

Dr. Bacon had used income as the main variable and as income falls, as so happened in 2008 and 2009, he should have allowed for that if he wanted the trend line to be correct. The cost of credit should also have been considered because when it rose, it was a reason why sales fell. He also referred to Dr. Bacon's use of the exchange rate as an alternative to price. While he could understand his rationale for doing so, he had not gone about it the right way. He should have corrected the price variable rather than putting in the exchange rate. He had doubts about the actual exchange rate used. In his opinion the British Retail Price Index would have been preferable as it covers imports from all over the world. That would have given an idea of the average price of cars supplied to Ireland.

One other issue which had to be addressed what that of change of ownership. While it was connected to used car sales it was not a used car sale. It was a factor that needed to be taken into account and quantified. A further criticism was Dr. Bacon's consideration of elasticities of demand. If you are going to have an elasticities of demand you have to define what 'the demand' is for. The numbers used by Dr. Bacon can only be used to predict long-term behaviour over time, subject to a whole series of assumptions which one might find were implausible.

Mr. McDowell discussed Dr. Bacon's analysis and treatment of the market in terms of dividing it into new and used cars. He had essentially posited the existence of two separate markets. Dr. Bacon should have started with the stock and allowed for the fact that

new and used imports are the mechanism for increasing stock. What drives them is the growth in stock. Dr. Bacon approached it by saying there were two distinct markets – one for new and one for used cars – which were not connected with the stock. Dr. Bacon's report does not provide any basis for questioning the price elasticity of demand 0.67 as relied upon by Mr. Dowling. He had not given any evidence in terms of demonstrating that the 0.67 figure was wrong.

Mr. McDowell was not party to the discussions between DKM and the plaintiff in relation to how much money was lost and he was not taking any view on that matter. His only concern was whether the views presented by Dr. Bacon stood up to analysis. It was his opinion that they did not.

He said the present system of determining how much VRT is to be paid is a sort of OMSP approach yet no OMSP is proffered by the importer. Instead the OMSP is a Revenue estimate of what the car would sell for were it to be sold through a dealer and, given this is related to the Car Sales Guide, that means a sale through a main dealer. Obviously, because the car is sold at a price that includes a profit for the dealer, it is not based on the price which the dealer has paid for a domestic used car.

The price that the dealer has paid for the domestic used car contains the embedded VRT and, given that the margin for the dealer is positive, this means that the quantum of VRT chargeable on an imported used car exceeds the embedded VRT in a domestic equivalent car. Mr. McDowell said, from his understanding of EU sources, when used cars are imported they should not be subject to VRT in excess of the VRT embedded in the equivalent domestic used car. This suggested that the present system is in breach of the EU rules.

This was his position and also that of Brendan Dowling. All of the 'arithmetic gymnastics' presented to suggest otherwise was basically wrong or based on bizarre assumptions.

In relation to the DKM report Mr. McDowell said that the figures showed that the actual stock of vehicles in 1993 was 891,000 and this was projected to increase to 1.191 million is 1997. That projected increase was to come from imports. Dr. Bacon did not seem to understand that the DKM approach was based on an assumption that new car prices are downward sticky. This implies a permanent shift in the relative price of new cars, they become more expensive because used car prices fall, which increases the price of new cars on any given list price. The cost of changing a car will also increase. Dr. Bacon was not allowing for that adjustment and his estimation of 93% was missing the point. He had fallen into the trap of treating adjustments to the stock of vehicles as being adjustments to the market.

In cross examination Mr. McDowell said that if VRT worked properly in Ireland then the price of cars in Ireland, net of VRT, should be the same as the price of cars in the UK. The embedded VRT of the two should be the same. Dr. Bacon was contending that somehow VRT got re-embedded and that was an extraordinary concept. He disagreed that the value of the VRT remained constant throughout the life of the vehicle. The total VRT is given by the amount which was paid at the original registration and it doesn't change. However the burden of that money is spread over the people who drive the car during its life.

Mr. McDowell said his analysis had dealt mainly with Ireland and the UK as examples of cars going backwards and forwards between EU States. He was aware that Mr. Dowling had made a complaint in 2003 to the European Commission. The fact that the Commission had not taken action on infringement proceedings in relation to VRT did not necessarily mean that it approved of the current situation.

Counsel directed him to the Commission Press Release of 26 January 2012 and the sentence "*the residual value of the tax diminishes proportionately with the depreciation of the vehicle*." He did not agree that it could be garnered from that statement that the Commission was in agreement with Dr. Bacon's approach to embedded VRT. He thought they were saying quite the opposite. The residual value of the tax diminishes proportionately with depreciation and therefore, if you sell it on, the embedded VRT is the same proportion of what you get for the car as a proportion of the original VRT paid on the car.

Counsel said that the EC's position in relation to embedded VRT was clarified in the 'FAQ's section' in the Commission's document. Mr. McDowell said the only disagreement between him and the EC was what constituted the value of the vehicle. It was basic arithmetic and logical to conclude that the sum of the residual values could not exceed the original total. Mr. McDowell said that the wholesale price was not necessarily one which meant selling from an individual to a dealer. He rejected the statutory definition.

In relation to Dr. Bacon's first report he said the analysis was defective because the price effect of -0.4 calculated was so weak in terms of its statistical reliability that, under conventional economic interpretation, an economist would say it was not significantly different from zero. Counsel said that Dr. Bacon had made his calculations by accepting the price elasticity of 0.67 as put forward by DKM. He would have to check that assertion because, if it was the case, then it was not the impression he had been given from reading Dr. Bacon's reports.

He said counsel had failed to understand one of the principal points he was making in his critique of the Bacon report – Dr. Bacon's approach was completely wrong because he treated the market as effectively being the imports of new and used cars.

Mr. McDowell was given the opportunity to read a further short report submitted by Dr. Bacon. He said that Dr. Bacon was suggesting that the relevant demand he was using was the demand for a flow. Mr. McDowell said that if you want to know what drives the additions to the stock you have to ask what the demand for the stock is. He fundamentally disagreed with Dr. Bacon's analysis.

He reiterated that Dr. Bacon had described the total demand for cars as a demand for new cars. He said it didn't apply because, in order to establish what his analysis is saying about the demand for new cars, you have to know what the stock is. The price elasticity of demand is not the price elasticity of demand for new cars but the price elasticity of cars generally. He had tried to show that you can get extraordinary increases, apparent increases and implied values for elasticities if all you look at is the swing item.

He disagreed with the statement that the results produced by DKM's application of the elasticity of demand were incorrect. He wasn't sure what Dr. Bacon was saying but that it seemed to be that over a three year period there would have been a further increase in the stock of approximately 9% of the opening stock.

The court asked, referring to Dr. Bacon's elasticity application, could the stock referred to not be interpreted as meaning stock in trade as distinct from the total stock. Mr. McDowell did not believe so because stock in trade is an asset and, if the cost of holding the stock rises, it will reduce inventories. He said that both he, Dr. Bacon and DKM had ignored the issue of traders holding stocks.

17. Evidence of Mr. Martin Kenneally

Mr. Kenneally, an economist, Director of the Centre for Policy Studies and Senior Lecturer in Economics in University College Cork, was

retained by the plaintiff to assess VRT.

In his report Mr. Kenneally included a table, drawn from an internal Revenue staff guide issued in 1992, illustrating how VRT worked. His evidence was that the only time there was a personalised touch in the valuation of a car was when Revenue categorised it as good or fair. Apart from that, the officer dealing with the valuation simply fed various characteristics of the car into a computer and it generated the OMSP according to a formula. As OMSP's fluctuate, depending on market conditions, they represent a constructed artificial average for cars.

His analysis showed that the differential in 1996 between VAT and VRT was 228%. The discrepancy between the implied VAT-based estimates and VRT estimates for new cars were relatively minor. There was a big and unexplained discrepancy for used cars.

Dr. Bacon's report raised doubts in his mind because the model did not predict the data as well as it should have done. It under-predicted the rise in new car registrations and missed the turning point in the market in the late 1990s.

In relation to assessing residual VRT, Mr. Kenneally gave a simple example of what the VRT would be on a new car costing €10,000 which he calculated at 20% or €2,000. He said if the car was later sold for €5,000 then the VRT would be €1,000. If a dealer added value to the car and sold it on for €6,000 the VRT would remain €1,000. He compared this to the situation of the plaintiff using the same car as an example. Revenue OMSP was €6,000 and VRT would be €1,200, even though the true value of the embedded VRT was €1,000. He said that was an example of an overestimation of €200. Revenue takes the price from the Car Sales Guide and, if the plaintiff imported an identical used car, it will be assessed as if at the point of purchase that VRT had been paid on the domestic resale, when in fact it is not paid.

The sampling base of the Car Sales Guide was insufficient because it just sampled a subset of the market. He counted 29 makes of cars with over 900 different models. To obtain one price quotation would require a search of almost a thousand observations. Such lengths were not gone to by the authors of the Car Sales Guide, who relied on the main distributor values. Even if the Car Sales Guide got the average right, the cars may be under-assessed and some would sell below average. Car sales over the internet were not sampled.

Mr. Kenneally made comments on the month of registration of cars. It was peculiar and that when a car was older than one year and presented to the Revenue before being sold, it was adjusted upwards 3%. If the same car was presented later on in the year it was adjusted downwards by 3%. Therefore if a car was registered in January and presented the following January, its depreciation value increased by 3%. He compared it with a car registered in December and presented in August where there was no adjustment. This showed a car could be younger and have its value unchanged whereas an older car gets a higher value.

In relation to mileage he said the Car Sales Guide recommends changes to the value of the car in respect of mileage. It differentiates between petrol and diesel models and between cars that have different size engines. The Car Sales Guide outlines 18 separate values, 15 of which exceed €50. There is no upper limit whereas, in comparison, Revenue put a limit in place with the maximum mileage that can be accounted for 10% of OMSP or €500.

Mr. Kenneally outlined the comparisons he had made between MVED and VRT. He compared the MVED scale with the A1 table used by Revenue over a short period of time, from 1992 to 1994. He found the age depreciation value systematically increased. He gave an example which showed that on a €10,000 car the value under MVED, two to three years later, would have been 6,000 whereas under VRT it would have been 7,300 rising to 7,900. Dr. Bacon's report showed that in 2008 used car prices fell by 23% and new car prices by 3 or 4% but there was no downward adjustment in the age depreciation values and was not reflected in the Revenue's depreciation tables.

In cross examination Mr. Kenneally denied that the scope of his analysis was limited to the impact of VRT on intra-community trade.

He believed that the model and structure of the age depreciation method in the computer valuation system was wrong. To determine the market value of cars it was necessary to go to the market. The system used by Revenue was a mathematical formula and therefore, not actual prices. The computer only gave, at best, an estimate of the average price. In his view the average price was biased upwards and could not be relied upon.

He agreed that VRT had similar characteristics to a turnover tax. It was his view that VRT resided in the vehicle and declined with it pro-rata.

He referred to fiscal and commercial risk because of the unnecessary degree of uncertainty as to the amount of VRT assessed. When Revenue assigns a car to a different schedule, this poses an additional fiscal risk which is not faced by the trader in domestic used cars. There is no third or fourth levying of VRT on domestic used cars.

The issue for him was not whether dealers who imported Japanese cars could trade profitably but rather, whether the imposition of the system impacts adversely on them as compared to a trader in domestic used cars. In his opinion the system did adversely affect them. In relation to the distinction between retail and wholesale sales, he described a sale to a dealer as a retail sale because it was a sale to the end user. The reason he did so was that such a sale was closer to a retail sale than to a wholesale one.

18. Evidence of Mr. Patrick Massey

Mr. Massey, an economist with thirty years experience, was asked to identify the appropriate way to apply VRT to imported used cars. Mr. Massey found that the Revenue estimate the amount of VRT on an imported used car on the basis of the retail price of an equivalent used domestic car. Contrary to Dr. Bacon's report, he found there is no distortion due to charging VRT at the landed import price. He gave an example using two identical cars where the pre-VRT price and depreciation rates were the same in two separate countries. He found there was a differential in the price at which the importer sells the vehicle because more VRT is charged on the imported vehicle than the residual VRT.

The effect was that the imported car costs the dealer more. The dealer is then at a disadvantage relative to the domestic car. He has to either pass on the higher price and charge more, which puts him at a disadvantage, or accept a lower margin and match the lower price which means he suffers a loss. He found the current method used by the Revenue to calculate VRT places imported cars at a competitive disadvantage.

In cross examination Mr. Massey did not agree with the argument being put forward by the defendants regarding the calculation of VRT. In his view, the price the imported car should be subject to, in terms of calculating VRT, was the landed price. If a car appreciated in value because of some rarity that would be reflected in the price of the imported car. VRT would still be paid on the

landed price. By using this model there would be no discrimination or distortion.

He said Dr. Bacon had failed to distinguish between the wholesale and retail price of a used car. He agreed that the retail price is the price the dealer sells the car to the end user for and that VRT is levied on the retail price. Ultimately he contended that VRT should be based on the price the dealer buys the imported car for.

19. Evidence of Mr. Kevin Kenny
Mr. Kenny, a chartered accountant and former tax partner at Ernst & Young in Cork, gave evidence that, at the time his statement was written, the VRT calculator was not available on the internet. Further, a link to a twenty page memorandum in Section 8 of the Employee Revenue Manual on VRT was a very recent addition to the VRT calculator webpage.

Mr. Kenny's evidence was that what was unique about VRT, from a tax practitioner's standpoint, is that there is some type of theoretical calculation of an OMSP. The concept of market value existed across a range of taxes but he had never seen a situation where the market value of an asset, in any tax, was calculated on a basis other than the actual market value of that asset at that point in time. It was an extremely unusual feature of VRT in the sense that Revenue operate it and that could have a "jarring effect with any tax advisor".

Mr. Kenny said that two concepts were central – transparency and the ability to calculate tax. Transparency and certainty are important in a tax system and, for two taxes in particular, VAT and VRT, absolute certainty is needed because the trader, when disposing of an asset, needs to know precisely the tax impact of that transaction at that point in time because it impacts on his pricing. In his view it would be relatively easy to administer VRT on either the landed price or at the point of the third party sale.

Mr. Kenny referred to two publications from the Revenue, a "Traders Guide" issued in March 1993 and a "Revenue Notice VRT 1" from January 2003. In relation to the "Traders Guide", while the chargeable value was outlined, there was no indication of background methodology as to how the Revenue had arrived at the OMSP. Having read it you were no further advanced in your knowledge. The document "Revenue Notice VRT 1" was effectively one page long and did nothing to outline the methodology used to arrive at a particular result.

Mr. Kenny said that even with the addition of the 20 page document detailing the various depreciation schedules to the online VRT calculator, any tax advisor would be "completely bewildered" as to why they current system existed. Another problematic issue is that the web calculator gives the initial OMSP. From his own experience, he was surprised to find that his car was valued at the current price and not the price he had paid for it eight years previously. Considering depreciation schedules were being applied he automatically assumed they would apply to the original price. He had never seen such a system anywhere and said it was completely illogical. From his research and the information available he found it was quite impossible to determine what the VRT was on any vehicle.

In relation to the distributor's declared value he said that, based on general tax principles, it is surprising that a competitor, the manufacturer of the vehicle, could influence VRT.

He agreed that to make an appeal a person first had to pay the VRT required. This was not the case across all taxes. Appeals could be lodged against the Revenue for income, corporation and capital gains tax and an individual would not have to pay the disputed tax before lodging the appeal. VRT and Stamp Duty were the exceptions to this rule.

In cross examination Mr. Kenny said the difficulty was not in computing the applicable rate but, rather, it concerned the valuation of the vehicle for the purpose of applying the rate. He agreed the purpose of VRT was to tax cars at registration and there was nothing unusual about that. Mr. Kenny agreed that a trader could technically control when the taxable event occurs by postponing registration by keeping an imported vehicle in bond until he disposed of it to a third party but, with one amendment – a trader would wish to dispose of his stock at the earliest possible date, otherwise his working capital requirement would increase significantly.

Mr. Kenny said there was nothing in the legislation, memoranda or public information that referred to Revenue making material available to members of the public to assist in calculating VRT from 1998 on, but he had read that some CDs were made available to traders at various intervals.

20. Evidence of Mr. Donal O'Boyle
Mr. O'Boyle F.C.A., referred to the unique credit arrangement where the plaintiff was allowed 45 to 125 days credit from the date of a shipment landing in Ireland to pay for the vehicles. It was assumed that this credit would continue.

He said profit before taxation was £134,612 in 1990 and £161,825 in 1991.

The assumptions he made relating to the market were taken as those set out in the DKM report, which assumed a reduction in the VRT over valuation of 30% and, on that basis, gave a projected average gross margin for 1993 to 2008.

Mr. O'Boyle assumed that the plaintiff would invest its surplus in ten year Irish Government Bonds.

His calculation of loss was on the basis of the DKM report of the 31st December, 2010, but as the plaintiff could not have been in a position to accommodate the projected market share immediately, there would be a delay in projected profits, which he calculated as €3,224,914 on the basis of an increase of 1,800 units.

On the basis of the assumptions of interest, overheads and taxation, he concluded that the plaintiff suffered a loss of earnings over the period of the claim in the sum of €128,381,623.

Having examined the books of account of the plaintiffs, he concluded that they had been well kept. He noted that the audited accounts for the year ending the 31st October, 1993, was qualified in relation to the plaintiffs company's recorded turnover comprising cash sales, over which there was no system of control on which the auditors could rely for the purpose of their audit. In relation to cash sales, the auditors had not obtained all of the information and explanations that he considered necessary and were unable to determine whether the proper accounting records had been maintained.

Mr. O'Boyle noted that the evidence of Fintan Riordan and Niall O'Dowling in relation to the number of vehicles sold by the plaintiff differed in each of the years 1990 to 1994. The focus was not on the books and records but on the bookkeepers employed who, Mr. O'Boyle said, were most diligent and competent and his review of the books supported that view.

He was of the view that the projected margins in the DKM report appeared to him to be reasonable and not inconsistent with the historic actual margin.

21. Evidence of Mr. Niall Butler

Mr. Butler joined the Revenue in 1975 and worked in various aspects of customs and excise until he was assigned to Rosslare. In 1992 he was appointed as a manager, assigned to the Central Vehicle Office, to set up and carry out administrative and operational duties in relation to the introduction of VRT. The deadline was 1st January 1993 when the single market came into being. The main job was to approve a network of dealers, or any other commercial entity, that wanted to deal in unregistered cars after 1st January 1993.

The chargeable event was the point of registration, filling out the form and handing it to the officer. The next step was for the Revenue officer to form an opinion as to the value of the vehicle but essentially, based on the legislation, it was on the first sale in the State in an open market.

There was about 60 to 65 staff working in the office in Rosslare initially but from June 1993 onwards it started to wind down, eventually leaving about 30, 25 of whom would have been researching the Irish market to ensure that the OMSP reflected market value in the country. The work on valuations consisted of setting up specific spreadsheets for every make and model and establishing values for those based on whatever publication was available.

The process wasn't "absolutely exact" but that they took every piece of information available. The main variable was age but others were mileage, condition, the model itself and extras. They excluded variables like the negotiation skills of the buyer / seller and the pricing policy of the dealer, in order to ensure consistency. They researched every newspaper and magazine where cars were advertised and relied on dealers to provide them with information.

A huge amount of research went into valuing vehicles. They calculated VRT as a percentage of the OMSP, which itself was calculated by reducing the OMSP of the new vehicle in accordance with the depreciation table. The information in the depreciation tables came from researching actual market values. They then translated the actual market values into how that would be reflected as a percentage of the value as new and those values effectively became the depreciation values.

Depreciation tables were analysed to see whether they could build in a logarithm so that when a particular vehicle was assigned to a particular depreciation table, that table reflected the values of that particular model right along through its different ages.

By November 1992, before the system went live, they had fourteen depreciation tables.

By producing bands of depreciation they finally arrived at six depreciation tables (A1 to C2) but that they then discarded A2 because the research showed that no vehicle fell into that depreciation pattern.

One of three conditions could be applied to an imported car; good, fair or poor. The system itself provided a whole range of options but it was the examining officer at a VRO who would ultimately examine the car, identify its particulars and would then input those variables into the computer system. The system then provided a valuation.

He developed guidelines in partnership with Dr. Lennox's office and these were given to all VRO's. They set out a number of checks and balances that would have been carried out by management in those offices. There was an element of discretion available to the examining officer in terms of determining the condition of the cars. The OMSP had to reflect the value of any extras that were fitted prior to registration so they gathered as much information as they could in relation to the actual value of extras. When distributors brought in new cars they would supply information to the Revenue on disc with the details of the vehicle. Once the five digit statistical codes had been registered, they added on three further digits which distinguished the particular make and model of the imported version.

When he concluded his report, it was sent for comment and observation to Edge Anderson.

It remained a significant feature of the work of the CVO to continue to monitor and analyse car values in the actual market and then go in and refine and adjust the system. Minor adjustments were made to the depreciation tables where the car had not been registered until May or June. They used June as a benchmark and made adjustments accordingly.

When doing the research for the tables, the benchmark and only available value for a new vehicle at the time was the Recommended Retail Price ("RRP"). The RRP was published in the Car Sales Guide. There was negotiation between the distributors and the government and it was the end of November / early December 1992 when the main distributors agreed that their OMSP's would come in at 94% of the RRSP.

Revenue built a compensating factor of 1.06 into the IT system to allow for the 6% adjustment. They continued to look at the market and refine and develop the depreciation tables. They moved up to 22 tables plus one, which was a stopper table. It became table number 23. They removed the supplementary adjustments for the first year because they didn't reflect the market. The court asked if they removed them or adjusted them, as the figure suggested they went up from ½ % to 3%. He said they reduced it based on research and experience.

There was a concern that the values being produced by the system, mainly based on the depreciation tables, was actually undervaluing OMSP. Customs and Excise officials and Revenue officials did some surveys in relation to actual selling prices of a range of models. This consisted of looking at the sales prices of quite a number of second-hand Japanese sales and sending that data back to the VRO.

Mr. Butler said that the appeals process usually took about one week, there was no charge and the number made was quite low – 200 to 300 a year. Mr. O'Dowling had made a complaint that statistical codes were kept confidential from dealers. Mr. Butler said Revenue had a very open policy of providing information to dealers. They provided statistical codes on request to anybody who required them. At the beginning of 1993, people were looking for codes which were not on the system and that meant that research had to be done to find the information. Once they had the code and, where someone made an enquiry or asked for an estimate, they would print out the information which specified the make, model, statistical code and amount of VRT payable and the estimate would be maintained for 14 days.

They achieved a two day turn around for providing estimates in January 1993. Within six to eights weeks they had a one day turn around. From April 1993 they could have an answer within a few hours. It was the policy of the CVO that if they received any legitimate information that their values were out of sync with the market, they would do their research and adjust accordingly.

In cross examination Mr. Butler said he had taken up his position in the CVO in mid May 1992 and Dr. Leonard started two or three weeks later. The two main functions, as per the legislation, were that they had to develop a frame work for developing the OMSP and a framework for the registration tax by dealers. He agreed that the 1992 staff guide was released on the eve of the introduction of VRT. A flaw had been not producing a staff manual so that all staff were working off the same information however they had clear guidelines on what was required.

He was given a copy of the 1992 Act when he was assigned to the CVO. He was not given written instructions but the verbal instructions were very clear. Counsel asked if Mr. Butler could give an explanation for why the spreadsheets had disappeared and electronic or hard copies were not maintained. He said the spreadsheets would have changed and expanded over the preparatory months. They were done on 'standalone computers' using a software system that has since become obsolete. The files would have been contained on discs on standalone computers. The data that is currently on the Revenue mainframe came from that original research and accurately reflects the OMSP.

Mr. Butler said that a significant amount of general files would have been kept in relation to the ongoing functionality of the unit. He did not know why they were not discovered. He took no steps to safeguard documents for discovery as he was not involved and was being reassigned at that time.

Mr. Butler agreed he was involved in market research while down in Rosslare. Mr. Butler said he had no knowledge of how many people were employed at the Car Sales Guide, how often they collected data or their knowledge of the industry. He did not have discussions with the people in Car Sales Guide nor did he make enquiries as to how reliable their data was, how up to date they were or whether they were audited.

Counsel asked Mr. Butler what authority he had to re-introduce depreciation tables as a system of valuation. He replied that he had not introduced depreciation tables. What he and his team did was develop a system that produced OMSP's in relation to particular used cars. His understanding was that the administrative practices he put in place did not require regulation.

He agreed that the statutory definition of OMSP was critical to his work. It had changed after he had written his report and 12 days before VRT was due to come into force. He did not alter his approach to his work because the OMSP of a used vehicle in the State was, to him, an easy concept to grasp. He could not recall paying any attention to the amended definition of OMSP in the Finance (No. 2) Act.

Mr. Butler said he did not get instructions in relation to maintaining the tax yield – his only instructions were to implement a law and design an OMSP that reflected actual market prices.

In relation to mileage counsel said the calculations were not logical - £50 per thousand miles up to a maximum of £500. Technically the same model and five year old car, one with 75,000 miles and the other with 200,000, would only have a difference in value of £500. The Car Sales Guide suggested an allowance but didn't have a limit. Mr. Butler said that the market reality is that there is a limit.

In relation to extras, counsel said that Revenue depreciated extras at the cost they were based on a new car, when they may in fact have cost far less when initially bought. That was not consistent with trade practice. Counsel suggested it was done to maintain revenue yield. Mr. Butler's understanding was that extras did retain their value as the car depreciated and that is why the new price was applied. In the guide, extras were depreciated by 50% in the first year, 25% in the second and third and in their fourth they are considered to have no residual value in the car.

Counsel asked why cars less than three months old were not subject to depreciation. Mr. Butler said the legislation required cars less than three months old to be treated as new. He would have discussed that with Dr. Lennox at the time as he would not have made a solo decision on something like that.

Mr. Butler had a very clear recollection of collecting every possible newspaper and publication they could get their hands on in relation to the car markets. Counsel asked why there was no inclusion of a common car, such as Ford, in the table contained in his report. Mr. Butler said it was possible that they had not done sufficient research on Ford at the time to include it. He was trying to think of a viable explanation and said that the cars listed were only examples. Other leading makes (such as Toyota) were missing from the tables. Mr. Butler insisted that his office had carried out in-depth research.

His report was written at a particular point during the research and they were 'very very conscious' that the research had to continue.

Dr. Lennox had set up the meeting with Edge Anderson. No documents were provided to Edge Anderson other than a copy of Mr. Butlers report.

Edge Anderson had only been supplied with the report and not the spreadsheets because they were only engaged to comment on the report. They did not ask for the spreadsheets.

Mr. Butler agreed the legislation did not require the use of depreciation tables.

Mr. Butler said that the purpose of his report in August 1992 was to provide a framework and give certain assurances that there was a system in place that would work. He agreed the main depreciation tables had never been published. He agreed that there was no information in Appendix C in relation to which vehicles were to be assigned to which tables.

Mr. Butler said that the system was based on continuous review and research. The plus and minus 5% was a supplementary adjustment depending on the month of registration of the used vehicle. Counsel said the market did not treat cars in the manner outlined where two cars, one bought in January 1990 and the other in December 1990, would effectively be depreciated at the same rate. They adjusted the car on the basis of the month that it was registered and did not take account of the variation in the months and year of first registration.

Mr. Butler said it was very easy system to understand. The OMSP of a new vehicle was declared by the main distributor. This did reflect actual market price because, while the distributors declared the OMSP as, on average 94% of the RRSP, they still retained the RRSP's as a marketing tool in relation to their sales. There was a two-tier system in place. The court asked for clarification in relation to the VRT on new cars from 1st January 1993 being RRP less 6%. Mr. Butler said the declarations were quite formal and the legislation required them to be made three weeks in advance of the price coming into force.

Counsel said there was a 'stratagem' between SIMI and Revenue whereby part of the purchase price could be taken as delivery charges and not subjected to VRT by the seller. Mr. Butler would not have been aware of that but he was aware that the delivery charge was considered to be a service and not part of the OMSP. The law required registration tax to be paid at the time of registration when an invoice is provided, which is the normal course of business, but that the service and delivery charge could be construed as a service separate to the OMSP of the car.

Mr. Butler said that 35,000 vehicles were imported from the UK in 1993 where 'no sale took place'. The court asked for clarification. He said the vast majority of those imports would have been private and that those sales would not have been picked up by the Car Sales Guide as they were not sales by dealers.

Mr. Butler said various people in the CVO decided which cars attached to the tables. Mr. Butler said the officers would have been working in the car market for two, three and six months, depending on when they started. Mr. Butler refuted the claim they had 'abandoned the spreadsheets' because it was too much trouble to update them. They recognised they could develop a system which brought in a range of tables, so having a separate depreciation for every single model on the market was unnecessary.

Counsel submitted the difficulty with the system was that no one had ever explained why particular cars were assigned to particular tables. That information was no longer available. Mr. Butler said there was nothing unusual about not keeping data but he accepted they had not retained it for posterity.

The court asked if an economic analysis of the depression caused by the extra imports had been carried out and counsel said it had not.

Counsel referred to a letter written by the plaintiff's solicitors in 1994, complaining about the fact that the proposed valuation changes in relation to Japanese cars would amount to an increase of between 5 and 30 per cent over the existing values. Mr. Butler said it was likely the letter was drawn to Mr. Leonard's attention. He did not know why the plaintiff received no reply. He and Mr. Leonard had carried out some research in relation to Japanese cars at that time and it was clear they were being undervalued. None of that research was available.

The report prepared by Niall Butler was drafted before the amendments in the Finance (No. 2) Act of 1992, were enacted. The report explains that the VRT on second hand vehicles would be calculated as a percentage of the OMSP. The OMSP would be calculated by reducing the OMSP of the new vehicle in accordance with a depreciation table, and incorporating further reductions for the condition and mileage.

The report continues:

> "An importer will call to the local Vehicle Office with a second hand vehicle on which he intends to pay the Registration Tax.
>
> The officer examines the vehicle. He notes the exact model, any extras, the mileage on the clock and then makes an informed judgment on the condition.
>
> He returns to his office and, assuming that the model is currently available, he extracts the search code from a list supplied by the Central Motor Vehicle Office (CMVO) and keys this into the system. The system will then generate a list of models and statistical codes and the officer will identify the exact model.
>
> He also assesses the total cost of extras from lists supplied. He then keys onto his screen the statistical code and total value of the extras, the date of first registration of the vehicle (or year and month of manufacture for unregistered second hand vehicles) the condition and the mileage. He then rechecks the data that he has keyed and inputs it into the system by pressing the transmit key.
>
> The system will then prompt the value on which the registration tax is calculated. No further adjustments to this value should be required. Therefore, if a further adjustment was made by the examining officer by keying directly this would have to be flagged immediately to the system for subsequent investigation.
>
> In cases where the statistical code for the model in question is not readily identifiable the officer will note all relevant details, complete an inquiry form and fax this to the CMVO. The statistical code and value will then be conveyed to the officer by the CMVO. A copy of an inquiry form currently used . . . is attached at Appendix B.
>
> All inquiry cases would be dealt with in this manner."
>
> The calculation sequence is provided on the following page:-
>
> A. The Stats Code generates a value on Age Depreciation Table.
>
> B. The total amount for EXTRAS is added to the value at A.
>
> C. DATE of first registration depreciates the values at B as specified in the Age Depreciation Table.
>
> D. The CONDITION calculates an amount which will be a percentage of C.
>
> E. The MILEAGE calculates a second amount of applicable.
>
> F. The amount at D and E are added and the total is subtracted from the value at C.
>
> G. The value thus generated at F is the value prompted to the officer.
>
> The Butler Report concludes:
>
> "It is impossible to emulate the complex and inconsistent system of second hand car valuation operated by the motor trade.

> The proposed system does however go a long way to producing realistic market values which may not exactly mirror prices offered by individual traders. The motor trade itself accepts that the main criteria for the price paid for a car is that of supply and demand. The system obviously cannot cater for this but it can establish a reasonable OMSP for a vehicle using criteria that are acceptable, consistent and fair."

The Butler Report states that "where possible a cross check was made with advertised selling prices in the newspapers to ensure there were no major disparities in the prices".

20. Evidence of Mr. E. Campion

Mr. Campion, Assistant Principal in the CVO since 1995 described the developments in the VRT system. In 1995 the monthly adjustment, which had been in the range +3% to -3%, was changed to +5% to -5% as there was research conducted by Mr. Butler to support the restoration to that figure. It was evidence of how Revenue sought to improve the system to ensure it reflected market data.

Counsel referred him to a representative valuation review undertaken by Mr. O'Connor, Executive Officer in the Central Vehicle Office, conducted on 4th July 2011, which illustrated the treatment of direct Japanese imports. Mr. O'Connor used a Honda Edix, which did not exist in the Irish or UK markets. A Honda FRV was selected as it was considered a similar model. Based on his research Mr. O'Connor concluded that there was poor model recognition in the market and slow market interest. He reviewed the valuation downwards from the E1 to F1 scale.

Revenue had assimilated VRT into the taxes division with effect from 2003 and were required to produce monthly output statistics from that time on. There were no figures for codes under review before 2003. Reviews were carried out within the CVO and codes were amended or reviewed. Depreciation tables were not subject to the reviews but two further tables were added in 2002.

Mr. Campion explained the appeals process to the court and said Revenue endeavoured to respond within 30 days but, if it went over that time, the applicant was entitled to go to the Appeal Commissioner. If the amount of VRT should have been higher, s.145 of the Finance Act 2001 provided that the Revenue could insist on the applicant paying the excess. In reality that rarely happened. He could only think of one time in seventeen years where an applicant was asked to pay an excess.

He referred to his report and the table which showed all appeals lodged with the CVO from 1992 to 2010. The figure for 1993 showed 219 appeals lodged, being 0.64% of all used car registrations for that year (33,940). Of the appeals, 133 were successful. The small number of appeals suggested a customer satisfaction rating of 99.36%. An appeal lodged by Mr. Niall O'Dowling was answered within two days.

He understood that CDs were also made available to the trade from 1999 and said that the administration records in the VRT branch in Dublin showed that CDs were posted to the plaintiff on fairly regular dates throughout 1999 to 2001.

When asked how many estimates would be given in a year he said the figure of 75,000 would not surprise him. He said a difficulty might have arisen where a person sought to rely on an estimate received by telephone. It was simpler to honour an estimate received in writing.

In cross examination Mr. Campion said he had no evidence to give in relation to why the monthly adjustment range was ever at plus and minus 3% if the correct range was 5%. He did not have any direct evidence to state in relation to why, from 1993 to 1999, the incorrect percentages of plus and minus 3% were used in the administration of the system. He said the hybrid depreciation table began in November 1999. He could not tell how many hybrid codes existed. If the code was displayed on the Revenue system it would show the customisation.

He did not have an estimate for how many codes there were in total. He was only concerned with the codes that were subject to review. His responsibility included all active codes officially but, in terms of knowing the population of codes, he focussed on the *ad valorem* ones which he estimated at 18,000. He did not know how many codes were customised and he could not say how many had originated in any particular year.

Mr. Campion confirmed that Executive Officers in the CVO have responsibility for moving vehicles from one code to another. Their decisions do not have to be signed off. The Car Sales Guide was published once a month and records were not constantly updated to reflect that. The system was entirely manual and there was no systematic way of checking values.

Mr. Campion said that the test in the legislation is that Revenue should form a reasonable opinion when reviewing codes. Reviews took place possibly twice a year.

In 1993, 60.73% and in 1994, 82.5% of appeals resulted in refunds which, counsel said, suggested a very high rate of error. Mr. Campion disagreed. He said that the particular cars had features such as unrepaired crash damage and being in poor condition. Valuation was a subjective matter and different methods of research could yield different results.

He outlined the process of inputting information into the system. He said the value was reached by reference to market research, namely the Car Sales Guide. In the event of an appeal, the CVO officer researched the market and came to a conclusion. This research consisted of primarily contacting dealers.

Counsel suggested the steady increase to 2,041 refunds in 2009 showed the Revenue system was in error frequently. Mr. Campion said that he would be surprised if refunds were around 25%. It was an easy system where officials encouraged appeals. It was submitted that this was proof that the system was not working properly when Revenues' own staff was encouraging people to appeal decisions.

Counsel referred to a letter from Mr. O'Leary, Assistant Principal, to Mr. Goodwin, Principal Officer, VRT Administration branch, dated 4 June 1997. It referred to the Mr. O'Leary's reservations to publish the valuation database. The letter also stated, in relation to the Car Sales Guide, that,

> "the influx of secondhand imports, mostly UK and Japanese, in recent years has created a situation where the guide no longer covers the entire range of vehicles available in the market"

and

> "the problem for the CVO is the total dependence on the guide as a source of information".

The letter also said,

> "the existence of the guide allows us to adopt a minimalist research and analysis of the secondhand market".

Mr. Campion's position was that the Car Sales Guide greatly facilitated the research of the market.

Counsel referred to Mr. O'Connor's Edix Report of 2011 where it was suggested the Revenue might replicate the research techniques used by the publishers of the Car Sales Guide. Mr. Campion was of the opinion that this was a reasonable conclusion.

Mr. Campion said he did not agree with the statement that "no code can be assumed to be completely correct".

Counsel referred to where Mr. O'Leary's letter said "codes are subjected to cursory 'review'" and asked what the presence of the quotation marks implied. Mr. Campion said it seemed to be a form of posturing to exert pressure on the manager to allocate more staff to the CVO.

Counsel referred to the "CVO Submission", of 14th July 1997 which said the choices were either to publish the entire system complete with new OMSP's and depreciation tables or to issue a set of tables covering all 10,500 codes but only providing values for years of availability. Mr. Campion did not think either of those things were done. Instead, a kiosk system was set up where the user made selections and the system generated a VRT estimate.

Counsel then referred to the quotes from the CVO Submission

> "whether this limited publication would satisfy our obligations under Freedom of Information in the context of the UCII court case is a matter for legal advice"

and

> "the extent to which our full system is exposed to public scrutiny will determine the amount of corrective action required within the CVO".

Mr. Campion said this was a reference to earlier reports where Mr. O'Leary was looking for additional information and said it was indicative of his wish to perfect the database.

Counsel said what was being suggested was that the more public scrutiny there was of the system, the more corrective action would be necessary. Mr. Campion said that the system was fit for use and that he interpreted the quotes as a desire to have a system which, when the public accessed it, could be relied upon. Counsel asked if OMSP's had been audited by the Revenue and Mr. Campion said they would go into new vehicle vendors and conduct surveys. The Assistant Principal was responsible for checking the accuracy of the OMSP's

A further quote from the Submission "…nondisclosure removes the possibility of such challenges…the key element will be the frequency of reviews and resources to date within the CVO have not permitted a satisfactory performance in this regard". Counsel referred to the fact that the report stated that 3,000 codes had not been reviewed for at least 12 months which represented 37% of the total database and 23% of all registrations in the previous year. Mr. Campion said that was not a satisfactory situation and he would wish that the codes would be reviewed at least once a year.

Counsel then referred to the "Report of the Working Group" dated September 1997: "Since its introduction policy in relation to the valuation system has been not to reveal how it works to the motor trade or the general public". Mr. Campion was not aware of any such policy but he was aware of certain factors, for example, complaints from the Irish Motor Dealers Association that the system discriminated against used Japanese cars and criticism from members of the public that the system of valuation was arbitrary and secretive. The purpose of the working group was an attempt to achieve greater transparency. He was not aware of Mr. O'Leary's concerns and would not have characterised aspects as 'flaws'. He would have said they were necessary enhancements.

Counsel asked why Mr. Butler constructed an entire system of allocating existing vehicles to Revenue codes back in 1992 and Mr. Campion said it was preparatory work and there was great benefit in having codes set up and ready.

23. Evidence of Dr. Les Lennox

Dr. Lennox, former Principal Officer of the Revenue Commissioners, said that around the time the VRT system was being developed, many representations were received. There were concerns across the car industry that the system would cause problems. He referred to a document dated 5th October 1992 which was written by Colm O'Herlihy, the former Revenue official who acted as a consultant for the plaintiff and a number of the traders in 1992. He said that in many ways Mr. O'Herlihy was the architect of the current VRT system as, in his document, he had recommended using OMSP's and depreciation tables. Dr. Lennox said that the ideas were tweaked and refined but the underlying idea was Mr. O'Herlihys.

Counsel referred to Mr. Butler's report and his reference to 'maintenance of the revenue yield'. He said he never had an instruction from anybody telling him that he had to protect revenue in developing the VRT system. Dr. Lennox said leading up to the meeting of 22nd September 1993, the trade in general had concerns about the VRT system and some of the second hand car importers were unhappy.

He explained to the trade at that meeting that the prices would be adjusted to reflect the research Revenue had gone through. He felt at the time that there were efforts made by the trade to explain this 'kind of situation away'. The trade wanted to discuss the imminent increase in the OMSP for Japanese imports and what they perceived to be the lack of equity in that new and second-hand cars were effectively dealt with in a different manner.

Dr. Lennox had a note of the September 1993 meeting. Mr. O'Dowling and Mr. Riordan stated that Revenue was acting in an illegal way and both quoted EU laws to support their position. Dr. Lennox said he felt the meeting was being dominated by a small number of traders and he tried to open it to everyone. Mr. O'Dowling presented a folder at the meeting which contained cars he contended would not attract the OMSP as valued by Revenue if they were sold. It was Mr. O'Dowling's view that VRT should be paid on the invoice price of the cars imported.

Dr. Lennox said there was no mention of invoices or problems concerning invoices at the meeting. The trade was aware that Revenue had the right and remit to do audits. The trade was asked if they would prefer to do business with Revenue on that basis and there was a strong negative response to that proposition. Counsel said that it had been claimed in evidence that this was a threat. Dr. Lennox refuted this because Revenue reserved the right to audit as they saw fit. Revenue had already carried out extensive research into the prices achieved for cars for the purpose of the meeting.

In cross examination Dr. Lennox disagreed that nothing other than the Car Sales Guide was used to determine values. He had not contacted the publishers and he did not know how they collected their data. He could not say if the prices listed in the Guide were actual RRSP or asking prices.

He was not aware of discussions with SIMI with a view to giving them concessions in order that they would not object to the new system. He was not aware of the Revenue Commissioners giving concessions to new car importers.

Dr. Lennox agreed that the reason SIMI would want information on the value of second hand imports was so that they could see how those vehicles were being valued by Revenue to ensure they weren't posing a competitive threat to domestic used cars. However, he said he could not comment on and knew nothing about, a letter from the Minister for Finance to SIMI, where it stated that SIMI would be given the opportunity to meet with the Revenue periodically to investigate specific complaints about undervaluation.

SIMI were also offered another concession in relation to delivery charges for new cars where the letter stated that "provided they are shown separately on the invoice, the charges will be excluded from the OMSP". Dr. Lennox said his understanding was that the delivery charges were always outside of the system. Dr. Lennox said he could not remember concessions being made to SIMI that involved him.

Counsel asked why Edge Anderson was not asked to review Appendix C of the Butler Report on the eve of the introduction of VRT (which moved the number of scales from 5 to 14). Dr. Lennox did not think they would have been in a position to add any value at that stage. Dr. Lennox did not know why Edge Anderson had only been provided with the Butler Report and no other documentation or spreadsheets. He could not say why their involvement with the Revenue was so sparsely documented.

24. Report and Evidence of Dr. Peter Bacon

Dr. Bacon, economist, was asked to review the submissions and reports submitted by the experts on the plaintiffs' side. He prepared a report in December 2011 which was before the court. He summarised his finding by saying there is no discrimination in the treatment of domestic and imported used cars with respect to VRT.

In his report of December 2011, Dr. Bacon referred to the plaintiff's target market segment of Japanese used cars of less than five years old. The stock of cars rose quite rapidly over the period in contention. Sales of new cars peaked in the late 1990s and again in 2006 – 2007, followed by with a sharp fall attributed to the economic downturn.

Car ownership remained quite low compared to other high tax Member States in the EU. There was no simple relationship between new and used car sales. Income was the key driver in demand with a one to one relationship for new cars. Price elasticity for new cars was minus 0.4 and cross-elasticity between competing models was much higher in the range three to five.

The alleged bias of 30% excess VRT charged on imports, contained in the reports of the plaintiffs' expert witnesses, rests on an argument that Revenue calculated VRT liability on the basis of schedules which underestimated the rate of depreciation. Dr. Bacon found no foundation to support that allegation. He submitted that the schedules were used only as an administrative tool to ensure consistency and efficiency. Cars were valued against prevailing used car prices in Ireland as published in the Car Sales Guide.

Dr. Bacon said that the three people from the Revenue who had given him instruction were Mr. Kieran Coyle, Principal Officer, Mr. Sean Kennedy, economist and Mr. Eamon Campion, based in Rosslare. His office had spoken with Sean Kennedy and asked him his understanding of how the depreciation tables were used. It was based on that information that he submitted his evidence. He said that on the afternoon of 16th November 2011 his office spoke with Mr. Campion, who provided a similar account to the evidence he himself had submitted to the court. Mr. Campion had said that the purpose of the depreciation tables was to ensure a consistency across the various regional offices and were a means of alerting Revenue to possible fraud.

Dr. Bacon referred to a second element in the claim of DKM 2011 being based on a calculation that provided an estimate of the impact of the alleged bias on the business of the plaintiff. He regarded the calculation as complex and involving the creation of a hypothetical car market in Ireland for the years 1993 – 2009, that differed substantially from the car sector that actually existed. It was based on the assumption that a lower VRT rate on imported used cars would have provided a boost to car ownership in Ireland, a major boost to imported used cars – particularly those sourced in Japan – and would have facilitated the plaintiff in greatly expanding its business. Ultimately, it was calculated that the plaintiff would have imported 26 times more cars that it actually did register in that period.

Dr. Bacon found it hard to see how a 7.5% reduction in price, as estimated by DKM, could give an increase of 2,500% in sales. Inelasticity is a characteristic feature of the demand for cars. Where elasticity is less than one, it is a fact that a reduction in price will not lead to an increase in revenue. Where inelasticity is at unity, a reduction in price will lead to the same revenue.

The calculation involved supplying elasticity to various levels of demand and assumptions in relation to the car market. The elasticities used are in line with reasonable estimates but the way in which they are used is unusual. The basis for the calculation is the allegation that the VRT that was charged on used imported cars in this period was 30% higher than it should have. The basis for this estimate, apart altogether from arguments in relation to the underlying concepts, is unclear.

He said the argument that VRT should be levied on wholesale prices leads to a conclusion that 23% of the VRT charged was excessive, i.e. the wholesale or landed price at which Japanese cars arrive into Ireland was 23% less than the price that was used by the Revenue to calculate VRT. The argument that the depreciation rates used were too small leads to the conclusion that the actual market price of such cars was 30 to 40% less than the estimated market price.

The assumption of 30% overpayment of VRT would appear to be a middle point, but there is no logic to this. Furthermore, if these assertions are correct, it follows that the price at which a used car imported by the plaintiff could have been sold on the open market was substantially less than the landed cost price of that car. Obviously, Dr. Bacon concludes, such a business would not be sustainable.

He believed that there were major problems with the calculation arising from a number of unreasonable assumptions and from a number of fundamental mathematical and other technical errors.

Those could be summarised in a series of six errors that have accumulative effect on the calculation.

1. The first is a mis-definition of demand so that the elasticity of demand is applied to the stock of cars rather than to annual demand.

2. The share in new cars is assumed to fall following a reduction in the price of used cars. However, the new market share of new cars is then applied to the original market size to estimate demand for new cars, rather than to the larger market size that would exist following the fallen price.

3. The market share of used cars is artificially inflated relative to the underlying assumptions being increased by thirty percentage points rather than by 30%. Dr. Bacon regards these as basic errors which are not a matter of opinion. Together they account for 75% of the total loss of sales that are estimated.

4. An assumption that new car manufacturers would not respond to a large loss of their market share and that the domestic used car market would not fall in response to a big rise in the supply of used cars onto the market. The argument in relation to this issue is fairly conclusive as it is inconceivable that the market would not react to a big increase in the supply of used cars and, as a result, the cross-elasticity is wrongly applied. The price of domestic used cars would definitely fall if this happened.

5. An assumption that the share of used Japanese cars would have risen to 60% although there is no evidence to suggest it could have achieved or sustained a market share at anything close to this level.

6. Finally, a claim that the plaintiff would have maintained a market share of 20% in a rapidly growing and profitable market.

Dr. Bacon tabulates the impact of correcting those errors which he calculates as accounting for 98.7% of the incremental sales identified in the claim as follows:

Table 4.4 – Impact of removing errors from calculation

	Incremental Imports after Correction	Impact after correlation	% of total remaining after correction
Original	43,659		
Error 1	70,399	-23,260	75.2%
Error 2	66,224	-3,775	71.1%
Error 3	23,835	-42,769	25.4%
Error 4	5,491	-18,344	5.9%
Error 5	2,363	-3,128	2.5%
Error 6	1,193	1,170	1.3%

He concluded that, when the errors were removed, there was a 7.5% reduction in the price and this resulted in an increase of 33% in sales, not 2,500% as maintained by DKM.

He said the idea of embedded VRT is that the value of the VRT continues to exist through the life of the vehicle and exists proportionally to the value of the vehicle. If VRT was 25% on day one then it will be 25% of the retail value at a point in time in the future when the price of the vehicle has depreciated.

Dr. Bacon said the plaintiffs' were proposing that the VRT base for imported vehicles should be different than for domestic vehicles. The law states that the base is the retail price, therefore the claimant's position is inferring that the law should be something different from what it is. He could not see any discrimination in how Revenue practiced the application of VRT. There were no barriers to entry in the motor trade so the market would reach equilibrium in terms of price and margin.

He referred to the appeals process and said about 2% of VRT decisions had been appealed. If there was the alleged injustice, unfairness and bias being imposed on participants in a segment of the market, you would expect that number to be higher than 2%.

In cross examination he said the plaintiffs' argument was focussed on depreciation tables. Brendan Dowling had contended that imported cars were overvalued because of depreciation. Dr. Bacon said that that was not how Revenue valued cars. An officer of the Revenue had told him that depreciation schedules were not used to calculate the OMSP's for used imports, but were merely used for administrative purposes.

Counsel said that Revenue stating they did not use depreciation schedules was clearly fundamental to Dr. Bacon's entire report, and was at variance with everything in the reports of Mr. Dowling, Mr. McDowell and Mr. Kenneally. Dr. Bacon said the information he was given by Revenue led him to believe that the experts for the plaintiffs had misinterpreted how the Revenue value cars.

Dr. Bacon said that the basis of his analysis was his belief that the practice of using the Car Sales Guide was widespread within the trade. Revenue had not said anything to him about statistical codes but he did not see why they would. He had never questioned the information he had been given by Revenue as he presumed he was being told the truth. He did not look at the depreciation tables nor did he ask for information explaining the system. In cross-examination he agreed that he did not carry out any analysis of the accuracy of the depreciation tables or whether or not the guide prices actually reflected prices throughout the market for second hand vehicles. He took the statistics and summarised what had happened.

He agreed that when a domestic main dealer buys a used car, adds a margin to it and sells it for a higher price, no VRT is charged on the margin. The margin can be as high as 30%. If a dealer buys a Japanese import instead of a domestic vehicle and adds a margin, VRT is charged on the margin. Dr. Bacon said in that scenario VRT is included in the margin by virtue of the fact that it is levied on the retail price.

While he did not disagree with the process used by DKM to estimate the percentage of incremental demand which they believed would be met by imports, he did not agree with DKM defining demand as the stock of cars rather than the annual demand and with the adjustment period of three years.

Counsel maintained that applying price elasticities to stock was standard in the literature. Dr. Bacon disagreed saying they were trying to measure how demand changes in response to a price change, not the ultimate effect on the stock of cars as a result of a price change.

Counsel put it to Dr. Bacon that his approach was 'eccentric' and 'unorthodox' and that nobody in the economic community, including the EC and ESRI, adopted such an approach. It was not approved by Mr. Kenneally, Mr. Dowling, Mr. Massey or Mr. McDowell.

Patrick Massey believed that Dr. Bacon had failed to distinguish between the wholesale and retail price of a used car and the difference between them. Mr. Massey, contrary to Dr. Bacon's report, said that there was no distortion due to charging VRT at the landed import price.

Brendan Dowling of DKM was of the view that Dr. Bacon's model was for the annual demand of cars as distinct from stock. He felt this was a mistake on Dr. Bacon's part because the DKM report found that Dr. Bacon's model was essentially an income elasticity model.

Dr. Bacon's model examined the figures for 1993, showing that new car sales amounted to 60,800, with the registered stock at the time being 891,000. The ratio of new cars to stock was 6.8%. The Bacon model suggested that a 10% rise in income would lead to a 10% rise in new car sales but, in reality, when applied only increased car ownership by 0.68%. Mr. Dowling believed that the Bacon model performed poorly in 2009 which illustrated that it had little explanatory power.

Moore McDowell believed that Dr. Bacon's criticisms were based on a misspecification of what the underlying market was. What he was looking at as the demand for new cars was actually the number of cars joining the existing stock.

He had used income as the main variable but had not considered the cost of credit. He did not calculate price effect.

He did not define what "the demand" was for. He appeared to have considered the car market as comprising of a separate market, but nonetheless, applied the concept of 'one price' in order to conclude that used and new cars are not the same market.

He did not seem to understand that the DKM approach was based on the assumption that new car prices are downwards sticky. This implies a permanent shift in the relative price of new cars as they become more expensive and cost more to change because used car prices fall.

Counsel referred to figure 2.9 at page 14 of Dr. Bacon's report at the graph which was supposed to show 'predicted demand'. The difference between the predicted and actual demand was 80,000 units, which suggested that the model failed and did not do what it was supposed to – predict registrations.

Dr. Bacon said his estimation, if the plaintiffs' claims were correct, was that the plaintiff would have sold an additional 1,193 cars.

25. Evidence of Mr. Michael Fogarty

Mr. Fogarty, Revenue Official, outlined the development of the computer system which was released on the 1st January, 1993, in order to calculate VRT. Its second function was to register a vehicle by "birth certificate". He referred to kiosks introduced in the VROs in 1998, which gave a snapshot of data was taken from the Revenue system and updated five nights a week. Revenue officials were given a desktop version of the kiosk to answer questions from individuals calling with queries in relation to estimates for VRT.

Revenue then issued CDs, which allowed the trade to input information and come up with an estimate of VRT.

From 2002 a new online service was available for dealers which allowed them to interact with Revenue and register vehicles from their premises. In 2004 the VRT calculator was introduced online. A new system was also introduced that year whereby distributors could upload statistical codes to the Revenue via Revenue Online Services (ROS). This allowed officials to inspect information submitted and approve it. It could then be stored on the system and matched against other vehicles. Also in 2004 a Vehicle Technical System (VTS) as part of an Integrated Taxation Processing (ITP) was developed.

Mr. Fogarty said it was customary in Revenue to design systems that didn't waste storage and could store more data than was needed for operational purposes. The systems would cease at six or seven o'clock in the evening, after which, nightly batch runs were done. Payments and returns for various taxes were put into the system and they would then be ready to use the next day.

In cross examination Mr. Fogarty said he had been responsible for the management and development of the VRT system since 2007 and had peripheral involvement prior to that. His involvement in VRT prior to 2007 would have been ad hoc and infrequent. He and his team made some amendments to the mainframe system and occasionally hired experts.

The function to amend statistical codes rested with the officers in Rosslare. The Revenue Inspector had no discretion to change the OMSP, the underlying statistical code or the values associated with that code. His understanding was that the VRO officer inputs the statistical code, the condition, mileage and extras. He referred to the public touch kiosks being available in three locations.

Mr. Fogarty could not definitively answer if CDs given to the trade containing the statistical codes were available prior to 1999. In his opinion it was time consuming to prepare the CDs.

A letter dated 17th May 2001, was sent by Revenue to CD-Rom subscribers, updating the January 2001 CD-ROM. It stated that the CD-ROMs containing the statistical codes could not be accessed.

His role as a manager was to oversee and he was not aware of any deliberate policy within the Revenue to suppress information from the public. However Revenue business managers would occasionally decide, for reasons of confidentiality, that certain information should not be made available to the public.

Dr. Murphy had stated accessing the Revenue mainframe was possible using a 'COBOL Programme'. Mr. Fogarty said, even at its simplest, the massive mainframe could not have been ported and made available on a PC with all of the system components it would need to allow it to interact. The amount of data held and stored by the mainframe was vast.

The Vehicle Technical System was introduced in 2004 and had the full history of amendments made to the codes since 2004. However the mainframe system was not capable of storing the full history of amendments made to OMSPs and depreciation codes. The maximum number it could store was three. Mr. Fogarty was not aware why the system was designed in that way. He said it was probably the case that details of three amendments was sufficient for Revenue's needs. In 2009 a Bull NovaScale system (Helios) was

introduced. Since November 2011 Revenue no longer use the mainframe system.

The system was designed to be able to store the Depreciation Group Code but it seemed to him, because of a programming error, that wasn't picked up when the programme was developed and it didn't go ahead. It was remedied by November / December 2011 but he could not say if it was fixed before then.

Counsel asked if it was appropriate in a system, which was controlling significant amounts of revenue for the State, for individuals to have to go and talk to others and ask for their recollection on a transaction. He said it was probably a rare enough occurrence because the vast majority of VRT cases are just registered normally. He did not perceive any operational difficulties for Revenue.

Mr. Fogarty maintained it was incorrect to suggest it would be a simple job to provide a working version of the Revenue system on a PC. Mainframes were not portable. The Bull NovaScale had taken 320 days to develop with the Revenue team of nine along with six external Bull experts over nine months.

26. Evidence of Declan Sherlock, Deputy Revenue Solicitor
Mr. Sherlock attended with Revenue Officials in the Central Vehicle Office in Rosslare on the 21st June, 2007, to allow the plaintiffs to inspect the operation of the mainframe VRT system.

He referred to a letter of the 27th March, 2007, from the Revenue Solicitor to the plaintiff indicating that "historical data in general is not stored on the system". The plaintiffs' solicitor, by letter of the 20th April, 2007, noted the letter of the 27th March.

The inspection with the plaintiffs experts took place over three hours and allowed those experts to take print outs. There were 38 queries which were responded to. Where it was not possible to answer these immediately, the Revenue Officials agreed to write to the plaintiffs' experts with their answers after the meeting. Had the plaintiffs experts required a further meeting it could have been arranged.

In relation to depreciation codes, Mr. Burns of the Revenue had answered Mr. Loftus's questions that the statistical codes and depreciation codes were not available on the mainframe.

Manual code records were refused as the request to the court via discovery had not been granted.

The PC was not part of the mainframe and the plaintiff was told that it would not be available for inspection. However, the information on the PC had already been furnished in Mr. Burns's affidavit of discovery of the 28th June, 2006.

Moreover, the computer disc was furnished to the plaintiff on the 27th July, 2006.

Mr. Sherlock said he was happy to stand over the version of events that occurred at the inspection. He declined the request for manual records because the plaintiff representatives were looking for market research and that order was refused by the court when applied for. When Mr. Loftus asked, he intervened and said it was outside the scope of the investigation in light of the High Court order which was not appealed. Mr. Loftus also referred to the PC and asked if he could see it and again he indicated this was outside the scope of the investigation.

A further offer was made to allow the plaintiffs to inspect the VRT mainframe and that was done in January 2012. There was no further correspondence from the plaintiffs following his letter of 14 February 2008 until 15 October 2010 stating they were intending to proceed with their claim.

In cross examination counsel referred Mr. Sherlock to the Revenue Customer Charter. Mr. Sherlock said it existed from 1998 but its ethos would have existed long before then within the Revenue. Counsel referred to the section marked "Information and Assistance" where it stated:-

> "you can expect to be given the necessary information and all reasonable assistance to enable you to clearly understand and meet your tax and custom obligations and to claim your entitlements and credits".

Reference was then made to a letter of 25 March 1994. Here the plaintiffs' solicitor asked Revenue to explain "what is the established normal values of similar vehicles sold in the State". No response was received by the plaintiffs.

Counsel asked how the lack of response to correspondence sent by the plaintiff's solicitor to the Revenue tied in with the aims of the Revenue Customer Charter. Mr. Sherlock said he would have expected that there would have been a response

Counsel then referred to the 1997 memorandum prepared by Revenue official John O'Leary. Suppressing information and masking statistical codes was hardly consistent with the ethos in the Revenue Charter. Mr. Sherlock said he had no particular comment to make but that he was not prepared to concede that point.

Counsel said Laffoy J. had made no order in respect of the scope of the inspection, saying it was the subject of discussions between the parties. Mr. Sherlock maintained that what the plaintiffs were seeking was outside the scope of the order.

27. Evidence of Mr. Paul Jacobs
Mr. Jacobs, partner at Grant Thornton, was asked by the defendants to review the report of Mr. O'Boyle, to test the assumptions he had adopted, to review the financial performance of the plaintiff and to review the economists' reports. He relied upon the financial statements for the plaintiff provided in discovery and reviewed them from September 1989 to 31 October 2008.

He was not provided with enough information to determine the calculation of projected gross margin per unit as estimated by DKM, nor did DKM provide a calculation in relation to costs. Mr. Jacobs did not feel Mr. O'Boyle had tested his theory adequately. He felt that he had undertaken a more rigorous exercise.

He was not provided with financial statements from 2009 and 2010.

The court notes that the 2009 financial statements consist of an abridged balance sheet only. There was no directors' report or any reference in the auditors report to litigation. Stock had been reduced to €23,793; net current assets reduced from €581,000 to €390,000 and there was an increase in creditors from €734,000 to €932,000. The auditors reported that the financial situation warranted a s. 40 statement.

Mr. Jacobs stated that Fintan Riordan incorporated Munster Car Importers Limited in 1995 and started trading in 2000. The accounts showed it had the same registered offices as the plaintiff. Mr. Riordan and his wife were also directors of Sluggera Cross Garage Limited which was struck off the register in 1995 for non-submission of annual returns.

Mr. O'Dowling's company, Sports Car Centre Limited was incorporated on the 14th June, 1995, and had abridged accounts from 1996 to 2010.

That company had gross profits of £394,600 and operating profits of £113,300 in 1997. In 1998 the gross profits were £884,000 while the operating profits were £453,000.

Mr. Jacobs did a detailed analysis of the trading profit and loss account of the plaintiff and calculated that the actual annual gross profit percentage had increased from 12% to 20% and back to 16% over the period 1990 to 1996.

The plaintiff had relied in directors loans of €612,000 in 208 and loans from connected companies of it being Munster Car Importers Limited of €535,000 in the same year.

In relation to the plaintiff he said that for the period ended 31st August 1990, the company achieved sales of IR£2.7 million and increased a further 6% by 31st October 1992. Mr. Jacobs went through the figures and said that by 1992 the company had net assets of £165,345.00. The amount of stock they had by 1993 suggested an almost doubling in the size of stock compared with the levels of sales. There was an increase of over 40% and yet sales remained static, only up by 10%.

In 1990 the plaintiff achieved a gross profit of £320,000, which was 12% of total sales. This increased to 12% and 17% but fell to 14.3% for year ended 1992. The plaintiff made 21% in the first period, 24% in the second and back to 21% which was good money but did not represent the scale of business contemplated by the multimillion euro claim. The auditors' reports were unqualified for these periods.

Turning to the period 1992 to 1996 Mr. Jacobs said that total sales fell by 24% down to £2.2 million but nearly offsetting that was a decrease in the purchase price of cars. The sales value went down but it cost less to buy the cars and so the gross margin was about the same. In relation to the direct cost of sales, this had reduced substantially from £187,000 to £138,000. When everything was taken into account there was an increase in the gross margin from 14.3% to 20.4%. The plaintiff made a loss in 1993 of £27,403. In that year there was a considerable increase in directors' remuneration and the cost of rent.

To the end of 1996, the two year figure in the accounts showed that the plaintiff achieved sales of £3.463 million, which is £1.7 million per year. If that were the case, that represented a 21% decrease from the 1993 position. The gross profit for the two years was £681,000 which represented 16.6% for the year 1996. This was a profit of £4,541.00. Directors' remuneration was down to £31,000 and rent changed from £128,000 to £64,000.

Mr. Jacobs said his analysis showed that the plaintiff recorded a decrease in sales of 24% from IR£2.9 million to £2.2 million year ended 31 October 1993. 1992 showed a decrease in profit compared with 1991 and 1993 showed an increase in percentage. That was the year VRT was introduced. For 1994 and 1995 he only had one set of accounts but for the two year period the gross profit percentage was less than 20%. 1996 showed a drop in gross profit percentage. Overall he found gross profit percentage increased in 1993 and that is not consistent with the allegations made by the plaintiff about the effect of the introduction of VRT.

The court said that there was the issue of the arbitrary increase of some 30% in 1994. Mr. Jacobs said that in relation to gross profit percentage there was no noticeable adverse impact in 1994 and 1995 which was evident from the financial statements of the plaintiff. One of the most striking things was that sales for 1997 and 1998 were high and then there was quite a substantial fall off in the years 1999 and 2000. Sales declined from 16.6% in 1996 to 6.6% in 1999. This period coincided with the establishment of Sports Car Imports Limited by Mr. O'Dowling.

Mr. Jacobs said shipping and stevedoring was £56,296 in 1997 with increases to £246,000 in 1998 and £188,000 in 1999. By year end 31 October 2001, sales had dropped 41% to £665,642. That marked the first time the plaintiff became loss making. Directors' remuneration was £50,000 in 2001, up from £33,000 in 2000. Sales increased in 2005, up 21% on the previous year. This fell dramatically in subsequent years and by 2007 it was down to £335,000. There was a gross profit margin of 30% in 2005 but this was contributed to the down sizing of the business which meant the sales base was lower.

In relation to overheads, in 1990 the figure was 8.5% of sales. This increased to 22% in 1999. 1993 was a significant year with regards to directors' remuneration, rent and rates. Mr. Jacob's believed those payments caused the plaintiff to make a loss that year. The cost of interest was significant. In 1990 it was £34,428. This increased to £58,000 in 1991, £36,000 in 1992, £39,000 in 1993 and £52,000 in 1994 and 1995. In his opinion there was an inconsistency between the evidence of Mr. Murakami and Mr. O'Boyle in relation to interest. Mr. Murakami's evidence was that 120 days credit was given from the date of the letter of credit issued in Japan whereas Mr. O'Boyle was of the impression that the plaintiff received 45 to 100 days credit from the date the cars landed in Ireland. He said the O'Boyle report purported to say that there was no interest cost at all involved in the importation of used cars into Ireland. He did not think that was an accurate assessment of the position.

The financial statements were qualified in 1993 and, after a change in auditors, from 1995 to 1998.

He said the qualification from the auditor was suggestive that the auditor had a difficulty in relation to the control systems which were in place within the plaintiff company. In his experience the qualification would not have been widespread. He was surprised that the qualification related to the plaintiff's cash sales.

The reasonableness check by Mr. O'Boyle was referable to Johnson and Perrott Limited accounts for 2004 which Mr. O'Boyle said were comparable. Johnson and Perrott was the only company reviewed as part of what Mr. O'Boyle referred to as the sample. Mr. Jacobs questioned the validity of that being a reasonable comparator given that its turnover in 1993 was £27 million (£2.2 million for the plaintiff) while net assets were £5.6 million as compared to £0.1 million for the plaintiff.

Moreover, Johnson and Perrott had a rental car subsidiary and was an agent for Volvo and Opel while the plaintiff only dealt with used cars.

The claim for lost incremental margin in 1993 was not consistent under any assessment with the actual gross profits received by the plaintiff in the preceding years. Mr. O'Boyle had asserted that, had there been no change to the tax system, the plaintiff would have achieved incremental gross profit in 1993 amounting to €5.7 million in addition to those actually achieved. This would have

represented ten times the gross profit actually achieved in the previous year (1992) which would have been highly unlikely. No explanation was given by Mr. O'Boyle to substantiate such an increase. Figure 4.1 in the Grant Thornton Report provided a comparison of claimed loss incremental margin as compared to the actual gross margin achieved (1993-2008) which showed graphically the scale of the lost incremental profit margin claimed from 1993 to 2008 compared to the actual gross margin from 1990 to 2008.

He said it was a relevant consideration that:

1. Other companies associated with the directors were competitors and may have had an adverse effect on the plaintiff profits;

2. Mr. O'Dowling's departure in 1995 may have had an adverse affect on the plaintiffs profits;

3. Mr. O'Riordan became a shareholder in Munster Car Importers Limited in 1995, even though it did not trade until 2000.

The assumptions of the saved overheads of 19% of incremental margin was too simplistic to apply over the period.

Mr. Jacobs concluded that in addition to the errors identified in the Bacon report, he identified a number of important factors which from his point of view showed that the assessment of the claim had not adequately taken into account a number of important considerations including, but not limited to:

(a) The inconsistency of the claim for incremental gross profits when compared with historic profits and cash flows. The O'Boyle report did not explain why the plaintiff would have achieved such a significant increase in its business volumes and gross profits in 1993 compared with earlier years. Given his experience it would have been particularly challenging, if not highly unlikely, for a company such as the plaintiff to increase its gross profits by such a magnitude within one year as contemplated by the claim. Moreover, the challenge/ability of a company to increase its gross margin by in excess of ten times its previous years gross margin in one year (ie. from the actual 1992 gross margin to estimated incremental gross margin in 1993), noting that this could have a cumulative effect on latter years.

(b) The lack of a track record of the plaintiff in generating the levels of profits and cash flows which are contemplated by the claim;

(c) The fact that gross profit margin actually increased in 1993 to 1996, compared with 1990 to 1992 – the relevance of 1993 being the year in which the VRT regime was introduced. That issue was not addressed in the O'Boyle Report.

(d) The qualification to the audit report from year ending the 31st October, 1993, to 31st October, 1996 in relation to a lack of adequate system of control governing car sales;

(e) The impact of the loss of one of the company's shareholders/directors (a potential loss of management to the plaintiff) and the establishment by him of another company which appears to have operated with a similar business to the plaintiff and a concern that the expert analysis submitted on behalf of the plaintiff did not make reference to Munster Car Importers Limited.

Based on his review of the information provided to him, taking all of the evidence together, in Mr. Jacobs' opinion the claim for lost earnings of €128.4 million is unsubstantiated.

28. Evidence of Prof. Frank Bannister
Frank Bannister, Chartered Engineer, is the Associate Professor at Information Systems in the School of Computer Science and Statistics in Trinity College, Dublin since September 1994, having been previously employed by PwC as an information technology management consultant for sixteen years.

He has had a number of engagements with the Revenues' Information Communications Technology and Logistics Division and has undertaken extensive study in Consumer Trust in Service Quality in the Revenue Online Services (ROS) with other colleagues.

In his opinion the ICT and L. Division in Revenue is highly competent and operating to professional standards. It was the first organisation in the Central Public Service to invest in computer technology.

He referred to the witness statements of Mr. Sean O'Callaghan, Ms. Ciara Quinlan and Dr. Tony Murphy. Both Mr. O'Callaghan's and Dr. Murphy's statements contained a number of misunderstandings and ambiguities, which in the case of the former, had no relevance to the question of the data available to the plaintiffs. He referred to Mr. O'Callaghan references to OMSP and depreciation rates but did not include other factors such a mileage and condition. It was not clear whether Mr. O'Callaghan's reference to data being removed from the system on a yearly basis was dated from five years earlier or the date of proceeding. Backups were not made on a monthly basis but on a daily basis. Mr. O'Callaghan says that "Revenue were unable to supply all the data relating to this case", his understanding was that most of the data was available and, where it was not possible to provide the data on the spot, all of the relevant and available data could either be provided or regenerated, although this would take time and require manual intervention. He referred to the daily backups and storing of data off site.

Revenue faced a particular constraint with the size of disc storage packs on the Bull framework which would fill up and would prevent further data being written to them. This data was and is available for retrieval but can no longer be updated.

Mr. O'Callaghan stated that not keeping full historical records and transactions recorded would seem to be serious flaw in the archive of the RCHI VIL and backup policy of such a national important collection system. This was not necessarily a serious flaw in systems designed which was to register vehicles and collect VRT. The person paying VRT had 30 days (not 21 days, as stated by Mr. Fogarty) to appeal the VRT assessment, following which there was no subsequent right of appeal. From the view point of the Revenue Operations, therefore the depreciation rate information used to compute this value is no longer of importance.

Dr. Murphy was of the view that depreciation rates were not saved to, save in the cost of storage. His enquiries were that nobody was aware of that being said and that historic codes were not of operational relevance after the 30 day appeal period expired.

Dr. Murphy had stated that "on information in relation to how OMSP and depreciation data is determined was consistently withheld by Revenue. This information was easily available and could have been supplied by the Revenue". Professor Bannister said that the second of those statements was not valid as the relevant data was not always available. The depreciation code, hence the OMSP, of

a particular model of vehicle could change a number of times during the models life time.

Professor Bannister agreed that storage of financial transactions for six years was normal. However, the process referred to was not a financial transaction but a price computation.

It is only when the VRT charge is paid that a financial transaction occurs. Based on discussion with Revenue officials it was his understanding that such transaction records are, and always have been, kept on line by the Revenue for five years and then archived.

He agreed with the evidence of Mr. Fogarty as to the difficulties in making a version of the main frame system available to him on a PC that the plaintiffs could use for their own analysis.

The court accepts the evidence of Prof. Bannister as to the purpose for which the computer records existed: to collect VRT and to register vehicles. The calculation of OMSP was not the financial transaction. That came with the payment of VRT by the person registering the vehicle.

While there are differences of opinion as to the 2007 meeting in Rosslare, the court accepts the evidence of Mr. Sherlock that the Revenue officials would deal with many of the 38 questions that had been put and sent those in writing to the plaintiffs experts. There is, however, no evidence as to whether this was done or not.

The court also notes that Mr. Sherlock had told the plaintiff's solicitor that depreciation tables were not available and no issue was taken in the plaintiff's solicitors reply.

Professor Bannister has dealt with this from a technical point of view in relation to the purpose of depreciation and the changes in the depreciation schedule which render them not necessary to be kept on the main frame.

While there had been reluctance by the Revenue to give the plaintiff the data requested, the court is satisfied that the process undertaken by the Revenue officials did consider the factors such as mileage and condition in addition to depreciation.

The court is of the view that the straight line depreciation commented on by Mr. Yarrow did not accord with international market data which shows the high depreciation in earlier years of most models. However the statutory definition of new cars which extends to cars of up to three months sold and with mileage of 3,000 km is a plausible explanation of cars being held in bond and not taxed until they are older.

However there was no evidence one way or the other in this regard.

29. Evaluation of Directors' Evidence
The court considers that the evidence of both directors, but in particular that of Mr. O'Dowling, form the evidential basis for the expert reports. All the instructions M. O'Dowling gave to the experts related to direct imports of used cars from Japan.

Mr. Riordan referred to 44 cars imported from Northern Ireland but these imports were not the subject of analysis by DKM. Mr. Boyle's instructions were to apply the same excess VRT rates to them as applied to Japanese imports.

The court is aware of the limited time Mr. O'Dowling was with the plaintiff from the time of the introduction of VRT on the 1st January, 1993 to his departure in September 1995, less than three years later. This was, he said, as a result of his dissatisfaction with the way VRT operated. When pressed, he said that that was the only reason for the break up between himself and Mr. Riordan. Both agreed that the parting was amicable. Both developed their own independent businesses of importing cars and, as appears clear, even from the incomplete records of the plaintiff, they imported less Japanese cars than before and much less than the overall increase in the importation of used Japanese cars into the Irish market. There was no convincing evidence why the plaintiffs' competitors, under the same VRT system, increased their imports during that period.

Mr. O'Dowling had said that he was not satisfied with the extent of discovery. While the Revenue did show a reluctance in complying with information regarding tables of depreciation, it is acknowledged that some progress was eventually made by providing more information to the public. Moreover, the complaint in relation to discovery was a matter for interlocutory applications which, as is clear from the decision of Laffoy J. on the 1st March, 2006, was somewhat dilatory. It appears that from that time it was Sports Car Sales Limited rather than the plaintiff who sought information.

The plaintiff had a copy of Niall Butler's report of the 28th August, 1992, which outlined the steps taken by the Revenue in ascertaining the OMSP. The statement therein that "it is impossible to emulate the complex and inconsistent system of second hand car valuation operated by the motor trade" and that "the proposed system does however, go a long way to producing realistic market values which may not exactly mirror prices offered by individual traders" explained the position of the Revenue. The motor trade itself accepts that the main criteria for the price paid for a car is that of supply and demand. The system obviously cannot cater for this but it can establish a reasonable OMSP for a vehicle using criteria that are acceptable, consistent and fair.

The evidence was that Mr. Colm O'Herlihy, who had been a Principal Officer with the excise division of the Revenue and a person experienced with MVED, was an expert in the area whose expertise was relied on by the plaintiff. It is unclear when Mr. O'Herlihy ceased to act for the plaintiff. A letter from Mr. O'Herlihy to the Revenue dated the 5th October, 1992, on behalf of the plaintiff and another trader asked the Revenue to monitor non registration, but did not complain of VRT.

Mr. O'Dowling repeated under cross examination that the plaintiff was practicing blindly under the VRT system which was "constantly changing", that estimates were "continually changing on a month by month basis" and that there was "continuous interference when VRT was introduced". Referring to the scrappage scheme, he said the reduction of the rate of tax and an increase in the open market selling price "led to higher payments of VRT" and that the "tax was continually on an upward trend" which "turned out as a simple liability".

While the court might expect some element of exaggeration in relation to the evidence, there is no evidence to prove the allegations made. There was no claim that when Mr. O'Herlihy was acting for the plaintiff, that the plaintiff was "purchasing blind". As a matter of fact, the tax was not "continually" on an upward trend. More importantly those complaints related to the rate of tax and not the determination of OMSP.

In relation to the appeal process, Mr. O'Dowling said that the plaintiff never got a favourable answer, its invoices were never

accepted and that the Revenue was judge, jury and executioner. The plaintiff did not agree with the appeal process on the basis it was too long and time consuming. No evidence was given of the time taken. The first appeal took one, not three, months. No evidence was given as to the number of appeals, the success rate or the length of time taken. His own evidence was indeed, that appeals were successful but that OMSP's were still too high.

Mr. O'Dowling said that new car dealers never appealed because the new cars were valued by them and that "perhaps somewhere in the region of 75% may have been overvalued". The court assumes that he was referring to the recommended retail price. In any even, no evidence was given as to the 75%. His assertion was unsubstantiated.

Moreover, while there was an assertion Mr. O'Dowling had negotiated a contract with the Japanese Nazak shipping line, with a carrying capacity of 5,000 to 8,000 cars, there was no evidence for an expectation that the plaintiff would ever reach that capacity, given that the figures of cars imported by the plaintiff had decreased from a high of 850 in 1990 under MVED to 600 in 1993 and 1994 and further, gradually declined from September 1995, when Mr. O'Dowling left the plaintiff.

Mr. Murakami's evidence was that he thought he had shipped new and used cars. He shipped cars to many dealers in Ireland up to 2008, but could not remember when he had stopped shipping to the plaintiff. He did not remember shipping cars to Munster Car Imports Limited (Mr. Riordan's company). He did ship to Sports Cars Centre Limited (Mr. O'Dowling's company after September 1995). The court accepts the evidence in this regard.

Mr. Riordan's evidence was that the plaintiff had been given a loan in 2010 – 2011 by Sports Car Centre Limited. No accounts were in evidence for those years.

Mr. Murakami said that he was shipping 150 to 300 cars to Ireland in the early 1990s and the potential demand for used cars in Ireland was 6000 to 8000 used cars per month (equating to 7,200 to 9,600). This does not accord with the capacity of the market, given that the total number of new registrations was between 90,000 to 98,000 for 1991 – 1993. He agreed that that could have been a miscalculation, but was based on the New Zealand experience, where he was shipping 8,900 used cars per month in the mid 1990s. Later he referred to such exports to New Zealand in the period 1987 – 1988, but could not be sure of the statistics. No comparison was given between the two markets.

The court is of the view that there is no basis for such projection as there is no evidence of what proportion of potential imports would have been taken up by the plaintiff.

It is unclear what was the cause and effect of the declining proportion of the plaintiff imports.

Mr. O'Dowling referred to "an increase of upwards of 23% on their best selling models" in January 1993, notwithstanding the notified increase in Japanese OMSPs.

Mr. Niall Butler's evidence was that in 1993, some 35,000 used cars were imported from the UK privately and were not picked up by the Car Sales Guide. No evidence was given in relation to the degree to which this affected the overall price of used cars in Ireland in that year. It is clear that an increase in supply of that magnitude must have depressed prices of used cars significantly given that a total of used vehicles, as calculated in the Bacon report, for 1996 – 1998 was on average 46,000 (of which, on average 17,000 were from Japan).

Mr. O'Dowling's evidence was that he noticed in January 1994, that the estimates had increased in amount while, at the same time, VRT had dropped from 25.7% to 23.2%.

The court has noted his evidence that the cost and transport of the Japanese imports were less than 25% of the retail price when sold in Ireland. His evidence was that on the retail price of £4,500 the gross margin was £3,000 before VAT and VRT. It was uncertain whether this was for 1993/1994 or for the total period. It is also clear that any increase in VRT or on the underlying OMSP could, on his evidence, amount to any more than the 23% of the VRT tax rate of 23.2% which was 5.29% of the OMSP.

Given the margins indicated this does not explain the downward trend in imports.

It seems to the court that an important intervening variable was the resignation or retirement of Mr. O'Dowling from the plaintiff. It was he who had the presence and contacts in Japan. It is somewhat inconsistent to then say that he had everything in place from finance, shipping, dealers and product and to say that it was the new regime of VRT that caused him to abandon the plaintiff. Mr. Murakami's evidence was that he did not know Mr. O'Dowling had ceased to be a director and shareholder. He did not have any dealings with Mr. Riordan after 1995. He continued to ship to Sports Car Centre Limited, Mr. O'Dowling's company. The court concludes that it is likely that that company director benefited from the decline of the plaintiff. It follows that this factor, rather than the incidence of VRT together with the fall of market prices of used cars generally due to increased competition, was decisive.

It is even more extraordinary to claim that the plaintiff was a small player as a result of the introduction of VRT. The reference to the scrappage scheme is an example of "continuous interference when VRT was introduced" applied, of course, to other dealers of Japanese cars.

The court notes the complaints made to the European Commission in 1993 stating that "we are now facing a disastrous situation if our Government are to proceed with their new legislation to increase VRT".

It would appear to be a misstatement that the plaintiff was importing 600 cars per half year when they had imported only 608 cars in 1993 and 613 in 1994. It was not an answer to say that the plaintiff was carrying stock from the old MVED system. Indeed the complaint was made that it was this old stock that caused the plaintiff to do badly compared with its competitors. No complaint is made in these proceedings of MVED.

The court notes that VRT was paid on registration in the name of a buyer and not on stock held by the plaintiff.

Indeed, it was agreed by Mr. O'Dowling that there was no complaint of secrecy and that the complaint was about the increases in VRT in February 1994.

The letter from the European Union of the 6th December, 1993 is critical. There was no discrimination against products of other Member States. This was followed by an equally clear letter from Dr. Lennox of the 14th December, 1993.

The reference by Mr. O'Dowling to an official in the Commission saying that "the way the Irish are calculating tax is illegal" is, of course, hearsay. That official did not give evidence, nor did Mr. O'Dowling have any contemporaneous note to that effect despite saying that he had a copy of a telephone conversation with him.

The decision of the 11th November, 1994 by Mr. Scriviner in the official journal is also critical. That decision stated that the imposition of VRT on new vehicles could not be deemed to infringe Article 95 of the E.C. Treaty. Community law did not require Member States to apply the real value of the vehicle as the taxable amount for this type of tax is not harmonised at European level. The scale will always be somewhat arbitrary.

The court was concerned that Mr. O'Dowling did not have the file on complaints to the European Union with him and could not tell the court what documents were sent to the Commission by the plaintiff.

There was no evidence that the plaintiff could have been as "big as any distributor of imported cars in Ireland or as big as all of them of put together", which the court notes was an exaggeration and out of touch with the reality of the plaintiffs position.

Moreover, the assertion that the plaintiff "could not put stock into auction as they would lose too much money" was not substantiated.

In relation to imports from the Member States, reference was made to 44 cars imported from Northern Ireland between 1993 and 1994.

The example given by Mr. O'Dowling of a BMW 318i with an administrative value (OMSP) of £4,287 and an actual sales price of £3,320 does not appear to be on the list of car imports from Northern Ireland.

His evidence was unclear as to whether this was the car imported by the plaintiff or by Sports Car Centre Limited.

Indeed, the correspondence with the Commission in the late 1990s, when Mr. O'Dowling was no longer a director, shareholder or, it appears, involved in the plaintiff, would appear to refer to Sports Car Centre Limited.

The court is of the view that this was not reported by the plaintiff.

The complaints, indeed, are similar in that he still could not determine the OMSP in 2004, which would appear to be in relation to Sports Car Centre Limited. He acknowledged that the Revenue had distributed the depreciation tables at that stage.

His complaint that the Revenue was "judge, jury and executioner" in relation to the OMSP was mentioned in that context. The court was aware of the provisions of the section which deal with the Revenues role in calculating the OMSP, subject to appeal.

His claim that the plaintiff could have a bigger mix of used vehicles, including such vehicles from Member States if VRT had been more fairly charged on imports from Northern Ireland, was not substantiated either by examples or by analysis. Indeed his evidence was that the cost of three to five year old Japanese imports was cheaper when shipping and taxes were added than imports from the United Kingdom, which made them more profitable.

It is unclear what the terms of Mr. O'Dowling's departure from the plaintiff were. Mr. Riordan's evidence was that it was an amicable parting but does not add much more.

What is clear is that, in anticipation of the introduction of VRT on the 1st January 1993, the plaintiff had high expectations of a growth in the importation of used cars from Japan. What is surprising, however, is that there were no written contemporaneous plans or forecast. Indeed there appears to be some difficulty in reconciling the trends in the sales chart which appears to have been calculated by office staff in respect of sales from 1990 to 1994. The 1989/1990 figures are combines sales over a fourteen month period in respect of the sales of 871 vehicles (745 on an annualised basis) to 751 and 755 in 1991/1992 under the MVED system of duty, to 572 in 1993 and 515 in 1994. The sales chart indicate that there was a drop in sales from 1992 to 1994 of some 24% or 183 units and that sales had further dropped by nearly 32% in 1993/1994 over the 1992 figures.

Mr. O'Dowling attributes that fall to the introduction of the new system and, in particular to the increases in 1994 in the rate of VRT. It is, however, clear that in his complaints to the European Commission he did not ascribe that decline to secrecy or lack of transparency at that time.

The court is satisfied that the plaintiff relied on Colm O'Herlihy, a former excise inspector with the Revenue, who had been employed as consultant to the plaintiff and who, in Mr. O'Dowling's evidence was conversant with the system.

Mr. O'Dowling, in his evidence in chief, had referred to cars sold to the trade for £6,000 where VRT was based on an open market selling price of £8,000. There was no evidence, however, to back this assertion.

The court is of the view that the complaint, with regard to the changes and estimates for similar cars between the 31st January 1994 and the 22nd February 1994, was explained by the change in VRT rates, which had been notified and that this was not, accordingly, an arbitrary increase. No complaint was made in the pleadings or in the evidence of the rates of VRT.

There is some confusion in relation to the evidence of an increase in 23% in 1993 and a further increase of 20% in 1994. There was no evidence to back up this assertion.

The court is not satisfied that the plaintiff was "purchasing blind" or that the estimates could not be relied upon.

The perceived threat of an audit was explained by Dr. Lennox in his evidence and does not appear to be a threat as alleged.

There was no evidence that appeals were unworkable. The evidence was that many of the appeals made by the plaintiff were, indeed, held in their favour. It was agreed that officials contacted dealers when there was an appeal. The court is satisfied that the determination of the open market selling price by the Revenue, under the provisions of s. 133(3) of the Finance Act 1992, required the establishment of a database such that the opinion of the Commissioners, as to the price which might reasonably be expected to be fetched on a first arms length sale in the open market in the State by retail, could be ascertained.

The court finds that there was no evidence that the Revenue were "judge, jury and executioner" in relation to appeals and/or

estimates or that the plaintiff was "working blind", that "goalposts were moving all the time" or that the plaintiff was "operating on shifting sands". As in many aspects of the evidence given by Mr. O'Dowling, these remarks appeared to be unsubstantiated exaggerations without any evidential basis. For example is difficult to understand from the financial data how "assets were turned into liabilities".

The court is not satisfied that the reason why Mr. O'Dowling ceased to be a director was because of the introduction of a totally discriminatory VRT and for no other reason.

The court finds that the basis of calculation of 10 extra units per month by each of the 82 dealers seemed to have been an arbitrary projection in establishing a basis for 9,600 extra vehicles being sold per year. Given that the highest annual figure for sales pre 1993 was 745 vehicles, or a little over 10 vehicles per year per dealer, on the assumption that there were 82 dealers in 1990, this projection is speculative with no basis in reality. In any event even if these 10 extra units were over a longer period – though the evidence does not seem to so suggest – there is no objective basis for such projection. No evidence was given by any of the dealers as to what the market would bear. The calculations with regard to price elasticity of demand given in the expert evidence was not referred to.

The evidence in chief of Mr. O'Dowling referred to the increase of the bonded yard from 1 acre with a capacity of 300 cars to that of 7 acres until 2002, seven years after the resignation of Mr. O'Dowling.

The court is not satisfied that the evidence of Mr. Dowling, the plaintiffs' main witness, had established a basis for the DKM analysis or Mr. O'Boyle's calculations of €2.125 million excess VRT paid to the Revenue.

The court has some concern with regard to the extent of importation of used cars from member states of the European Union. Mr. O'Dowlings's evidence was that between 1993 and 1994 there were "about 40 such cars imported" but he also referred to 30 to 40 units. Mr. O'Boyle dealt with a list of 44 vehicles imported by the plaintiff from Northern Ireland which shows dates of registration from the 23rd September 1993, to the 7th February 1996. The bulk, 39 of the 44, were imported between 1993 and 1994.

Mr. O'Dowling agreed that all instructions given to experts and all material before the court in the case concerned direct imports from Japan to Ireland. The projected losses related to imports from Japan to Ireland.

The court is satisfied from the evidence in cross examination as to average purchase price and landed costs in Ireland, that there was a substantial profit achieved on the average sale price, even allowing for VRT. Moreover, it is clear from the evidence that the most popular five year old cars, such as the Nisan Micra, were in greater demand. Mr. O'Dowling agreed that he could calculate VRT on such models but complained that in attempting to move to newer and more expensive models, he was not in a position to calculate the VRT. His complaint appeared to be that there was discrimination, or more discrimination, in the latter category. His evidence was that he could not calculate VRT on those cars. This would appear to be somewhat of a generalisation given that he had the facility for getting an estimate and, of course, for appealing.

He was asked why nobody sued the Revenue and he replied that nobody would be willing to take on a 20 year commitment to do so. The court is not satisfied that the delays in the prosecution of the claim were the fault of the Revenue. The pleadings indicate that notice of Intention to Proceed was served on three occasions from October 1999 to October 2010. The court had regard to the statement of Mr. Kieran Coyle with regard to the increase in imports generally from 1993 to 2000 which ranged from 34,000 to 48,000 per annum from 1993 to 1996, with a reduction in 2000, along with Dr. Bacon's analysis of Japanese imports, from 23% of total imports in 1996 to over 50% in 1998 and 1999.

Given that background, the court has difficulty in understanding the evidence of Mr. O'Dowling that the plaintiffs' performance had suffered because of the VRT system. There would appear to have been other variables that account for the difference of performance of the plaintiff compared to competitors.

Moreover, there was no evidence or suggested basis for the assertion that increases were so severe that growth was stunted.

There was no satisfactory evidence from the accounts of the plaintiff that there was stock which "took years to sell". No analysis of the age of stock was presented to the court. Moreover, it is common case that VRT was not due until the cars were sold. No evidence was given as to whether the plaintiff, the dealer or the purchaser registered the car when sold.

It was put to Mr. O'Dowling that the plaintiff had an opportunity to continue in the market. He replied that this would have required financing. This, indeed, may have been the problem for the plaintiff when Mr. O'Dowling left as director and shareholder in September 1996, less than three years after the introduction of VRT.

The court notes the plaintiffs' role in the institution of infringement proceedings by the European Union under Article 226, relating to the VRT system and to the correspondence in 1993. Mr. O'Dowling agreed that there was no complaint of secrecy or lack of transparency in 1993. He said that the "real system as far as he was concerned kicked in after the increases in February 1994" which appears to suggest that, contrary to the pleadings that the introduction of VRT on the 1st January 1993 had caused the difficulties complained of, that it was the later increases in the rate that was of concern.

The court has considered the Commission letter of the 6th December 1993 to the plaintiffs solicitors that there was no harmonisation of law regarding car tax and that there was no discrimination against the products of other Member States. This was followed by the memo from Dr. Lennox of the 14th December 1993, one week later. The court accepts that this position of the Commission is a critical notification to the plaintiff some fifteen months before proceedings issued.

Mr. O'Dowling, notwithstanding his reference to the increases in February 1994, said that there was total chaos when the system of VRT was introduced. There was no reference to the advices or dealings with Mr. Colm O'Herlihy. The court has no doubt that there were teething problems. However, estimates were given and an appeals procedure was in place.

Nr. Niall Butler's report of 28th August, 1992, (see p. 72 above) had referred to the impossibility of emulating the complex ad inconsistent system of second hand car valuations operated by the motor trade. Mr. Butler was of the view that the Revenue system went a long way to producing realistic market values, even if they did not exactly mirror prices offered in the trade.

29. Decision of the Court

29.1 Scope of Claim:

The pleadings in the case before the court and the evidence of the plaintiff directors are extensive and embrace both EU and Irish law in seeking historic losses and loss of opportunity. The claim involves a wide range of grounds alleging breaches by the Revenue of rights, not only of the plaintiff, but of the public.

The Supreme Court in James *Kennedy v. DPP* [2012] I.E.S.C. 34 at p. 19, Clarke J. held for the majority as follows:-

> "In addition it is in my view, important to keep clear that the distinction between different rights asserted as being applicable in this case and also to keep clear the implications and consequences which arise from possible breaches of, on the one hand, the Constitution and, on the other hand, rights guaranteed under the European Convention on Human Rights ("ECHR"). I also include, therefore, some observation and the relevance of those distinctions to this case.
>
> Those distinctions are of particular importance when a challenge is brought on a wide range of grounds invoking different rights or different aspects of rights derived from the Constitution and the ECHR. I do not think it would be unfair to characterise the challenge initiated on behalf of the applicant/appellant ("Mr. Kennedy") as involving something of a scattergun approach. While it is, of course, the right of any litigant to place before the Court argument based on any proposition where the raising of the issue concerned does not amount to an abuse of process, it nonetheless remains the case that a court, when faced with a scattergun approach, has to exercise significant care in identifying with some precision the issues that fall for determination and the precise rights invoked which are relevant to each specific issue."

In *Madigan v. Attorney General* [1986] I.L.R.M. 136 at 159, O'Higgins C.J. stated:-

> ". . . counsel for the defendants have submitted that the plaintiffs in these actions should not be permitted to advance arguments based on assumptions or hypotheses outside the facts and circumstances of the two actions before the court. They submitted that it was in accordance with the facts approved by the court in *Cahill v. Sutton* [1980] I.R. 269. The learned trial judge in his judgment accepted this submission.
>
> In the view of the court he was correct in so doing. Accordingly, this Court will only consider such submissions of unconstitutionality made on behalf of the plaintiffs as are relevant to the circumstances of one or other of the plaintiffs before the court."

The same observations were made in relation to *Norris v. Attorney General* [1984] 1 I.R. 36.

> In *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 Hardiman J. held:-
>
> "The *jus tertii* rule is a very necessary regulation of locus standi - standing to sue. It prevents the proliferation of litigation and the expense and uncertainty it causes by requiring that each litigant must show that on the facts of his situation he is personally affected by the law he challenges. It prevents necessary and important laws from being struck down on a purely hypothetical supposition which may never arise in real life and avoids the tax payer having to fund the holding of pointless moots. Once a declaration of inconsistency or invalidity is made, however, its effect appears to me to be, necessarily, universal."

The plaintiff claims breach of community and domestic law in relation to the import market generally as well as to the plaintiff and to Sports Car Centre Limited (2000, 3266P) where similar proceedings issued on the 14th March, 2000.

The court is satisfied that the plaintiff is confined to arguments based upon circumstances that affect it directly. Arguments on a *jus tertii* cannot be made. The plaintiffs claim is based on importing cars from Japan.

Mr. O'Dowling's visit to Japan in August 1989 was prompted on the availability of good quality right hand drive cars, obtainable for a good price.

In cross examination he said that the plaintiff had been to auctions in the United Kingdom, but "there were very few vehicles available and VAT was charged again on importation into Ireland".

It was put to Mr. O'Dowling that the business of the plaintiff was to import cars purchased directly from Japan and that was the basis of his complaint. Mr. O'Dowling replied: "My complaint is the overall system and that even applies to Irish citizens who want to purchase cars in Member States and bring them in, so on that basis I am complaining, not only for myself, Sports Cars Centre, UCII, but I am also complaining on behalf of the citizens of Ireland".

Only matters that are directly relevant to the plaintiff's circumstances can be litigated in these proceedings. To argue that the plaintiffs' growth was adversely affected by the uncertainty of and inability to ascertain the amount of VRT requires more than an assertion that there were overall systematic overcharges.

There is no evidence from the plaintiff directors that when Colm O'Herlihy was acting for the plaintiff any complaint was made of uncertainty or of an inability to ascertain the VRT due. Subsequently, when the plaintiffs' volume of sales increased, it had records itself for assessing the OMSP and the tax and for appealing if dissatisfied. It was common case that, as the Revenue developed the database, more information was provided to the public by way of estimates, calculators and CD ROMs.

The pleadings, the evidence of the plaintiffs' directors and the plaintiffs' experts related largely to discrimination under EU law. While the claim as pleaded also refers to Constitutional rights and breach of principles of Irish law, the quantification of loss is based on discrimination under EU law.

Domestic taxes are not regulated by the Communities. *Fazenda Publica v. Nunes* (C-345/93) at p. 3 of 6 at para. 11 states:-

> "There is at present no rule of Community law which prevents Member States from introducing a general system of internal taxes charged in accordance with objective criteria on a particular category of goods, such as the category concerned here.
>
> However, in applying Article 95, and in particular when comparing the taxes applicable to imported second hand cars with those applicable to second hand cars purchased at home, which are similar or competing products, it is necessary to have regard, as the Court held in (*inter alia*) case C-47/88 *Commission v Denmark* ([1990] . . . not only to the rate of direct or indirect internal taxation on domestic or imported products but also to the basis of assessment and the detailed rules for

levying the tax."

It is common case and, indeed, is so recognised by *Fazenda Publica v. Nunes*, that all taxes are capable of interfering with competition. It is accepted that the plaintiffs' case is not a claim for uncompetitive practices.

Kawala v. Gmina Miasta Jaworzna case C-134/07 was a reference from Poland where the referring court asked whether the first paragraph of Article 90 EC should be interpreted as precluding the imposition of the charge in question, which is levied, in practice, on the first registration of the second hand motor vehicle imported from another Member State, and not on the purchase of a second hand vehicle in Poland insofar as the latter vehicle is already registered there.

Paragraph 22 of the order is as follows:-

> "22. Given that, on the one hand, the Polish Government considers that the requirement to obtain a registration certificate for a second-hand motor vehicle imported from another Member State does not come within the scope of Article 90 EC, but within that of Articles 28 EC and 30 EC, as a measure having equivalent effect to a quantitative restriction on imports and exports which is nevertheless necessary, proportionate and justified on grounds of public policy and, on the other hand, the referring court raises the possibility that the charge in question falls within the scope of Articles 23 EC and 25 EC, that is, the prohibition on customs duties and charges having equivalent effect, it is necessary to determine, first, under which provision of the EC Treaty the charge in question should be assessed.
>
> 23. It is settled case-law that the scope of Article 28 EC does not extend to barriers to trade covered by other specific provisions and that barriers of a fiscal nature or having an effect equivalent to customs duties, which are covered by Articles 23 EC, 25 EC and 90 EC, do not fall within the prohibition laid down in Article 28 EC. Furthermore, as regards the respective scopes of application of Articles 25 EC and 90 EC, it is settled case-law that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, with the result that, under the system established by the Treaty, the same charge cannot belong to both categories at the same time (see, inter alia, Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, paragraphs 32 and 33 and case-law cited)."

Indeed, this Court notes that a decision is by way of an order rather than a judgment as it was satisfied that the answer to the question could be clearly deducted from existing case law.

The court continued at para. 25 to say that a charge such as that in issue in the main proceedings was not levied on an amount of the crossing of the border of the member state which had imposed it.

It is clear from the information provided both by the referring court and by the Polish government that the charge in question was levied on second hand motor vehicles only for the first registration in Poland, with the exception of vehicles, which, for whatever reason, were not intended to be registered. In addition, according to the information provided by the Polish government, the charge could also affect the first registration of certain limited categories of vehicles already in Poland but which have not yet been registered there. The court concluded:-

> "26. Therefore, to the extent that a charge on the first registration of motor vehicles, such as the charge in question, is clearly fiscal in nature and is levied not on account of the crossing of the border of the Member State which imposed it, but upon the first registration of a motor vehicle on the territory of that Member State, it must be held that it comes within a general system of internal dues on goods and therefore falls to be assessed in the light of Article 90 EC."

The compatibility of a tax such as Vehicle Registration Tax with EC law is a matter for Article 110 of the Treaty.

Article 110 states:-

> "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

This provision applies to imports from Member States. It does not apply to direct imports from Japan into the Community.

Tivoli v. Wurzburg C-20/67 ((1968) ECR 199) confirms this in dealing with the policy of the EEC in relation to imports from third countries and the inapplicability of Article 95 (now Article 110) of the EC Treaty.

The Court of Justice stated:-

> "It appears from the file that the main action concerns the importation of cereals from a third country. Since the provisions of Article 95 of the Treaty establishing the European Economic Community relate only to products originating in member states, they cannot be applied to imports from a third country."

Simba SpA and Others v. Ministero Delle Finanze, Joined Cases C-228/90 to C-234/90 and C-353/90, dealt with the direct import of bananas from non-member countries. The question arose whether, in trade with the non-member countries, there is any rule prohibiting fiscal discrimination analogous to that laid down in Article 95.

The court held:-

> "13. Since a duty such as the national tax on consumption must be regarded as internal taxation caught by Article 95, the question whether such a charge is contrary to the provision insofar as it is applicable to fresh bananas imported directly from non-member countries must be answered first.
>
> 14. According to the case law of the court (See the judgment in case 148/77 cited above), Article 95 is applicable only to products imported from other Member States. It follows that the provision does not apply to products imported directly from non-member States.
>
> 15. The answer should therefore be that a duty such as the national consumption tax introduced by the Italian legal

system by law No. 986/1964, as amended by law No. 873/1982, is not covered by Article 95 of the EEC Treaty in as much as such a duty is applicable to imports of fresh bananas coming directly from non member countries."

The same conclusion was arrived at in *Hansen v. Hauptzollamt de Flensburg* C-148/77, which dealt with tax arrangements for spirits from non-member countries.

At para. 23, the court concluded:-

"For trade with non-member countries, and so far as internal taxation is concerned, the Treaty itself does not include any rule similar to that laid down in Article 95."

In relation to the issue of embedded VRT, counsel submitted that the ruling in *OTO v. Ministero Delle Finanze*, C-130/92 was applicable. This case involved the direct imports of audio visual and photo optical products from Japan into Italy. Former Chief Justice Murray J. giving the judgment of the court held as follows:-

"6. On the 18th October 1984, the chief collector of the Rome Customs Office sent to OTO a demand for payment of national consumption tax in respect of imports of goods from Japan affected between the 2nd February, 1983 and the 4th September, 1983.

7. OTO brought an action against the defendant before the Tribunale di Roma (District Court, Rome) in which it claimed that the national consumption tax had been calculated on the basis of the implementing decree, which, as it departed from Law No 53, had to be regarded as unlawful. The Tribunale di Roma upheld its claim ...

8. The defendant appealed against that judgment, arguing that Article 4 of Law No. 53 was contrary to Community law on the ground that it had the result of placing goods brought into free circulation in other Member States and then exported to Italy at a disadvantage compared to goods imported directly into Italy from non-member countries."

The court referred again to previous cases in concluding:-

"18. The Court has also consistently held that Article 95 applies only to products from the Member States and, where appropriate, to goods originating in non-member countries which are in free circulation in the Member States. It follows that that provision is not applicable to products imported directly from non-member countries.

19. Accordingly, a tax such as that which is the subject-matter of the main proceedings does not come within the scope of Article 95 of the Treaty in so far as it is applicable to goods imported directly from non-member countries."

Vehicle Registration Tax is a system of internal taxation levied on the registration of the vehicle and not on an import crossing the frontier.

That position was made clear as early as 1993 in the letter from Mr. Venturi of the European Commission to the plaintiff:-

"It may that you have already taken professional advice, but for clarity perhaps I should explain that there is no harmonisation of law on car taxes and, therefore, Member States are, in principle, free to tax as they choose.

There is, however, one major proviso to this: there must be no discrimination against the products of other Member States and no tax advantage given to the national product. Thus, second hand cars which you "import" from other Member States (including Japanese cars which have been produced or entered free circulation in other Member States) must not be taxed more heavily than the equivalent cars in Ireland."

From a consideration of the case law considered above and from Mr. Venturi's letter it is clear that the plaintiffs claim for damages, based exclusively on alleged discrimination under EU law, must fail.

The complaints made by the plaintiff to the commission on the 21st October 1993, (to Mr. Limo Facco) were based on the alleged breaches of EU law by the defendants. These complaints preceded the initiation of the present proceedings on the 15th March 1995.

While the claim as pleaded goes beyond EU law, the quantification of the claim for damages is based on discrimination at EU law.

The court is of the view that there is no basis for the assertion that discrimination under EU law can apply to imports from outside the community.

29.2 Reference to Intra Community Trade

Niall O'Dowling said that had VRT been more fairly charged on the 44 cars imported from Northern Ireland between 1993 and 1996, the plaintiff could have had a bigger mixture of vehicles including more member state type vehicles. However, his evidence was that the cost, including shipping and taxes of Japanese three to five year old cars was cheaper and accordingly, profitable, suggests that the plaintiffs' decision, excluding 1995 in respect of which no figures were given, was to import Japanese used cars. Indeed for that period the evidence was that over 1.600 cars were imported directly from Japan. This is reflected in the claim and in the calculation of losses.

The evidence in relation to the intra community imports of 44 cars imported from Northern Ireland cars did not establish that the values as a general rule were not "very close to their actual value". While Brendan Dowling had remarked on the lack of evidence on landed costs of Japanese used car imports, he did not refer to any evidence for these 44 cars.

The mere assertion of a 20% differential was not substantiated. Mr. O'Boyle was simply asked to apply the losses claimed for Japanese direct imports proportionally to the imports from Northern Ireland.

While Mr. O'Dowling did not give specific details, Mr. Fintan Riordan said that between the 23rd September 1993, and the 7th February 1996, the plaintiff imported 44 cars from Northern Ireland. He said that valuations assigned to cars coming from Northern Ireland were high, but not as high as those placed on Japanese cars. He said if they had not been as high the plaintiff would have increased the numbers of imports from the UK. No satisfactory comparative valuation of OMSP's was given.

In cross examination Mr. Riordan said that he and Mr. O'Dowling had travelled to England to source cars initially, but were unhappy

with the quality and choice of cars available. He said the cars in England would be "harder to get probably". He agreed to accept Mr. O'Dowling's evidence in relation to the UK market.

It is unsatisfactory that neither Mr. O'Dowling nor Mr. Riordan gave any evidence of overvaluation of OMSP's on cars imported by the plaintiff from the UK (or Northern Ireland). Neither is there any specific analysis of the resulting loss of opportunity. There was no mention of imports from Northern Ireland or the UK in Mr. O'Boyle's report.

The second DKM report of September 2011, at pg. 22 and 23 referred to Japanese imports as being the main source of supply as market characteristics did not favour UK imports:-

> "Given that Japanese used cars were running at around 40 per cent of such imports in 1990 – 1992 it is clear that the main source of right hand drive cars for the Irish market, if import demand had increased in the wake of lowering of the VRT barrier, would have been the Japanese market. Imports from the UK might also have been expected to grow but market characteristics operated against the development of a major wholesale business in the distribution of UK sourced cars in the Irish market.
>
> We have no reason to believe that the market share of Japanese used car imports held by UCII in 1992 would have fallen if there was an expansion in Japanese imports from 1993 on the scale indicated by the price elasticities."

The plaintiff submited that EU law provides for the taking into account of actual depreciation of vehicles based on general criteria to be compatible with the provisions of the Treaty and refers to Case C-393/98 *Gomes Valente*.

That ruling of the 22nd February, 2001, was, of course, determined in relation to the second hand vehicles imported from other member states as was clear from the facts of that case.

The plaintiff, in this case has not imported the cars from other Member States but from Japan, other than the 44 cars imported from Northern Ireland.

The court is of the view that, by virtue of the decision in *Gomes Valente* that the plaintiff's claim would necessarily be restricted to those 44 cars. However, no satisfactory analysis was given as to the overvaluation of OMSP in relation to those imports.

While the DKM report is comprehensive, it relies on divergence of OMSP of Japanese imports from open market prices. There is not a separate analysis of the divergence in relation to the 44 Northern Ireland imports.

29.3 Legislative basis of VRT

Section 133(2)(b) and (3) of the Finance Act 1992, as amended by s. 9 of the Finance (No. 2) Act 1992, provides the basis for calculating OMSP of used cars by reference to the price of a new vehicle:

> (2)(a) For a new vehicle on sale in the State which is supplied by a manufacturer or sole wholesale distributor, such manufacturer or distributor shall declare to the Commissioners in the prescribed manner the price, inclusive of vehicle registration tax, which, in his opinion, a vehicle of that model and specification, including any enhancements or accessories fitted or attached thereto or supplied therewith by such manufacturer or distributor, might reasonably be expected to fetch on a first arm's length sale thereof on the open market in the State by retail.
>
> (b) A price standing declared for the time being to the Commissioners in accordance with this subsection in relation to a new vehicle shall be deemed to be the open market selling price of each new vehicle of that model and specification:
>
> (c) Notwithstanding the provisions of paragraph (b), where a price is declared for a vehicle in accordance with this subsection which, in the opinion of the Commissioners, is higher or lower than the open market selling price at which a vehicle of a similar type and character is being offered for sale in the State at the time of such declaration, the open market selling price may be determined by the Commissioners for the purposes of this section.
>
> (d) Where a manufacturer or sole wholesale distributor fails to make a declaration under paragraph (a) or to make it in the prescribed manner, the open market selling price of the vehicle concerned may be determined by the Commissioners for the purposes of this section
>
> (3) "new vehicle" means a vehicle which is less than 3 months old when reckoned from its first entry into service or which has travelled less than 3,000 kilometres;
>
> "open market selling price" means
>
> (a) in the case of a new vehicle referred to in subsection (2), the price as determined by that subsection,
>
> (b) in the case of any other new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, would be determined under subsection (2) in relation to that vehicle if it were on sale in the State following supply by a manufacturer or sole wholesale distributor in the State.
>
> 133(3) It means the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, a vehicle . . . might reasonably be expected to fetch on a first arm's length sale thereof in the State by retail . . ."

This is subject to the provisions of s. 133(2) already referred to as the basis for valuation in which it is the declared price of a new car by the manufacturer or sole wholesale distributor inclusive of VRT. However, artificial this may be as compared to actual prices negotiated by a buyer it is the statutory basis for depreciation.

The OMSP of a vehicle, other than a used vehicle is, accordingly, the price inclusive of all taxes and duties as if the vehicle were in the State following supply by a manufacturer or sole wholesale distributor in the State. Thus the OMSP relates to the manufacturer's delivered price which may well be higher than a market price.

The definition of such declared price is further seen in the definition of a new car in s. 133(3) as being a vehicle less than three

months old when reckoned from its first entry into service or with less than 3,000km.

While a retailer would expect a discount on the declared price and a further discount on a car with some mileage less than 3,000km this is the basis for the determination of the OMSP. The definition is clear and is to be interpreted literally.

Where the words of an Act are clear, the court must follow them in accordance with the rules of strict interpretation. In *Byrne v. Conroy* [1998] 3 I.R. 1, Kelly J. stated the effect of the rule was that he was "not permitted to put any gloss upon the words used in the Act and must assume that the words and phrases are used in the ordinary and natural meaning".

Finlay C.J. in *McGrath v. McDermott* [1988] I.R. 258 at 276, said that the court may resort ". . . in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be constructed with it".

The words "in the opinion of the Commissioners" are contained in other Revenue statutes.

Section 15(1) of Capital Acquisitions Tax Act 1976 provides:

> "Subject to the provisions of this Act, the market value of any property for the purposes of this Act shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market on the date on which the property is to be valued in such manner and subject to such conditions as might reasonably be calculated to obtain for the vendor the best price for the property".
>
> Section 3(a) of the Stamp Duty Consolidation Act 1999 provides:
>
> "Any instrument chargeable with stamp duty shall, unless it is written on duly stamped material, be duly stamped with the proper stamp before the expiration of 30 days after it is first executed unless the opinion of the Commissioners with respect to the amount of duty with which the instrument is chargeable, has before such expiration, been required under this Act".

Section 3(b)

> "If the opinion of the Commissioners with respect to any instrument chargeable with stamp duty has been required within 30 days after its first execution, the instrument shall be stamped in accordance with the assessment of the Commissioners within 14 days after notice of the assessment".

Central to the powers of the Commissioners is the statutory provisions of the enabling Act. There must be consistency in, and a basis for, the valuation.

The taxpayer may test both consistency and basis by appeal. The court accepts that the appeals were free and reasonably expeditious. The evidence from the Revenue was that the majority were successful.

There was little evidence on the plaintiffs' part regarding appeals. The plaintiffs submitted that the successful appeals demonstrated that the OMSP's were unfair. The initial evidence was that the plaintiff had not been successful and that the plaintiffs' did not pursue many appeals as it would have to pay the VRT as a condition of appeal. Given the volume of imports and the resolution of appeals within a reasonable period, the court finds that the plaintiff did not avail of its right to challenge the opinion of the Commissioners. They did not seek a remedy by way of appeal at the time. They did not exhaust that remedy.

29.4 Submission that there is no legislative basis for VRT

The plaintiffs' claim is that there is no legislative basis for the VRT system and that the implementation of the VRT is *ultra vires*. They submit that there is no mandate given to the Revenue to determine a price which the vehicle may reasonably be expected to fetch by reference to a "completely arbitrary and complex system of valuation in order to determine administrative values which are then used as the chargeable basis of the tax".

Neither, it is submitted, is there any legislative basis for using the Car Sales Guide. They state that the provision for making regulations was not used and claim that the system was secret, arbitrary and non-transparent.

The statutory provision regarding the determination of OMSP's is unambiguous. It is based on the opinion of the Revenue Commissioners on the basis of the declared price. The evidence does not establish an arbitrary or secret system. While there is a provision which allows for regulations, there was no suggestion as to what regulations were necessary.

Even if there had been any element of the administration being ultra vires the liability of the defendants for damages does not follow.

There was no specific reference to damages resulting from the law being ultra vires and no calculation upon which damages could be assessed.

In *Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at 127, Keane C.J. referred to the decision of the respondent to issue a mining ban. He held that that decision constituted the purported exercise by the respondent of a power vested in it by law for the benefit of the public in general and not for particular categories of persons. Keane C.J. held:-

> "It follows that the *ultra vires* exercise of the power in the present case could not of itself provide the basis for an action in damages."

This was authoritively confirmed in the judgment in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23, where Finlay C.J. was satisfied that there was no liability for damages. He cited with approval the statement of law by Wade in *Administrative Law* (5th Ed.) at 673:-

> "The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:-
>
> 1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.

2. If it is actuated by malice, e.g., personal spite or a desire to injure for improper reasons.

3. If the authority knows that it does not possess the power which it purports to exercise."

The court is satisfied that none of these situations arise in the present case.

The Commissioners have statutory power; there is no evidence of malice and the first element does not arise.

In *Blanchfield v. Hartnett* [2002] 3 I.R. 207, the State had conceded that the orders had been made without jurisdiction, but the High Court and the Supreme Court refused to quash the orders because it would have served no purpose.

The normal rules of statutory interpretation applied to the Finance (No. 2) Act 1992, as appears from the decisions in *Revenue Commissioners v. O'Flynn Construction Limited* [2011] I.E.S.C. 47, the 1933 judgment of Kennedy C.J. in *Revenue Commissioners v. Doorley* [1933] 1 I.R. 750 and in *McGrath v. McDermott* [1988] 1 I.R. 258, per Finlay C.J.

In *Revenue Commissioners v. O'Flynn*, O'Donnell J. stated:-

"The suggestion that the principles in *McGrath* preclude a 'purposive approach' is also perplexing. In the first place the express words of s. 86 require the Commissioners to have regard to the "purposes" for which it [*the relief*] was provided. Furthermore, the decision in *McGrath* itself expressly contemplates an approach to the interpretation of legislation that has always been understood as purposive."

Indeed if *McGrath* stands for any principle of statutory interpretation it implicitly rejects the contention that any different and more narrow principle of statutory interpretation applies to taxation matters.

The relevant section of the Finance (No. 2) Act 1992, s. 133(3)(c) provides:-

"In the case of a vehicle other than a new vehicle, the price, inclusive of all taxes and duties, which, in the opinion of the Commissioners, the vehicle might reasonably be expected to fetch at a first arms length sale thereof in the State by retail and, in arriving at such price . . ."

In the case of Japanese cars, Value Added Tax and the customs tariff is, accordingly, part of the open market selling price.

It is the Commissioners who must form an opinion as to what the vehicle might reasonably be expected to fetch on a first arms length sale thereof in the State by retail.

The court is of the view that the Oireachtas has provided that the Revenue Commissioners form an opinion. They have to form an opinion unless to do so would be unconstitutional. If it is not, then it clear that both the Oireachtas has the power to enact this particular provision and the Revenue has the power to administer it. Even if it were discriminatory, whether in relation to EC or Irish law, that would not necessarily make the provision unconstitutional.

The court is satisfied that there was no evidence such as there was in *Motor Distributors Limited v Revenue Commissioners* [2001] I.E.H.C. 19, to say that it was not the Commissioners who formed the opinion or that the Commissioners have exceeded their mandate in so doing. It is common for the Commissioners to determine open market value as the basis of capital gains tax, capital acquisitions tax and stamp duty in an analogous manner to its powers under s. 133(3)(c).

It is a matter for the Commissioners to decide how they reach their opinion. The details of how they do that are in all likelihood non-justiciable. Moreover, the court is clear that this is a private action being taken against the Revenue Commissioners and the State for damages. It is not a judicial review nor a public inquiry into vehicle registration tax.

There is of course scope for judicial review in relation to the formation of an opinion as is clear from the judgment in the *State (Lynch) v. Cooney* [1982] I.R. 337. O'Higgins C.J. giving the judgment of the court at p. 361 concludes:-

"The Court is of the opinion that s. 31(1) of the Act of 1960, as amended, does not confer on the Minister the wide, unfettered and sweeping powers which have been alleged by the prosecutor. The Court is satisfied that the sub-section does not exclude review by the Courts and that any opinion formed by the Minister thereunder must be one which is *bona fide* held and factually sustainable and not unreasonable."

The court agrees that this is the test to which the court is limited in reviewing the opinion of the Commissioners: that it is bona fide held, factually sustainable and not unreasonable.

There is no evidence to establish that the opinion formed by the Revenue was not *bona fide* held.

While the court may be critical in relation to inconsistencies of valuation and in the preparation and the production of depreciation tables, it has to acknowledge the administrative difficulties in producing a database that ensured consistency for all importers in every Vehicle Registration Office. Despite allegations of secrecy and lack of transparency, the evidence was that the Revenue staff had been both open and flexible in relation to the determination of open market value by way of the depreciation tables, which were based on the Car Sales Guide, small motor ads and, indeed, the result of appeals.

The difficulty with unusual models imported, in respect of which there was no declared price by manufacturers or wholesale distributors, did cause problems for the Revenue which resulted in delays. The plaintiff did not identify any such models.

Moreover, the Revenue officials made an offer for experts to meet, without lawyers being present, and that offer was never taken up. Mr. Sherlock's evidence regarding the 2007 inspection of the VRT offices remained uncontradicted – he was not cross examined in that aspect of his evidence. No motions were brought to challenge discovery. The Revenue officials spent considerable time and work in preparing the disc for the plaintiff, as attested to in the evidence given by Prof. Frank Bannister.

The court has to be satisfied, however, not alone that the opinion was *bona fide* held but that it was also factually sustainable. Every decision can be appealed where there is error and can be judicially reviewed if the correct procedures are not followed.

However, in terms of factual sustainability the defendant submitted that the Revenue looked at a number of sources for information in

order to determine market price and determine the depreciation scales. As already referred to, the Revenue used the Car Sales Guide, advertisements and communicated with dealers. The Revenue encouraged the rule in relation to an appeals system, pursuant to s. 138. In addition they provided estimates based on the data gathered. Mr. Campion's evidence was that the process by which information was obtained on appeal differed from the process of the original valuation in that it was more extensive. This, in itself, does not invalidate the original valuations. The evidence of the plaintiffs' directors as to the superior quality of Japanese used case relative to domestic used cars was consistent with the default grading of the imported cars as 'good'.

An increase in valuations was notified in September 1993, because, contrary to the claim made by the plaintiff, the Revenue sought out actual prices obtained by sellers of Japanese cars and discovered that the OMSP that they had been applying from January 1993, was too low. They subsequently informed the plaintiff and other dealers of this increase at a meeting in September 1993. This was not implemented until early 1994. Dr. Lennox's evidence, from his contemporaneous note of the meeting, indicated that this was explained to the dealers and was not seriously disputed at the time.

The court is satisfied, from the evidence, that the determination of the open market selling price was based on a system that was factually sustainable even if there were anomalies. There was always the right of appeal in relation to those anomalous valuations. There was no cost involved and no unreasonable delay. Moreover, there was a high success rate for the relatively small proportions of valuations appealed. The revised OMSP's then became precedent.

The court is also satisfied that, given the evidence before it, that the determination of the valuation was not 'unreasonable' in the sense applicable to judicial review cases. In particular, *O'Donnell v. Dún Laoghaire Corporation* [1991] I.L.R.M. 301, *The State (Keegan) v. O'Keeffe* [1986] I.R. 642 and *The State (Lynch) v. Cooney* [1982] I.R. 337 all refer to the reasonableness test.

Data relating to age, mileage and condition was inputted by Revenue officials and, while the intention of the system was to harmonise valuations for like cars, it did have some differences that were not entirely explained to the satisfaction of the court. The court accepts the evidence of the plaintiff's experts that the depreciation scales did not reflect the market. However the court acknowledges that the plaintiff itself, given the volume of imports of three to five year old Japanese cars, had the ability to and did, on occasions, challenge, by way of appeal, such anomalies and was in a better position to do so using its own database, than an individual or a one-off importer.

The court, having regard to the overall evidence beleives that the determination could not be compared with the "eccentric and ludicrous" system that was the subject of *Brennan v. The Attorney General and v. Wexford County Council* [1984] I.L.R.M. 355, in respect of land valuation. In that case the Supreme Court held:-

> "In the assessment of a tax, such as a country rate, reasonable uniformity of a valuation appears essential to justice. If such reasonable uniformity is lacking the inevitable result will be that some ratepayer is required to pay more than his fair share ought to be. This necessarily involves and attack upon his property rights which by definition becomes unjust."

The OMSP for similar used cars must be uniform throughout the country. There was no evidence that it was not so. In a sellers market where demand is high, the actual selling price may be higher than in a market with low demand. However, a centralised system of assessment may not, in any practicable way, be in a position to record such differences.

Glencar Exploration v. Mayo County Council [2002] I.R. 84 and *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23, already referred to, related to a change to the value of the property upon implementing Ministerial decisions. Such change did not necessarily mean that an injustice was done to the plaintiff. In *Pine Valley* Finlay C.J. elaborated:-

> "That fact, itself, however, does not, in my view, necessarily mean that an injustice was done to the plaintiffs and I am certain that that does not constitute an unjust attack on the plaintiffs' property rights. . . . I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act *bona fide* and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

The Chief Justice in *Glencar* was satisfied that the considerations in *Pine Valley* applied. The Chief Justice (with whom the other members of the court agreed) said:-

> "The remedy available to persons affected by the commission of an *ultra vires* act by a public authority is an order of *certiorari* or equivalent relief setting aside th e impugned decision and not an action for damages, to allow which, in the case of public officials, would be contrary to public policy for the reasons set out by Finlay C.J. in the passage just cited."

In the present case the remedy available to the plaintiff was to appeal the determination.

The plaintiff submitted that the Revenue did not take any account of the actual market selling price of the particular vehicle under assessment nor make any effort to value "the" vehicle under assessment but, rather, they charged the tax on a notional value for similar vehicles.

The court notes there was no evidence that the main dealers were, indeed, selected and were not simply a representative sample. No evidence was called by the plaintiff in relation to the compilation of the guide nor, indeed, was that evidence called by the defendants. The court accepts that the Car Sales Guide was a reasonable reference that was used in a widespread way in the industry and corresponded to the declared prices of new cars discounted in respect of used cars.

The chargeable value of a new vehicle is relevant to the registration of a used vehicle when imported into the State.

It is clear that the opinion by which the Revenue Commissioners determine open market value can take into account prices which are higher or lower than the declared value, of a vehicle of similar type and character. The open market selling price may be determined by the Commissioners for the purpose of s. 133 in such circumstances.

The court is satisfied that the taking into account of the Car Sales Guide is a factor which the Commissioners are entitled to make reference.

While the depreciation tables were developed and applied, (presumably with the benefit of the depreciation tables used for the MVED), without any reference to an enabling statutory instrument, the court is not satisfied that the evidence considered by the

court showed a significant deviation from the values contained in the Car Sales Guide.

The court is further satisfied, given the expression "in the opinion of the Commissioners", that this is a fundamental element in determining the open market selling price.

The court has also considered the submissions of the plaintiffs with regard to the absence of regulations made under s. 141(1) of the Finance Act 1992. That section empowers the Commissioners to make such regulations as they consider necessary or expedient for the purpose of managing the registration of vehicles and managing, securing and collecting vehicle registration tax. Particulars are given in subs. (2) which includes at (c) (may) prescribe the manner in which a declaration under s. 131 shall be made. That refers to the declaration of prescribed particulars for each vehicle being declared to the Commissioners for the purpose of registration. The similar provision covering the conversion of vehicles is contained in subsection (3).

Neither generally (under (1)(a) nor particularly (under s. (2)) are there provisions for the Commissioners to make regulations in relation to the open market selling price.

Subsections (3) and (4) empowers the Minister to make regulations as he considers necessarily expedient for the purpose of given full effect to ss. 134 and 135 (permanent reliefs and temporary exemption from registration). Similarly, there is no provision for the Minister to make regulations with regard to the open market selling price.

Accordingly, the court does not accept the submissions made by the plaintiffs in relation to the absence of regulations.

The plaintiffs made reference to the internal memorandum created by Mr. O'Leary of the Revenue, dated the 14th July, 1997, referring to problems within the system. Mr. O'Leary warned that the "extent to which our full system is exposed to public scrutiny will determine the amount of corrective action required within the CVO". The issues "are questionable and would not survive a public challenge". "Non disclosure removes the possibility of such challenges. The only test which can then be applied is to determine whether our outcome is accurate".

When this document was put to Mr. Campion of the Revenue his response was that it was John (O'Leary's) habit to persistently press his superiors for additional resources and that Mr. Campion would have been delighted with significant additional resources.

I have no doubt that more resources within the Vehicle Registration Office, particularly in the early years after the introduction of VRT, would have assisted the Commissioners in establishing a comprehensive database in relation to the makes and models of used cars being imported, not alone from Japan, but also from the United Kingdom and, to a lesser extent, from other countries.

The plaintiff submitted that secrecy had been and continues to be a central element in the VRT system and refers to the evidence of Niall Butler, who stated that it would have been within his remit to provide details of the depreciation tables, but he was aware that there were concerns about publishing them, and the evidence of Mr. Campion, who stated that he had never arranged for the depreciation codes to be published.

Further, the plaintiff submits that the system whereby the chargeable value for new vehicles was the value declared by franchised domestic distributors and used vehicle values were then derived from such a value, was an unlawful delegation of lawmaking powers.

The plaintiffs relied on the general comments in the Edge Anderson Report which stated that because the open market selling price only reflected values in the 26 counties, they did not reflect the much lower selling price in other member countries and this was "due to the control of the price by the distributors and the subsequent excise duty".

The court is of the view that even if there was satisfactory proof that the distributors controlled price, and there was no such proof adduced, this would have been a determining element of market price. There was no evidence that the distributors controlled excise duty or VRT.

Whether or not distributors control the price of new cars, this does not affect the actual open market selling price for those cars. Moreover, there was no evidence as to the variation of prices between any of the member states. In any event such variation is of no relevance for VRT purposes.

The Commissioners opinion on prevailing prices at the time of registration is what is relevant. The Commissioners are empowered to do so under the legislation. To say that there is an impermissible delegation of law making power to the Revenue is not borne out by the power given by the Oireachtas to Revenue to form an opinion. It is not a delegation of a power to impose tax. It is the power of an independent organ of the State to impose tax. It is the power to impose a duty of excise, to be called vehicle registration tax, to be charged, levied and paid at whatever of such rates as may stand specified for the time being by an Act of Oireachtas on the registration of a vehicle or the making of a declaration under s. 131(3) in relation to a converted vehicle.

29.5 Infringement of Principles of Law
The plaintiff has pleaded a breach of legitimate expectation, proportionality, legality, equality and legal certainty. Insofar as the plaintiffs' claim, in respect of the direct import of vehicles from Japan, fall outside the scope of EU law, all of the principles pleaded fall to be tested by reference to Irish domestic law and not by EC law.

It is an important evidential requirement that damages be proven to have arisen under domestic law. The plaintiffs' experts quantify the claim on the basis of discrimination. There is no quantification of damages that would arise as a result of any of the headings of legitimate expectation, proportionality, legality, equality and legal certainty. At most the court could only give declaratory reliefs. There would appear to be no basis on which the court could award damages under these headings.

29.5.1 Legitimate Expectation
The plaintiff submits that the representation made in the Revenue guide entitled "Vehicle Registration Tax, Trader Guide" was one upon which the plaintiff was entitled to rely, but that the representation of the value being the open market selling price as determined by the Revenue Commissioners was an untrue representation. The chargeable value of a used vehicle bore no relation to the open market selling price of the vehicle being the value declared by the distributor. The plaintiff had a legitimate expectation that the Commissioners would comply with the published representation and would serve the taxpayer fairly, efficiently and in good faith.

Glencar, already cited is of relevance to legitimate expectations. At p. 162, the penultimate page of the judgment, Fennelly J. refers to it being necessary to establish three matters in order to succeed in a claim based on failure of a public authority to respect legitimate expectations:

> "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. Secondly, the representation must be addressed or conveyed 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."

The plaintiff argued that the failure by the Revenue to impose VRT on the open market selling price was a breach of the principle of legitimate expectation. The representation was untrue in that the chargeable value of a used vehicle bore no relation to the open market selling price of that vehicle. Rather it was the value declared by the distributor reduced in accordance with predetermined depreciation schedules.

The court is not satisfied in relation to the evidence given by the plaintiff that the chargeable value of a used vehicle bore no relation to the open market selling price. The court has already referred to the development of the Revenue database, the reference to the Car Sales Guide and the attempt to streamline through depreciation tables which, while not published until 2010, were an effort by the Commissioners to have a uniform opinion in relation to the values.

The court also has regard to the appeals procedure, which was used by the plaintiff, and to meetings held with the Revenue. The court is not satisfied the assertions made are founded on evidence given by the plaintiffs in relation to the Revenue not acting in good faith towards the plaintiff either in terms of the assessment of tax liability or the conduct of these proceedings.

The chargeable value did not relate to landed value which is the basis for VAT, but not the basis for OMSP as required by section 133(3). The evidence of broad correlation with the Car Sales Guide with OMSP as defined in the Act was not controverted by any statistical analysis. The plaintiff's case was that it did not conform with the landed cost price.

The court accepts that the Revenue's use of depreciation schedules was unclear even when they were made available to the plaintiff. Cars which moved from one scheme to another without any published or disclosed notice cannot, however, amount to a representation or a breach of legitimate expectation. The absence or paucity of appeals to test the basis and consistency of OMSP for imported cars is an evidential defect.

29.5.2 Proportionality
In the context of proportionality, the plaintiff alleged that the purpose of VRT was somehow to protect the Irish motor trade from international competition and that such protectionist intent was in direct contravention of the State's obligations pursuant to Irish and EU law. The defendant said the system did not have such purpose.

Under Irish law, even if the State did have such purpose this would have been a legitimate matter of polity in relation to protection of trade subject, of course, to GATT. There was no evidence of such a policy. Moreover, as already found, there was no EU discrimination.

The court considers, in particular, the correspondence with the Society of the Irish Motor Industry.

On the 11th September 1992, Cyril McHugh, Chief Executive of SIMI, wrote to the Assistant Secretary of the Revenue, concerned that VRT was adding a new level of bureaucracy. SIMI's concern was to ensure that the imposition of a registration tax on their new car sales did not confer a competitive advantage on second hand imports from other countries. SIMI also expressed their concerns in a letter to the Minister for Finance dated 15th September 1992. A meeting was held on the 13th October 1992, and the Minister for Finance replied to SIMI's representations by letter dated the 16th October 1992, as follows:-

> "Valuation of Second Hand Imports: Data on values for used imports will be provided for SIMI periodically. The Society will be given an opportunity to discuss valuations of used vehicles and Revenue will investigate specific complaints about undervaluation."

Revenue notified the trade and the plaintiff of an increase in the OMSP of Japanese imports at the meeting of the 22nd September, 1992. Mr. O'Dowling said he noticed a 23% increase in the Revenue's valuation of the plaintiff's best selling models after January 1993.

While it may be a matter of policy for the defendants, and in particular, the Government to balance particular interests, the court is satisfied that there is no evidence that the Revenue Commissioners had no proper basis for revising OMSP's. The evidence on behalf of the defendants was that Japanese used cars had been undervalued prior to then and that there had been no objection taken by the trade at that meeting.

The court is not satisfied in the circumstances, that the principle of proportionality has been infringed.

29.5.3 Legality, Certainty and Transparency
The plaintiffs' complaint is not the calculation of tax that but rather the method by which OMSP is determined. The Oireachtas gave the power to the Commissioners to determine the valuation and allow them to express an opinion on the basis of the legislative provisions as stated above.

The plaintiffs are required to prove that the system was unlawful and non transparent. Dr. Lennox referred to a document dated the 5th October, 1992, before VRT was introduced, which was sent on behalf of the plaintiff, suggesting the use of depreciation scales and suggesting amendments for models with certain specifications. The court notes that there was a high degree of knowledge on the part of the plaintiff before VRT was introduced as is clear from that document which had been prepared on behalf of the plaintiff by Mr. O'Herlihy. The court also accepts that there is evidence of estimates being regularly sought by the plaintiff, at least from April 1993, when the plaintiff obtained statistical codes for models imported into the State.

A year later at the meetings of the 22nd September, 1993, and the 16th December 1993, the issues of confidence and transparency were raised.

Mr. O'Dowling's evidence was that he had a reasonable idea of the VRT liability on the vehicles he imported. He knew the maximum profits available on four to five year old vehicles. He accepted that Mr. O'Herlihy, as a former Inspector of Taxes was conversant with the system and operation of vehicle registration tax.

Communications were, at the time, by way of fax and telephone, not internet, email or mobile phone. Mr. Butler's evidence was that a dedicated fax number was provided so that the plaintiff and other importers could receive estimates from the Vehicle Registration Offices.

The plaintiff relied on the memorandum of Mr. O'Leary of the Revenue criticising the imperfections of the VRT system and requesting additional staffing. Mr. O'Leary did not give evidence. The court is of the view that they may have been problems, but that did not, of itself, render unlawful the administration of the VRT system.

Mr. Campion referred an increase in access to information and efficiency in dealing with queries and giving estimates. The Revenue introduced kiosks in their offices, distributed CD ROMs in 1998 and devised the online VRT calculator in 2004.

Dr. Bannister's evidence was to the effect that the Revenue were converting all of their systems to more updated IT mechanisms. His evidence was that it would not have been responsible for the Revenue to have tackled the VRT system in 1993 when transparency was satisfied by publishing the legislation.

Dr. Bannister's evidence was also that the Revenue did what it reasonably could to make the information available to the public but it was not under an obligation to do so any more than an inspector of taxes is to explain publicly how the valuation of property or land is assessed. He believed that Mr. Yarrow had not considered the increase in access to information through the provisions of kiosks, CD ROMs and the internet calculator.

The court is of the view that the level of information technology available in 2012 can not be applied to the position obtaining up to twenty years ago. The court is satisfied from the evidence that, even though there were anomalies, Revenue had sought to comply with its legal obligations. The anomalies could have been addressed by way of appeal.

The court notes that the plaintiff company traded successfully from 1993 to 1996. The evidence of Mr. Jacobs of Grant Thornton was that the average price of which used cars were sold for in 1993 exceeded the average price for 1992. There was no evidence that, after the introduction of VRT, the sale prices had declined.

The court is satisfied, as already determined, that the defendants acted on the basis of the legislation. The administration of assessment of VRT was reasonably transparent.

29.5.4 Equality & Property Rights of the Plaintiff
An alleged breach of equality is pleaded. The only issue is whether there is discrimination at Irish law as it would appear that the issue of discrimination at EC law does not apply for reasons already given.

Under Irish law the plaintiff is not in a position to rely on Article 40.1 of the Constitution because that Article relates to personal rights and does not apply to limited companies.

> Article 40.1 of the Constitution states:-
>
> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."
>
> Article 40.3 provides:-
>
> "1. The State guarantees its law to respect and, so far as practicable, by its laws to defend and vindicate the personal rights of every citizen."

In *Quinn Supermarket v Attorney General* [1972] 1 I.R. 1, at p. 13 with reference to the *State (Nicoloau) v. An Bord Uchtála* [1966] I.R. 567, that:-

> ". . . this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. . . . Furthermore, it need scarcely be pointed out that under no possible construction of the Constitutional guarantee could a body corporate or any entity but a human being be considered to be a human person for the purposes of this provision."

In *Browne v. Attorney General* [1991] 2 I.R. 58 at 65, in relation to taxation, Murphy J. held:

> "(3) That the tax discriminated against sales representatives who, unlike others, were required by the circumstances of their employment to use a motor car in the course of their work and as such was an infringement of their constitutional right to 'be held equal before the law' in accordance with Article 40, s. 1 of the Constitution. Whilst this argument was adumbrated, counsel for the plaintiffs properly recognised that it could not succeed before me having regard to the views which I have already expressed (see *Greene v. Minister for Agriculture* [1990] 2 I.R. 17 at p. 26) as to the effect of the decision of the Supreme Court in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1. Indeed the effect of that decision was more authoritatively and emphatically expressed by the then Chief Justice in *Brennan v. The Attorney General* [1984] I.L.R.M. 355 at pp. 364 and 365 as follows:-
>
> > 'The plaintiffs' arguments in relation to Article 40.1 have already been noted as have the submissions of the Attorney General. In the view of the court a complaint that a system of taxation imposed on the occupiers of land which has proved to be unfair, even arbitrary or unjust, is not cognisable under the provisions of Article 40.1. This section deals, and deals only, with the citizen as a human person and requires for each citizen as a human person, equality before the law.'"

In *Lowth v. Minister for Social Welfare* [1998] 4 I.R. 321, Hamilton C.J. at 339 stated:-

> "The particular difficulty of establishing the unconstitutionality of legislation dealing with economic matters was

recognised by Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294 at p. 312, in the following terms:-

> 'When dealing with controversial social, economic and medical matters on which it is notorious that views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen. Moreover, the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to this type of legislation.'

Taxing statutes are in a separate category as O'Hanlon J. remarked in *Madigan v. Attorney General* [1986] I.L.R.M. 136 at p. 151:

> 'It has been recognised, both in our own jurisdiction and in the United States, where the constitutional guarantees are closely analogous to those provided by the Irish Constitution, that tax laws are in a category of their own, and that very considerable latitude must be allowed to the legislature in the enormously complex task of organising and directing the financial affairs of the State.'

This reasoning was repeated and extended in *Murphy v The Attorney General* [1982] I.R. 241, at 283 where Kenny J. said:

> 'The mere fact that a heavier financial or other burden falls on some defined person or persons does not of itself constitute a repugnancy to s. 1 of Article 40. Having regard to the second paragraph of Article 40, s. 1, an inequality will not be set aside as being repugnant to the Constitution if any state of facts exists which may reasonably justify it.'"

There is a presumption that statutory provisions are constitutional. Given the complex task of administering the provisions of the Finance Acts, similar latitude must be allowed to the Revenue in administering the legislation governing and directing the raising of taxation.

VRT is calculated by reference to a value which is found in the opinion of the Commissioners in relation to the registration of motor vehicles. It is not a transaction tax.

The method by which the market value is determined is similar to the principles of the valuation of property generally. It does not differentiate unfairly against the owners affected. The court is of the view that the Revenue Commissioners valuation has been determined in a reasonable manner which is subject to challenge by way of an appeal procedure by which that valuation can be tested.

Following *Madigan*, the court is of the view that the imposition of VRT is not an unjust attack on constitutional property rights.

29.6 The Plaintiffs Expert Evidence

Much of the plaintiffs expert evidence relates to landed price, which is not the OMSP to which the legislation relates. The submissions relate largely to discrimination regarding to extra community imports.

All of that evidence, insofar as it relates to imports from outside member states, does not amount to discrimination within the European Union. Accordingly the European decisions, as already stated, are not relevant.

If the court is mistaken in this regard, the assumptions of the DKM report on loss do not take into account the ability or resources of the plaintiff to grow as dramatically as suggested. No account is taken of competition from new as well as from used car suppliers. The resulting change in market price for both was not considered.

What is also significant is Mr. O'Dowling's evidence that OMSP's were close to the Car Sales Guide prices, which were not market prices. It was submitted on behalf of the plaintiff that Revenue's view was that OMSP's were the prices listed in the Car Sales Guide and, despite over seventeen years of requests, Revenue had not provided a comparison to the plaintiff or to the court.

The court is of the view that is a matter for the plaintiff to adduce. It did not appear to be the subject of an order of discovery.

There was no evidence which analysed the difference in any systematic way. Moreover, the decision to discontinue appeals deprived the plaintiff of what would appear to be the court to be necessary evidence of price deviation.

While there was reference in the legislation to the Car Sales Guide, the court is of the view that the Revenue was entitled to take the Guide into account in arriving at an OMSP. There was not obligation under s. 141 of the Finance Act 1992, to make regulations in relation to the guide.

Dr. Bacon criticised the DKM report 2011 as being inherently wrong on a number of technical issues which, he said, had a cumulative impact on the calculation of loss. Adjusting for these so-called errors reduces the claim for damages by over 98%.

Dr. Bacon, having removed the perceived errors, concluded that the plaintiff would have effectively had an opportunity to sell an additional one thousand cars, or 33% more than were actually sold. He had calculated this using the elasticities of between 0.4 and 0.67 as outlined in the plaintiffs' submissions.

He also referred to the appeals process and said that about 2% of VRT decisions had been appealed. He said if there was the alleged injustice, unfairness and bias being imposed on participants in a segment of the market, one would expect that number to be higher than 2%.

Dr. Bacon also said he did not know why the plaintiff chose to make their argument on the basis of depreciation schedules because he believed that Revenue did not use them in the manner suggested by the plaintiff. The court has already noted the conflict of evidence on this point.

Mr. Brendan Dowling, on the other hand believed that Dr. Bacon's model was misspecified, which resulted in a reduction in the

estimate of additional imports from 100% down to 1.3%, whereas the DKM model is very clear. He said contrary to Dr. Bacon's assertions he had not made a mathematical error and that his assumption of 30% was reasonable. He did assume domestic used car prices would fall contrary to what Dr. Bacon said. He also said that a claim that the plaintiff would have maintained a market share of 20% was a matter of opinion.

The court is satisfied from the evidence of the performance of the plaintiff subsequent to 1993, which showed a significant loss of market share to competitors subject to the same conditions, that the assumption of maintaining a 20% market share was not supported. Moreover, the contrasting growth of Mr. O'Dowling's Sports Car Centre Limited deprived the plaintiff of some market share, turnover and profitability.

Mr. Dowling said the Bacon report referred an earlier report prepared for SIMI by Dr. Bacon on the effect of the abolition of VRT on car sales. That report had developed a model for estimating the impact of GDP on annual car demand. Mr. Dowling disagreed with Dr. Bacon's model, which was for the annual demand of cars as distinct from the stock. His model was essentially an "income elasticity" model which performed poorly in 2009, showing that it had little explanatory power. He said it was atypical of the specifications of demand.

The court notes the different approaches taken by DKM and by Peter Bacon and Associates in relation to "addressable market" and stock. It may very well be that there is a justification for taking stock rather than flow in the case of houses, capital equipment or consumer durables rather that the incremental flow of consumer goods as the basis for the calculation of price elasticity of demand of the used car market.

The court is of the view that, while a price effect on stock may be more appropriate for cars than a price effect on annual flows, this factor alone does not affect the other elements in Dr. Bacon's report.

Neither the reports nor the evidence of Mr. O'Dowling or of Dr. Bacon engage with the statutory definition of OMSP.

Dr. Bacon's report queried DKM's estimation of Revenue overvaluation and suggested that there could be no such overvaluation as Revenue always used the Car Sales Guide, which was regarded as giving the relevant market prices.

Mr. Dowling compiled a comparison of the application of VRT to used cars stating the result obtained by Dr. Bacon's 2011 report was incorrect as it ignored the very point at issue – i.e., the impact of VRT on the margins of used car dealers. He said the Bacon report included a dealer margin in the case of an imported car but excluded a margin in the case of a domestically sourced car. However, the legislation necessarily includes such margin in the OMSP of imported cars.

On the basis of Mr. Dowling's analysis, the DKM 2011 report calculated that the Commissioners overvalued imported 3-5 year old Japanese cars between 32% and 37% higher than would be expected from using international depreciation schedules and using the lower depreciation rates included by Mr. Yarow.

Mr. Dowling looked at what was paid as VRT on the assessed value compared to what the plaintiff actually paid for the cars. The report found that the OMSP's were on average 23% higher.

The report said at 3.1.12 "we looked at the actual VRT paid during the period and the VRT that would have been payable if the market price for VRT purposes was the wholesale price rather than the expected retail price". The difference between these two aggregates represented the excess VRT paid which amounted to 23%.

On that basis he calculates the ensuing loss to the plaintiff arising out of that overcharge and the consequential loss in projected demand for 1993 to 2009 and assuming that after tax profits were invested in Government Bonds as follows:

Table 3.8 Gross Margin and Net Profit Projections for UCII 1993 to 2009 (€)

	Gross Margin	After Tax Profits	After Tax Interest	Total Net Profit
1993	5,772,804	2,805,583	0	2,805,583
1994	6,559,133	3,187,739	158,908	3,346,647
1995	10,242,692	5,143,880	306,752	5,450,632
1996	8,011,842	4,971,342	610,898	5,582,239
1997	10,203,573	5,289,532	888,905	6,178,438
1998	11,690,471	6,439,112	1,223,011	7,662,122
1999	12,434,381	8,955,755	1,590,649	10,546,404
2000	13,211,726	8,133,139	1,960,662	10,093,801
2001	5,333,589	3,456,166	2,495,743	5,951,908
2002	4,982,574	3,390,143	2,495,743	5,885,886
2003	6,527,662	4,626,480	3,192,688	7,819,168
2004	2,697,575	1,911,907	3,255,421	5,167,328
2005	11,273,607	7,990,169	3,310,947	11,301,116
2006	9,574,095	6,785,640	3,275,929	10,061,569
2007	10,317,476	7,312,511	3,320,525	10,633,036
2008	3,634,676	2,576,077	3,508,820	6,084,897
2009	1,748,981	1,239,590	3,645,730	4,885,320

The loss of opportunity to the plaintiff was, in the present value terms, €119.5 million. If the VRT system had applied to actual market prices of imports then the plaintiff could have been expected to sell an additional 93,633 cars from 1993 to 2009.

However the court is satisfied, for the reasons outlined in relation to the determination of OMSP, that the DKM analysis did not take account of the legislative basis upon which Revenue had to assign OMSP.

29.7 The Plaintiffs' Loss
The defendants submit that the claim for damages is unsubstantiated in view of the evidence adduced. The plaintiff must substantiate and quantify the claim made against the defendants on the balance of probabilities.

The basis is the loss of vehicles which would have been imported had the open market selling price been lower.

There is little doubt that car prices in Ireland were higher than in other member states, as acknowledged by the European Commission.

The evidence of the expert witness for the plaintiff is that the price of used car sales in the market place was consistently lower than the OMSP of the Revenue.

What is the scope of a price which is the Commissioners opinion the vehicle might reasonably be expected to fetch on a first arms length sale in the State?

Reasonably, as opposed to arbitrary, requires a basis of support or a justification or the exercise of rational powers. It also requires consistency.

The determination of the price of an individual vehicle in the used car market depends on a multitude of factors as is clear from the evidence of the witnesses. The single depreciation scale under the MVED system had, in the plaintiff directors' opinion, advantages and disadvantages. The development of a multiplicity of depreciation scales by the Revenue may have more accurately reflected different scales of depreciation for different makes and models. The court was not clear on what basis these scales were introduced. What is clear is that the plaintiff was not privy to these scales in the early years after VRT had been introduced.

The Car Sales Guide was partly relied on. It had the advantage of being available to traders and the disadvantage of reflecting the values that the main dealers attributed to used cars. There was no evidence given to the court as to the research underlying the data.

There is, of course, no easy way of collecting and collating data on used car sales. The court accepts the remarks in the report of Niall Butler of the 28th August, 1992, that it is impossible to emulate the complex and inconsistent system of second hand car sales.

DKM tested prices achieved at car auctions (closer to wholesale rather than retail prices), which DKM said were less that 60% of Revenue OMSP. Prices available from dealers and individual sellers were 86% lower. Prices in the Car Sales Guide were about 2% below the values generated by the Revenue model.

However, wholesales prices are not retail arm's length prices which, with dealers' margin, would be higher. Significantly prices in the Car Sales Guide were close to OMSP.

The *Commission v. Greece*, case C-74/06 did not quantify the phrase "very close to their actual value" in the case of intra community trade.

DKM referred to the distortion caused by the application of VRT to the retail price rather than to the dealer costs or landed price.

This is of course is to ignore the statutory definition of OMSP.

In calculating their loss the plaintiff relies on the DKM reports, which find the overvaluation of imported Japanese used cars to be of the order of 30%. This estimate was based on the depreciation graph prepared by Rick Yarrow against the A1 depreciation table from the Revenue scales. Given an average VRT rate of 25% on the open market selling price, this represents an overcharge of 7.5% of the price. The plaintiff claims that, adjusting for this overvaluation, a 7.5% price reduction would be achieved.

The price elasticity of demand referred to in the DKM reports was 0.67, which was not challenged and, indeed, was accepted by Dr. Bacon.

Accordingly, a 7.5% reduction in used car prices should lead to a 5% (7.5 x 0.67%) increase in demand on the basis of international studies of price elasticity to total demand. This rise in stock of 5% would be met from imports on the assumption of there being no competition from new cars.

DKM assumed that 60% of the incremental demand for used cars covered by lower prices would have been supplied by Japanese imports with the balance coming mainly from the UK.

As outlined in the DKM Table 3.8 (Gross Margin & Net Profit Projections for UCII 1993 to 2009), referred to previously, DKM estimated that the plaintiff could have sold on average an additional 8,200 cars per annum, achieving a gross margin equal to the average margins achieved on relatively old cars. The sale of an additional 93,633 cars from 1993 to 2009 would have yielded an aggregate incremental gross margin of €134.2 million before indirect costs, and €108.7 million after, allowing for overheads and selling expenses. DKM's approach referred to the import market share in New Zealand, Cyprus and Malta, which were deemed to be comparable markets for right hand drive cars.

It was assumed that the plaintiff could have anticipated maintaining its pre 1993 share of the market in directly imported used Japanese cars. The loss of opportunity as calculated by DKM is, in present value terms, €131,606,537.

Donal O'Boyle discounted the first year, 1993, and calculated the loss at €128,381,623.

Dr. Bacon referred in evidence to the six errors he had identified in the DKM report. In removing those, he calculated that the plaintiff would have imported an additional 1,193 cars, rather than 93,659 cars, over the relevant period.

It was Mr. Jacobs' contention that the plaintiff could not have achieved the level of sales projected by DKM. He stated in evidence:-

> "Given my experience as a chartered accountant and partner in Grant Thornton, it would be particularly challenging, if not highly unlikely, for a company such as UCII to increase its gross profit by such a magnitude within one year, as contemplated by the claim."

It was difficult for the court to ascertain the number of cars imported by the plaintiff during the period 1990 to 2000. The figures given by Mr. O'Dowling, Mr. Riordan and Mr. O'Boyle do not correspond. Moreover, the inclusion of commercial vehicles by Mr. O'Boyle confuses the issue further. Mr. O'Dowling's figure was 613 imports for 1994, whereas Mr. O'Boyle used a figure of 513.

There was differing evidence submitted by both Mr. Riordan and Mr. O'Dowling in relation to the numbers of vehicles imported by the plaintiff between 1990 and 1994. An explanation for this confusion was given in Donal O'Boyle's evidence where he stated that Mr. Riordan's import numbers were for total unit sales whereas Mr. O'Dowling's were confined to sales upon which VRT was levied. Mr. Riordan accepted in evidence that the discrepancies in the documents meant it would be more difficult to for the court to assess any losses that might have been suffered.

There is no reference made in the witness statement of Mr. O'Dowling, nor the report compiled by DKM, of the number of vehicles imported by the plaintiff in 1995.

Mr. O'Boyle said that in 1994, 19% of the unit sales of the plaintiff did not have VRT applied.

There is no doubt that the evidence of Mr. O'Boyle in relation to this 19% does have a significant effect in relation to the extrapolation of loss up to the present day and will reduce the number of vehicles that form the base for the claim. There was already some divergence between the witnesses for the plaintiff in relation to the number of cars sold.

Mr. Jacobs's evidence was that: "there are more sales in the booklet than in the accounts which are not accounted for by timing".

It is a difficult task to reconcile the evidence in the expert reports and the evidence given by the directors of the plaintiff on the one hand, with the audited accounts of the plaintiff on the other.

There remains lack of clarity on the substance of the claim in relation to the basic figures. The evidence of Mr. O'Dowling and Mr. Riordan is critically at variance and, as such is an insufficient foundation for the detailed economic superstructure that is constructed thereon. The reconciliation made by Mr. O'Boyle is not borne out by Mr. Jacobs's evidence.

Mr. Jacobs's evidence is that there was a significant increase in selling prices and in gross margins in 1993. This is not consistent with the company being under pressure. In addition, the directors' drawings increased to approximately one third of the overheads in that year, which was consistent with good performance.

The issue of rent being paid to the directors is also significant. While no evidence was given as to ownership, the plaintiff did not have the benefit of the lease of the bonded premises.

The plaintiff was left with cars in stock but there was no evidence of what efforts were made to mitigate its loss.

Mr. Riordan's evidence was that he made loans to the plaintiff, though these were not detailed. The plaintiff diversified into the business of container hire.

Significantly, there is no reference in the annual reports of the plaintiff experiencing the difficulties as outlined in these proceedings. The directors' reports are optimistic, despite the evidence given by Mr. Riordan and Mr. O'Dowling that the plaintiff was being unfairly treated by the defendants.

The end of year accounts for 1994 were not submitted to the Companies Registration Office. The returns were made with the accounts for 1996 after a change in auditors. It coincides with the departure of Mr. O'Dowling from the plaintiff and the commencement of his own import company.

The court has already noted the evidence in relation to Mr. O'Dowling leaving the plaintiff in September 1995, and the evidence of the importance of his relationship with Mr. Murakami. Mr. Jacob's evidence was that that relationship was a really important issue for the plaintiff. Mr. Murakami's evidence was that after September 1995, he had no contact with the plaintiff.

The court has difficulty in understanding why, at that stage, Mr. O'Dowling set up Sports Car Centre Limited, which appears to have been in competition with the plaintiff. The plaintiff was deprived of the experience and connections Mr. O'Dowling had, which had undoubtedly contributed to the success of the plaintiff.

In 2003, some eight years after Mr. O'Dowling's departure, it appeared the plaintiff was trading poorly and had increasing liabilities.

Mr. O'Dowling was asked what arrangements were made by him with Mr. Riordan or UCII to cover his share of indebtedness to the plaintiff.

His reply was significant. He said:-

> "Well, I said that I would look after the case that I would work on behalf of the company on the case. I also went into Sports Cars Centre. We had problems in the period 1998/1999. We had continuous interference in the market and we had continuous problems with vehicle registration tax."

Sport Cars Centre Limited also issued proceedings against the Revenue Commissioners and the State in 2000. There had been no reply to particulars and the proceedings are at a standstill.

Mr. O'Dowling's evidence was that Sports Cars Centre Limited was set up in 1995 after he split up with Mr. Riordan and he brought it in a different direction selling vehicles to the UK. He also agreed that he had made profit out of selling those cars in Ireland.

He agreed that Sports Car Centre Limited was a profitable company, with gross profits of £394,613 and an operating profit of £113,000 after providing for depreciation, for year the ending 30th September, 1998.

The court is satisfied that this profitable venture could have been replicated within the plaintiff company to mitigate any losses that the plaintiff suffered.

In the circumstances, it is difficult to understand the plaintiffs claim that VRT was the cause of its losses.

The court is fortified in this regard by the audited accounts of the plaintiff which show fundamental weaknesses in turnover, profitability, reserves and an increase in stocks of vehicles, which were referred to in the replies to particulars of the 20th November 1995. Those replies referred to the basis of the claim for damages against the defendant. 100% of the 134 vehicles concerned were designated as "residue stock". To say that "the minimum (sic) estimated value" of this stock was less than the Revenue value begs the question of the plaintiffs' management and performance.

Moreover, it is difficult to see how these late 1995 figures can become an element in the calculation of damages attributable to the defendants. Yet it is the evidence of a discrepancy of OMSP and market price of the plaintiffs imports that form the basis of the claim.

As already observed there is no indication in any of the final accounts of such a claim or any note that the losses were caused or alleged to have been caused by the wrongful acts or otherwise of the Revenue.

Of further concern is the lack of clarity as to what the margins were in relation to sales to dealers. There was no evidence given on behalf of the dealers. This was significant in relation to the time that VRT was charged. The figure of 30% given in the DKM report seemed to have been an assumption rather than evidence.

The success of increasing competition in the used Japanese cars import trade is a factor that was not adequately considered by the plaintiffs' experts.

The DKM report states that the overall stock of cars in Ireland increased by almost two and a half times between 1989 and 2008 and points out that the plaintiff was a major importer of used Japanese cars, citing their average market share of 14.2% between 1990 and 1992 as evidence. The figures cited in the DKM report also show that the total market share of Japanese used vehicles in the same period was, on average, 38% of the total used vehicle market.

The figures cited by Dr. Bacon in his report show a distinct downturn in the Japanese imported used vehicle market in Ireland in the following years. After reaching a peak of 53.1% in 1998, the Japanese share of the market began to decline incrementally with the most significant drop being 8.7% between the years 2004 and 2005. This annual reduction coincided with the Celtic Tiger boom. Sales of new cars were the more popular choice during that period.

Since 2006, the number of used vehicles sold in Ireland increased, from 50,011 to 55,819 in 2008. What is significant about these figures is that over the same period, the market share of used Japanese imported cars decreased. In 2006 the share was 13.4% but by 2010 this had fallen off to 4.2%.

From 1990 to 1992, the plaintiff maintained a high market share because the total numbers of Japanese imports were relatively low during that period, at 18,763 in total for the three years. The most obvious conclusion is that the market opened up when others began to import used cars because the total number of Japanese vehicles imported was highest from 1996 to 1998. The figures suggest that there was a healthy market for used Japanese cars in the years following the introduction of VRT, which contrasts with the position of the plaintiff who claim that the industry became stunted. The DKM report questioned the accuracy of the import data stating that "there are major deficiencies in the import data, especially after the introduction of the SEM thus, a Japanese car bought in the UK and shipped to Ireland would have been classified as a Japanese import". While Niall Butler had referred to 35,000 used cars being imported from the UK, he made no reference to Japanese used cars.

The data on percentage Japanese imports submitted by DKM shows that despite the plaintiffs' market share percentage of Japanese imports rising between 1990 and 1992, the actual numbers of cars they imported decreased during those years, from 858 in 1990 to 790 in 1992.

The data also shows that despite the increase in the numbers of used Japanese cars being imported into the country between 1996 and 1998, the plaintiffs' imports dropped, from an average of 822 between 1990 and 1992, to 535 between 1996 and 1998. One can conclude that, despite the evidence that the consumer demand for Japanese used cars was rising, the seemingly drastic drop in the market share of the plaintiff from its peak of 19.5% in 1992 to just 2.5% in 1998 may be explained by their inability to maintain market share while competition in the sector was obviously increasing and by the departure of Mr. O'Dowling. VRT applied equally to the plaintiffs' competitors. In 2000, the plaintiffs' market share was 1.95%.

Despite the projections offered in the DKM report, the court is satisfied, on the balance of probabilities and having regard to the actual sales of imported Japanese cars achieved between 1996 and 2010, that it is apparent that the plaintiff could not have maintained a market share of at "least 20%" and, accordingly, could not have sold an additional 93,633 cars from 1993 to 2009.

It is clear that the decline in the plaintiffs share in the Japanese import market preceded the decline of its competitors share by several years. To say that this decline resulted from the introduction of VRT is the fall into the *post hoc ergo propter hoc fallacy*.

The calculation of loss has ignored what appears to have been the abandonment of the plaintiff by Mr. O'Dowling. To attribute the sole cause of his departure in September 1995 to the burden of VRT makes less sense in the light of the plaintiffs' declining market share.

Accordingly, even if the court were wrong in excluding used car imports from outside the Community, it is clear that the legislative provisions, the assumptions made, the actual share in the market and the management ability of the plaintiff could not sustain the increase volume of trade postulated in the DKM Report.

29.8 Summary

1. No intra community trade discrimination proved in respect of over 3,600 cars imported from Japan from 1993 to 2003. The correspondence with the European Commission made it clear that the Treaty provisions related to intra community trade as does the case law. However, DKM relied on EU discrimination policy.

2. The analysis of the VRT estimated as overcharged on the 44 cars imported from Northern Ireland from September 1993 to February 1996, was given as £14,997 or about 40% of the £37,289 paid. This assumes that the overvaluation of OMSP was also about 40% which is inconsistent with DKM's calculation of 30%. The aggregate sales price was given as £142,669.

3. The VAT paid on the 44 cars was £18,771. No figures were given for the landed cost. The overpayment of VRT of £14,997 on the sales price of £142,669 is approximately 26%, rather than the 23% calculated by DKM.

However, as no analysis of the 44 cars was given, the court does not have an evidential basis of determination of loss. It seems to have been an afterthought in the claim.

4. The calculation of loss by DKM and Mr. O'Boyle's was on landed cost.

The legislation provides that VRT be calculated on the retail open market selling price. This is defined by s. 133(3) of the Finance Act 1992, as "the price inclusive of vehicle registration tax, which in the opinion of the Commissioners, a vehicle, including any enhancements or accessories fitted or attached thereto or sold therewith, might reasonably be expected to fetch on a first arm's length sale thereof in the open market in the State by retail. This is subject to subsection (2) which provides for "a price standing declared for the time being to the Commissioners . . . in relation to a new vehicle shall be deemed to be the open market selling price of each new vehicle of that model and specification". (s. 133(2)(b))

5. The Revenue Commissioners are, accordingly, entitled to relate the open market selling price of a used car by reference to the declaration of the manufacturer or distributor as provided for in subsection (2)(a) of that section.

6. The depreciation of the price declared by way of an increasing number of schedules has caused confusion and misunderstanding.

7. The reliance on the annual Car Sales Guide is an appropriate reference for the assessment of current used cars sale prices, even if it reflects main dealers' prices. It is comprehensive and used widely as an indication of used car prices over a wide range of models and ages of cars. Prices in the guide were 2% below the values generated by the Revenue Model.

8. It was always open to the plaintiff not alone to get estimates, but also to appeal VRT assessment. The evidence was that the plaintiff was given estimates which were valid for a reasonable period.

9. The plaintiff did avail of appeals in the early 1990s. No analysis of the result of these appeals was given to the court. The directors' evidence that the outcome of the appeals were unsatisfactory is not supported by the evidence. No satisfactory evidence was given as to why lodging appeals was abandoned.

10. The chargeable basis is clear from the legislation. Mr. O'Dowling and Mr. Riordan's evidence that the plaintiff did not know the chargeable basis on which the rate would be levied is not borne out by the evidence of estimates being given and appeals resolved in the plaintiff's favour.

11. There was evidence to support the assertion that there were constant un-notified increases of valuations of cars. As with much of the directors' evidence, the general complaints were unsupported by evidence.

12. The financial statements of the plaintiff company from 1993 to 2009 do not refer to any issue with regard to VRT nor to the commencement of litigation.

13. The plaintiff lost market share to its competitors including Sports Car Centre Limited which was formed by Mr. O'Dowling when he left the plaintiff in September 1995.

14. No satisfactory explanation was given as to the reason or to the terms of Mr. O'Dowling's departure.

15. The plaintiffs' experts' evidence was predicated on the landing costs of used Japanese imports rather than to the statutory open market selling price.

It was also based on an assumption that the plaintiff would maintain its market share. The evidence is to the contrary. The court is not satisfied that the loss of market share can be attributed to VRT. Competitors, including Sports Car Centre Limited faced the same conditions.

16. The gross margin and net profit projections for the plaintiff from 1993 to 2009 prepared by DKM calculate a total net profit of €2.8 million for 1993 when the plaintiff actually made a loss of £27,043. A projected margin of €5.7 million was given which compared to an actual gross profit of £254,038. Mr. O'Boyle rightly ignored 1993 in his calculations of projected loss.

17. Even if the court were wrong in finding that discrimination in relation to Japanese used car imports does not give the plaintiff a right of action, it does not follow that the plaintiff is entitled to succeed in its claim. The provisions of the legislation regarding OMSP does not relate to landed price. The assumptions regarding market share are not consistent with the evidence. The management ability of the plaintiff together with the departure of Mr. O'Dowling could not sustain the increased value of the trade claimed to have been lost as a result of VRT.

In the circumstances the court reflects the plaintiff's claim.

30. Orders
The plaintiff, in para. 16 of the statement of claim delivered on the 28th July 1995, sought eight reliefs.

All but two of these were directed against the Revenue Commissioners, the second defendants. Against the third and fourth, they asked for declarations that s. 133 of the Finance Act 1992, as amended, was unconstitutional in that it failed to vindicate the property rights of the plaintiff, infringed their right to equality and was an impermissible delegation of a law making power. The court is satisfied, for the reasons given in its decision, that a corporation such as the plaintiff is not entitled to such property rights. There is no evidence that importers of used vehicles from outside the Community are treated unequally. The court has found that there is no impermissible delegation of a law making power as s. 133 of the Finance Act 1992, as amended, clearly grants the power to determine the open market selling price to the Revenue Commissioners. There was no provision for the making of regulations under s. 14(2) with regard to the determination of OMSP.

The second declaration is that s. 133 of the Finance Act 1992, as amended, is contrary to the provisions of European Community law, as particularised. The court is satisfied that the European decisions distinguished between intra and extra Community trade. This is clearly fundamental in the European case law. The plaintiffs have been so notified at the time of their complaint to the Commission in 1994.

Accordingly, the court will not make the declarations sought under those two paragraphs.

Two of the remaining six reliefs against the Revenue Commissioners seek mandatory injunctions.

The first such relief is for a mandatory injunction requiring the Revenue Commissioners to publish to the plaintiffs the values for vehicle registration tax purposes of the full range of new and used motor vehicles and to publish revised values from time to time as they occur.

There is, of course, no requirement under the Finance Act 1992, as amended, to publish these values. Indeed, given the nature of open market selling price it is clear, that prices, of their very nature, fluctuate depending on supply and demand. Indeed, the more successful the plaintiff and other importers were, the greater the supply of used cars in the market which would, other things being equal, have suppressed the open market selling price. This is so whether the market is understood in terms of total stock or additional flows. In any event, the court is satisfied that the Revenue had put resources into the creation of a database from the introduction of VRT, gave estimates on a timely basis, dealt with appeals, provided an online calculator and computerised the values to the public over the period in question. The court acknowledges that the issue of depreciation tables, which appears to be a hangover from the MVED system, which was in place prior to the VRT system, was a source of some confusion, even from the point of view of the Revenue officials themselves. This appeared to have been clear from the evidence of Mr. O'Callaghan regarding the meeting of the 21st June, 2007, whether or not the issue of depreciation was or was not on the agreed agenda.

However, the court does not think it appropriate nor necessary to grant a mandatory injunction as requested in the first relief.

The second such relief also seeks a mandatory injunction directing the return of all excess vehicle registration tax paid by the plaintiffs. The relief would appear to be in addition to the loss of opportunity and seems to be based on assessment of damages, including damages for wrongful interference with constitutional rights and rights in European law.

The court is satisfied, for the reasons already given, that the plaintiff is not entitled to damages for constitutional rights nor, indeed, to relief under European law which does not arise or apply to extra community trade. There remains the claim for damages for conversion, detinue and negligence, which appeared to be alternative to a claim to return of excess vehicle registration tax. The plaintiff did not avail of the appeal process under s. 138 of the Act, save in a few cases and did not quantify its dissatisfaction on the outcome of those appeals.

Even if the court were, as is indeed indicated in the reliefs sought, to treat damages as a separate heading it is difficult to see from the pleadings how the components of the claim for some €130 million could arise.

While there is some indication of the VRT being paid under protest at the time the complaints were made in 1993 and 1994, the court is not satisfied that that applied to all payments of the tax. Moreover it is not at all clear from the evidence whether it was the plaintiff or an authorised dealer within the meaning of s. 136 who registered the vehicle and paid VRT. There was no documentary evidence as to the agreement with dealers. The argument was that the dealers suffered a loss if the estimated VRT was exceeded in what had to be paid by, or on behalf of the owner (as defined in s. 130). However, as already pointed out, there was no evidence from dealers, nor any documentary evidence of any such claims having been made. A mere assertion without quantification falls short of proof of loss.

In the circumstances, the court will not grant a mandatory injunction as requested.

There remain four reliefs are of a declaratory nature against the Revenue Commissioners at (b), (e), (f) and (g). Both (e) relating to the Constitution and (f) relating to European Community law suffered the same infirmity as (c) and (d) already dealt with.

The second relief, (b), seeks a declaration as to the unlawfulness of the assessment of VRT as contrary to s. 133 of the Finance Act 1992, as amended.

The court notes that these plenary proceedings are not proceedings by way of judicial review which, in any event, would require the decision to be, *inter alia*, irrational or *ultra vires*. The court is not satisfied that the opinion was irrational or *ultra vires*. The evidence was that reliance on sources, including the Car Sales Guide provided the open market selling price. Moreover, the availability of an appeals procedure, which was employed by plaintiff, ensured that there was a channel for the plaintiff to challenge the Revenue opinion.

Insofar as the Revenue Commissioners are entitled and have formed an opinion as to the open market selling price which appears reasonable, the court declines to make such a declaration.

Finally, the plaintiffs seek declaration that the assessment was contrary to the principles of legitimate expectation, proportionality, legality, equality and legal certainty. The court has already dealt with these matters and will refuse the reliefs sought under this heading.

In the circumstances, the court declines the reliefs sought.