Neutral Citation: [2015] IEHC 649

THE HIGH COURT

Record Number: 2002 No. 1736P

Between:

Alphonsus Muldoon

Plaintiff

And

The Minister for the Environment and Local Government, Ireland, The Attorney General, and Dublin City Council

Defendants

THE HIGH COURT

Record Number: 2002 No. 2288P

Between:

Thomas Kelly

Plaintiff

And

The Minister for the Environment and Local Government, Ireland, The Attorney General, and Ennis Town Council

Defendants

THE HIGH COURT

Record Number: 2002 No. 14481P

Between:

Vincent Malone

Plaintiff

And

The Minister for the Environment and Local Government, Ireland, The Attorney General, and Dublin City Council

Defendants

Judgment of Mr Justice Michael Peart delivered on the 16th day of October 2015:

General introduction:

1. For decades taxis have been an essential part of the public transport infrastructure in Dublin as well as other cities and large towns throughout the country. They serve the diverse needs of both the indigenous population as well as visitors. Being the capital city, Dublin has always had a greater need than other centres of population for a taxi service at all hours of the day and night, and that need has increased as the city developed in size both in terms of geographical size, economic development, as well as in terms of population and visitor numbers. That need was never adequately met in Dublin during the period 1978 to 2000 which are the years immediately relevant to these proceedings.

2. Efforts to identify the extent of the need, and to meet it adequately were the source of much tension between successive Ministers for the Environment and representatives of what I will loosely refer to as the taxi industry. As the numbers of taxi users steadily grew over the years, so did the need to increase the number of taxi licences so that an adequate service would be available to the general public. However, and perhaps understandably from the point of view of the individual taxi owners, they, through their representatives, resisted any significant increase in the number of taxi licences year on year because of the probable effect on their incomes.

3. On the evidence available, there is no doubt that over the years the taxi industry representatives developed into a very effective and powerful lobby group, and their efforts to persuade the Minister, and in due course in particular Dublin City Council, to keep increases in the issue of new taxi plates to a bare minimum or none at all annually bore fruit in the sense that the number of new licences issued annually was never sufficient to meet the ever-increasing demand for taxis. In fact over an entire decade from 1980 to 1990 no licences whatsoever were issued in Dublin. The empirical and anecdotal evidence was that particularly at night time,

queuing for a taxi was the norm and that waiting times became longer and longer, reaching unacceptable levels for a major capital city. The unmet demand meant of course that for those taxi drivers who were prepared to work longer and longer hours there was good money to be made.

4. How to tackle the problem was never easy for the Minister or the local authorities given the interest of the taxi industry in ensuring that the number of new licences being issued annually did not increase exponentially year on year. Nevertheless something had to be done, and at a political level the Minister could not be seen to do nothing in the face of increasing frustration and complaint on the part of the general public. Efforts were made by the Minister over many years to proceed cautiously and if possible by consensus. But what was possible to achieve by consensus was never a sufficient response to the problem, there being always the need for each side to concede some ground. My view from what I have heard in this case, however, is that the taxi industry certainly up to 2000 always appeared to come out on top in the negotiations, with the Minister never being able to achieve what would in an ideal world have seen the growing problem of unmet demand being resolved without running the risk of some industrial action by the industry which could with little difficulty bring the city to a standstill. Experience had shown that this was always a real possibility, and from a political perspective one that was to be avoided if possible.

5. As I will explain in more detail when dealing with the 1978 Regulations which gave rise to a secondary market in the sale of taxi plates, those consensual efforts themselves contained within them the seeds of destruction which many years later eventually, but not without much exploration of alternatives, saw the introduction by the Minister of S.I. 367 of 2000 ("the 2000 Regulations") which in effect eliminated that secondary market by an immediate deregulation or liberalisation of the taxi market whereby any adult who could pay a €5000 fee for a taxi licence could apply for a licence, and work as a taxi driver. The removal of any restriction on taxi numbers eliminated the very significant capital value which had built up in existing licences with disastrous economic consequences for many owners including the three plaintiffs who are simply representative of the different ways in which many within the industry have been affected by the 2000 Regulations. The different ways in which they have all been affected and the extent of their alleged losses, depending in part upon how, when and for how much they each purchased their licence, is not particularly germane for the moment, as it has been agreed that any questions of quantum will be left over until after the determination of the legal issues now under consideration. But it is worth saying that many of those who purchased their taxi licences in the years immediately preceding the 2000 Regulations, did so for very substantial sums (up to €100,000 in some cases) and having borrowed significant sums in order to do so, or invested their redundancy lump sums, or other savings.

6. The plaintiffs seek a declaration as to the unlawfulness of the 1978 Regulations and the 2000 Regulations under a number of headings, and a claim for damages for breach of statutory duty, breach of constitutional rights (i.e. breach of property rights, right to earn a livelihood, and right to be treated equally before the law), and, in the cases of Mr Muldoon and Mr Kelly, breaches of competition law. Claims for damages under other headings are included in the pleadings, such as negligence, negligent misrepresentation, unjust enrichment, breach of legitimate expectation, misfeasance in public office; but Counsel made it clear that the latter, while not abandoned, would rest on the written submissions provided to the Court, and would not be further expanded upon in oral submissions.

Brief regulatory history:

7. The starting point for any consideration of the issues raised in these proceedings is section 82 of the Road Traffic Act, 1961 which confers upon the Minister the power to make Regulations in relation to public service vehicles. That power is conferred in the following terms:

> *"82. – (1) The Minister may make regulations in relation to the control and operation of public service vehicles.*
>
> *(2) Regulations under this section may, in particular and without prejudice to the generality of subsection (1) of this section, make provision in relation to all or any of the following matters:*
>
> *(a) the licensing of public service vehicles;*
>
> *(b) the licensing of drivers and conductors of public service vehicle;*
>
> *(c) the payment of specified fees in relation to licences, badges or plates granted under the regulations and the disposition of such fine;*
>
> *(d) the conduct and duties of drivers and conductors of public service vehicles and of their employers;*
>
> *(e) the conduct and duties of passengers and intending passengers in public service vehicles;*
>
> *(f) the conditions (including the use of taximeters) subject to which vehicles may be operated as public service vehicles;*
>
> *(g) the keeping of specified records and the issue of specified certificates and the specifying of the persons by whom such certificates are to be issued;*
>
> *(h) the authorising of the fixing of maximum fares for street service vehicles;*
>
> *(i) matters related to the transition from the repealed Act to the regulations under this section." [emphasis added]*

8. Section 82 of the Act was commenced on the 27th October 1963 by S.I. No. 188 of 1963, being the same day on which the Minister brought into operation the Road Traffic (Public Service Vehicles) Regulations, 1963 – S.I. No. 191 of 1963 ("the 1963 Regulations).

9. Referring back to the wording of section 82 (1) of the Act, and to the lettered paragraphs of subsection (2) thereof, it is notable that the 1963 Regulations contained six Parts, namely Part I – General, Part II – Operation of Public Service Vehicles, Part III – Licensing of Public Service Vehicles, Part IV – Licensing of Drivers of Public Hire Vehicles, Part V – Duties of Drivers, Conductors …, and finally Part VI – Miscellaneous and Transitional.

10. It will immediately be seen that while the "operation" of public service vehicles is specifically provided for in Part II of the Regulations as are other matters specifically within the lettered paragraphs of subsection (2) of section 82 of the Act in Parts III - VI, there is no Part within the 1963 Regulations that deals with the separate concept of *"control … of public service vehicles"*. Clearly they are to be considered as being separate and distinct concepts. The question whether "control" was sufficient to confer a power to restrict the number of licences to be granted assumes great significance in this case, given the regulatory history as it evolved,

and this gave rise to great controversy – even within the present proceedings, or at least as originally pleaded – something to which I shall return in due course. The more recent issue arising in these proceedings, and which was the subject of an application by the plaintiffs to amend their pleadings following the opening of the case by counsel, is whether the Minister's power to make regulations under section 82 of the Act includes the power to delegate to local authorities the task of determining the number of new licences that ought to be granted in any particular year, as he did by the 1978 Regulations.

11. The evidence suggests that by 1970 the number of licensed taxis had significantly increased in the Dublin taximeter area. There was a 116% increase in taxi numbers in the period from 1958 to 1968. In the period from 1968 to1976 the number of taxi licences increased from 1208 to 1866. These increases were of concern to the taxi owners who saw their income levels threatened as a greater number of taxis serviced a market that was not increasing at the same rate. Pressure began to mount at a political level to introduce some form of legislation to restrict taxi numbers. The Court has been referred to a report from a Fact-Finding Committee which was set up by the Minister in late 1968 in response to pressure from the Dublin Taxi Federation, and this committee met for the first time in May 1969 and reported to the Minister in June 1970. The report deals with numerous aspects of the operation of the taxi and hackney industry, particularly in Dublin and Cork, and the committee received a large number of submissions from interested parties.

12. Given how in 1978 *The State (Kelly) v. Minister for the Environment* was decided by Costello J. (as noted in his written report of his decision signed by him on the 26th July 1978 in which he concluded that the word "control" contained in section 82 (1) of the Act was *"wide enough to include the power to make regulations which would limit the number of taxis"* (later upheld in the Supreme Court), it is curious at this remove to read so many inter-departmental memos within the papers submitted to this Court in which the constant refrain from officials within the Department is that there was no specific power within section 82 to limit numbers, and that if the Minister was to limit numbers some form of amending legislation would be required.

13. This June 1970 Report itself concluded on page 17, inter alia, that *"the law in this country has no specific provision to enable the imposition of a numerical limitation of taxis",* and it may be noted in passing that the report goes on immediately thereafter to state (and this is interesting in the context of the new delegation issue just referred to):

> *"… The Minister's powers to make regulations under section 82 are general enough to enable him to appoint any body or person as the licensing authority for public service vehicles; under the existing regulations the Commissioner of the Garda Siochana has been constituted the licensing authority."*

14. Throughout the 1970s and up to 1978 various new regulations were introduced aimed at addressing the concerns of taxi owners, but stopping short of restricting the number of licences that could be issued. The detail of these regulations is unnecessary to set out. Curiously, the view within the Irish Taxi Federation, certainly in 1977, was (and they had obtained a legal opinion to this effect), that section 82 did not preclude the Minister from making Regulations which might limit the number of new licences that could be granted in any one year – something that they were keen to see done at that stage. But the Department took a different view.

15. The Irish Taxi Federation maintained its pressure on the Minister to do something about the ever-increasing numbers of taxis coming onto the streets, and this is evident in many memos. By way of example, it seems clear that the ITF sent a submission to the Minister on the 31st March 1976 which addressed concerns under a number of different headings. An internal departmental memo, commenting upon the submission, stated the following under the heading "Limitation of Taxi Licences":

> *"The Federation submission seeks limitation of licences – paragraphs 1.1 and 3.5.*
>
> *Comment*
>
> *Taxi men have been seeking limitation since before the enactment of the 1961 Road Traffic Act, the purpose being to keep down competition. This has not been agreed because*
>
> *(a) there is no power in the Act to enable the Minister to do this.*
>
> *(b) it is contrary to public policy to limit competition in this way.*
>
> *(c) Even if limitation legislation were introduced it would be extremely difficult, if not impossible, to conceive a workable scheme to put it into effect, e.g. difficult questions as to the number of new licences to be issued and to whom they should be issued would arise.*
>
> *(d) a monopoly situation would arise which (illegible) … lead to difficulty in fixing fares.*
>
> *It is considered that these arguments are still valid.*
>
> *Paragraph 10 of the Memo to Government on the Organisation of the Taxi Service points out that if a Taxi Board were established one of the primary functions would be to carry out the necessary investigations which would form a basis for legislation."*

16. Even though the question of limiting numbers appeared to the Department to present difficulties, including what it considered to be the absence of a power to do so, there were nonetheless certain developments by way of regulation which have a bearing on events relevant to these proceedings.

17. One such development was the introduction in April 1977 of the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1977 (S.I. No. 111/1977) which, inter alia, and for the first time, made provision for an inter vivos transfer of ownership of a licensed vehicle (be it a taxi or a hackney vehicle) whereby the new owner of the vehicle could make application for the continuance in force of the taxi licence for that vehicle, subject to the approval of the person by the Garda Commissioner as to suitability.

18. While perhaps with the benefit of hindsight one can view this development as the genesis of a secondary market in the trade of taxi licences, and see it as transforming the licence from a mere permit or licence to drive a taxi into an asset of some value, the proposal appears not to have met with approval from the ITF in 1976, or indeed from the author of a departmental memo dated 8th October 1976 dealing with responses which had been received to certain proposals at the time to standardise conditions for small public service vehicles. In respect of the proposal to permit the transfer of licence the author stated as follows:

> *(c) "This proposal has been rejected by the taxi organisations and accepted by the Hackney organisations. The taxi*

organisation's rejection is presumably based on the fact that our proposal will mean that no licence will ever expire, it will be saleable (with the vehicle) and consequently more vehicles will stay in the business.

My own view on this is that it should not go into the Regulations, not for the taximen's reasons, but because a Small Public Service Vehicle Licence is given by the State and should not therefore be saleable. In any event licensing will be on a yearly basis and the need for such a provision is debatable; it may seldom be used. Also there is the possibility that people who have no intention of ever running a taxi may take out a licence purely to increase the value of the car and this would be undesirable. All in all, I see no value in this proposal; on principle I am not for it and as the taxi organisations have gone against it I do not think we should proceed with it.

I recommend that we do not proceed with this proposal." [emphasis added]

19. One can see a different view expressed in another departmental memo signed on 1st November 1976 where on page 2 thereof the following appears:

"It is suggested that the following recommendations be considered as the best possible solution to a complex problem.

……

(iv) transfer or sale of licence be permitted subject to usual conditions as regards suitability of new applicant. This concession may be beneficial especially to the taxi operator as the present Regulations permit transfer on death of holder to personal representative only."

20. As stated in para. 17 above, the proposal for the transfer of licences was adopted and introduced in S.I. 111 of 1977.

21. Another development was the introduction by a new Minister (following the 1977 General Election) of the Road Traffic (Public Service Vehicles) (Amendment) (No.3) Regulations, 1977 (S.I. No. 268 of 1977) apparently in fulfilment of a commitment given by Fianna Fáil during the election campaign that if elected a 12 month moratorium would be placed on the issuing of any new taxi licences *"in order to allow for a thorough review of the licence situation during that time".* These regulations suspended the September 1977 licensing window, thereby preventing anybody from making an application for a new licence until the window re-opened. It was the challenge to these Regulations on vires grounds by persons who wished to apply for licences and could not do so, that led to the decision by Costello J. in *State (Kelly) v. Minister for the Environment* holding that the word "control" within section 82 (1) of the Act was wide enough to embrace numerical control, and the challenge therefore failed.

22. As mentioned already, the question of limiting or controlling the number of licences that could be issued had been under consideration for some years, and continued to be the subject of discussion during 1977. The Irish Taxi Federation was clearly concerned that the market was becoming saturated with a consequential negative effect on its members' income potential, and wanted the Minister to introduce some method of restricting the number of licences. Memos within the department show that this was one of several aspects of the taxi industry under consideration within the Department. By way of example only, one such memo is dated 1st July 1977. It discusses how such limitations might be brought about, and ultimately the recommendation is that the local authorities for the relevant area should have the function of deciding on the number of licences for the area, rather than that it be determined by a new body such as the then-contemplated Taxi Board. It was felt that the latter would be open to the criticism that it was Dublin-based, and therefore not properly in a position to determine numbers required in other areas.

23. The regime for the issuing of taxi licences had been established under the Road Traffic (Public service Vehicles) Regulations, 1963, and operated very much on the basis that the laws of supply and demand would dictate the number of taxis that should be available to provide the public with a proper service, and licences would issue subject only to the applicant being considered to be a suitable person to hold the licence. In 1970, in response to overtures by the taxi industry, regulations were introduced whereby there were just four 14 day windows in any year during which applicants for new licences could make such application. Again in 1973, in an effort to further reduce the possibility for licence applications, and in response to representations from the taxi representatives, this number of 'windows' was reduced to one, namely the first 14 days of September in any year. These measures had some effect in limiting the numbers of new applicants but insufficient to meet the ambitions of the taxi industry, at least according to a departmental memo copied to, inter alios, the Minister in mid-1977. This pressure to reduce numbers led, as explained in para. 21 above, to a moratorium being imposed on new applications for one year, and this as we have seen, led to protests from persons who wanted to apply for a taxi licence, and in due course to challenges being brought by some, and to the decision of Costello J. upholding the power of the Minister to 'control' numbers by the providing for this moratorium.

24. It will be recalled that previously there had been a frequently expressed and held view within the department that section 82 of the Act did not give the Minister the power to impose numerical restrictions on the number of licences to be issued. However, following quickly upon the decision of Costello J. in *State (Kelly) v. Minister for the Environment the Road Traffic* (Public Service Vehicles) (Licensing) Regulations, 1978 (S.I. No. 292/1978) ("the 1978 Regulations") were introduced. These regulations, inter alia, delegated to local authorities the power to determine the number of new licences to be issued in any given year by the Commissioner of An Garda Siochana. These Regulations are at the very heart of the present proceedings, because the evidence is that from this time the representatives of the taxi industry were very effective in lobbying local authority representatives who, except in August 1979 when 150 new licences were granted, on an annual basis and over an entire decade voted for no increase in licence numbers. This pattern of voting was in the teeth of a clear and substantial unmet public demand for taxis on the streets. The secondary market in the sale of taxi plates flourished during these years to the point where the taxi plate became a very valuable asset indeed, which could be sold at a high price, or indeed rented out in order to provide a retirement income for its owner. The fact that no new licences were being issued meant that if a person wished to become a taxi owner, the only realistic route was to buy an existing licence. The fact that a large number of people wished to do this meant that the cost of buying a licence on the secondary market grew exponentially over the years until "the crash" occurred in November 2000 following the liberalisation of the taxi industry by the introduction of S.I. 367 of 2000 which saw the capital value of existing licences disappear overnight.

25. In September 1978, just before the 1978 Regulations were introduced, the Minister had established the Taxi Services Council. This was one of the proposals contained in a review by the Minister into the Taxi Industry which was completed in July 2008. A departmental memo dated 26th July 1978 refers to an election commitment given by the Minister to the ITF during the 1977 election campaign that *"no new taxi licences would be issued for the period of one year during which the licensing situation would be reviewed".* This memo goes on to state that the Minister had regard to a number of earlier reports, the taxi industry's submissions, and *"the effects of the several amendments made to the licensing code in recent years, which were designed primarily to restrict and regulate the flow of entry to the business".* The memo goes on to refer to the review having established that the principal issues of concern to the taxi interests which remained outstanding were at that time:

"(a) control of the numbers of licences current at any given time, and

(b) the absence of a central and continuous forum in which all aspects of taxi operations can be discussed and appropriate action taken or recommendations made to the responsible authorities towards resolving difficulties and differences of approach to licensing conditions, fares structures, the availability of services at particular locations and for particular occasions, the monitoring of complaints etc."

26. In relation to (b) above the memo refers to the possible establishment of a Taxi Board which had been previously recommended by interested parties as well as in the then-recent Hyland Report which was a report prepared for the National Prices Commission following a study of the taxi and hackney services here. As mentioned in paragraph 25 the Minister established the Taxi Services Council in September 1978. It met for the first time on the 12th September 1978, and in theory at least provided a structured forum in which all relevant stakeholders could air their views and discuss issues affecting the taxi industry generally.

27. In relation to (a) above there had been ongoing communication between the ITF and the Minister during the summer of 1978 about taking steps to restrict numbers. The ITF wanted the Minister to extend for another year the moratorium which had withstood challenge in the *Kelly* case. The Minister acknowledged that he was committed to doing what he could to limit the number of new licences, as pressed for by the ITF, but considered that as he was still awaiting the result of an appeal to the Supreme Court against the decision of Costello J. in the Kelly case it would not be appropriate to renew the moratorium. This was communicated in a letter sometime in August 1978 (no precise date on letter). However by the 25th August 1978, the Minister appears to have learnt from media reports that the ITF intended organising a withdrawal of taxi services in response to what it was alleging was a breach by the Minister of his election commitment to introduce measures to curb numbers. In fact some form of protest took place at Butt Bridge at this time. There is reference to it in a departmental memo dated 5th February 1979. Clearly pressure was mounting on the Minister to be seen to do something. Whether in response to this pressure or not, and the threat of a withdrawal of taxi services, the Minister by S.I. 247 of 1978, extended the moratorium for all areas to the 2nd – 14th October 1978.

28. Following the first meeting of the Taxi Services Council on 18th September 1978, there was a further extension of the moratorium into November 1978. The second meeting of the Taxi Services Council took place on 11th October 1978 at which a previously circulated draft of the proposed 1978 Regulations was circulated and discussed, and even though there was no decision yet on the Supreme Court appeal in the Kelly case, the 1978 Regulations were introduced whereby the power to determine number of new licences to be granted in certain areas, including Dublin and Ennis, was delegated to local authorities. The need to bring in these Regulations even ahead of the judgment of the Supreme Court was explained by John Weafer, an official in the Department at that time, and who gave evidence before me, as being to ensure that when the moratorium ceased at the end of November 1978 there would be a new regulation in place in relation to the issuing of new licences at the commencement of the next licensing period. The appeal in *Kelly* was dismissed by the Supreme Court on 1st December 1978.

29. A Press Release issued by the Department on the 27th October 1978 stated, inter alia, that the new regulations included *"specific amendments to the current system of control of licensing of public hire vehicles",* and that the regulations *"were agreed with the Taxi Services Council which was inaugurated by the Minister in September 1978".*

30. As can be seen from an appendix attached to a Review of the Taxi Services Council carried out within the Department and completed sometime in April 1980 it was not long before the ITF became unhappy with the new arrangements under the 1978 Regulations whereby the power to determine the number of new licences was vested in the local authorities. The appendix to this review document sets out in respect of each meeting of the Taxi Services Council the matters raised for discussion, comments made, by whom, and any decisions taken and action taken. The Council met on eleven occasions between September 1978 and March 1980. The 8th such meeting took place in July 1979 and the appendix notes that even at that stage the ITF raised a matter described in the appendix as "Determination of numbers of new licences in 1979/1980 grant period to be vested in Council [i.e. the Taxi Services Council] rather that Local Authorities". After discussion, a decision was made to recommend to the Minister that the existing arrangements should remain in place pending an examination of what is described as "UK report". It is noted also that the question of wider powers for the Taxi Services Council was raised subsequently by the ITF. Indeed, the appendix shows that at the very next meeting held on the 16th October 1979 a matter was raised by the ITF under the heading *"Power of determining numbers to be given to Council (i.e. Taxi Services Council] instead of local authorities"*, and that ITF stated that the local authorities were not competent to discharge this function. Again the decision of the meeting is recorded as having been that the matter would be considered *"in conjunction with proposals arising out of the UK Report"*. The matter was raised again at the next meeting in October 1979 which was after the UK Report had been considered. The ITF appear to have put forward a proposal that as part of a points system any applications for new licences should be restricted to existing taxi drivers. However it is noted under 'action taken' that *"[i]dea of points system examined in detail in Dept. A possible framework drafted but not found acceptable. Council advised at 11th meeting that Minister did not propose to change system at present but further examination by Council not precluded".*

31. Even by February 1979, just a few months after the draft 1978 Regulations had been signed off by the Taxi Services Council and introduced by the Minister under some pressure by the industry to do something to curb numbers, the industry was still not happy about the regime for issuing new licences. At least, that seems to have been the view within the Department judging from a memo dated 5th February 1979. This memo traces the regulatory history culminating in the 1978 Regulations, and concludes as follows:

"From the foregoing it is clear that a number of measures have been taken to accommodate the wishes of the taxi operators. Many of these measures were aimed at making it difficult and unattractive for part-time or prospective part-time operators to enter into or to remain in the business.

Some of the measures were also aimed at minimising the number of people entering the business. It was hoped that the current Regulations would go along [sic] way towards satisfying the various viewpoints but from recent newspaper reports (attached) it appears that neither those in the business or those who wish to become operators are satisfied with the present situation."

32. The ongoing discontent within the industry is evident also from a departmental memo signed by Paraic Sirr dated 16th March 1979 which noted that there had been a 24 hour work stoppage by taxi drivers in Dublin that day (i.e. the day before St. Patrick's Day, and therefore one on which it can be assumed that considerable inconvenience would be caused not only to the citizenry of Dublin but to visitors to the city also). Within that memo one can see some scepticism on the part of the author at least about the bona fides of the ITF representatives in their participation on the Taxi Services Council upon whose recommendation the Minister had brought in the 1978 Regulations. He goes on to state:

"… it would now appear from their statements and withdrawal of service for 24 hours from 6am today that they had no intention of accepting anything other than a decision not to grant licences. In doing as they have done it could be

argued that [the Taxi Services] Council has been misled and indeed that recommendations which were quite validly thought to be acceptable to the Taxi Federation were made to the Minister. The Minister in correspondence with various bodies has indicated that he does not wish to reopen the basis on which the Regulations were made as they have been agreed with the Taxi Services Council which is representative of the various interests. Similar arguments/reasoning have been used in replies to representations etc. Such reliance on agreement with the Council will appear unjustified in the light of the Federation's action and the threat of traffic disruption at a later stage."

33. It is clear from the memos created within the Department that its view was that the introduction of the 1978 Regulations was not the long-term solution to the problems perceived to exist in the taxi industry, particularly in the light of continued discontent of the ITF which by then claimed to represent the majority of taxi licence holders, but served only to take the heat out of the immediate situation. The ITF seems to have been successful in persuading local authorities that very few, if any, new licences should be granted. Indeed, this appears to have led disappointed applicants to seek redress in the courts and with some success. Discontent seems to have been rife on all sides. Mr Sirr was of the view that a further comprehensive review of the taxi industry should be undertaken over a four month period in the second half of 1979 in order to find a medium to long-term solution. He recommended that a sub-committee of the Taxi Services Council should be established to conduct such a review, and that the creation of such a sub-committee would assist in taking the heat out of the demands for urgent action, and to reduce the pressure being felt by both the Minister and the department.

34. As already noted above, while 1979 saw the Traffic Sub-Committee of Dublin Corporation recommend the granting of 150 new taxi licences for the period ending in August 1979 (and that number was issued) the following decade saw no increases being recommended in Dublin. At the end of 1989 however a recommendation for an additional 100 licences was made by the sub-committee. However, this recommendation was not adopted by the council members at its meeting in January 1980 and instead a motion was passed that *"the decision of the sub-committee to grant additional licences be deferred pending receipt of deputations".* Since no licences were granted for that decade, the value of existing licences had grown exponentially as those who wanted to enter the market could do so only by purchasing an existing licence. It will be recalled that Regulations passed in 1977 had for the first time permitted the owner of a taxi plate to transfer it to another person, subject, inter alia, to that other person being considered suitable by the Garda Commissioner. There is evidence that during the 1980s prices paid for a taxi plate rose from IR£2000 to IR£38,000. The pattern of no new licences being approved and the rise in prices being paid for licences on the secondary market continued into the 1990s. All the while demand for taxis was growing as the population in Dublin grew, as well as tourism and demand generally. The perennial problem of taxi queuing saw no signs of abating – in fact the problem was worsening all the time, particularly at peak times. This demand was not only enabling taxi owners to sell their licence for ever-larger sums, but it was enabling them instead to employ 'cosy' drivers by in effect renting out the taxi to these 'cosies' at times when they were not themselves using the taxi. This enabled a greater income to be derived from the taxi vehicle.

35. These so-called 'cosy' drivers were people who, if licences were being issued, would probably have applied for one. However for a decade none were issued, and becoming a 'cosy' was the only option apart from purchasing a licence on the secondary market at a very high cost.

36. A feature of that secondary market, and one which affected some very seriously after 2000, was that banks did not accept the taxi plate as good security for a loan. This saw some spending their redundancy money on the purchase of a licence, or their savings if they had any. Others borrowed large sums from a bank on the security of their homes. None appears to have considered that the regulatory regime might one day change in a way that would undermine the value of the taxi plate, and effectively destroy the secondary market. Many have been left with large loans outstanding from the purchase of an asset which is now worth no more than the modest cost of a new licence after 2000. Obviously, the owner of the licence could still ply his trade and earn an income after 2000 but with the overnight removal of the power to impose numerical restrictions, there was an exponential increase in the numbers of taxis on the road with a consequential reduction in income, unless greater hours were to be worked, and the capital value of the licence plate was wiped out. However, I have jumped ahead, and must address, albeit briefly, the way things evolved and developed during the 1990s, as the problems of demand outstripping supply continued to cause great concern both at departmental and ministerial level and for the all-important consumer.

37. Concerns about this ongoing situation increased at ministerial level. There is correspondence from the then Minister for Finance (Mr Albert Reynolds), the then Minister for Industry and Commerce (Mr Desmond O'Malley) and the then Minister for the Environment (Mr P. Flynn) which clearly indicates their concerns in 1991. Despite these high-level concerns, the elected council members of Dublin Corporation's Traffic Sub-Committee, apparently after a lengthy discussion at its meeting on the 18th February 1991, decided to defeat a motion that "this sub-committee recommends in principle an increase in taxi plates".

38. The Minister for Environment established an Inter-Departmental Committee in May 1991 to examine the many and chronic problems that dogged the taxi/hackney industry. These included the very high prices being paid on the secondary market for taxi licences, the lack of sufficient supply of taxis to meet the increased demand (particularly in Dublin), whether there should be controls placed on the numbers of licences to be issued, the relative roles of the taxi and hackney services and how they interact with each other, fare controls and so on.

39. The Committee issued an interim report in September 1991 containing 12 interim recommendations which it considered the Minister could introduce in the short-term pending completion of the final report. These included an extension of the Dublin taximeter area from a ten to a fifteen mile radius, the immediate issue of 100 new licences to operate in that extended area with the power to determine numbers being temporarily removed from Dublin Corporation and given to the Minister, an embargo on the transfer of a new licence for five years from acquisition, a new fee structure whereby a fee of IR£3000 would be payable on a new licence or a transfer of an existing licence, the introduction of a points system for determining to whom new licences be issued, and a moratorium on the issue of new hackney and taxi licences until the committee issued its final report. That final report was given to Government in May 1992.

40. In relation to the recommendation in the Interim report that the Minister should take back control over numbers on a temporary basis pending the final report, the Committee stated:

"While the local authorities concerned have regularly reviewed the adequacy of the number of licences in their areas additional licences have not been issued. (In 1979, the Cork Taxi Association obtained a temporary High Court injunction preventing Cork Corporation from putting into effect the terms of a determination to increase the taxi fleet by 50)."

41. When making its recommendation that holders of new licences should not be permitted to sell them for a period of 5 years it stated, inter alia:

"Apart from the question of taxi numbers, the most controversial concept applying to the taxi service is that of the transferability of taxi licences. While the Road Traffic (Public Service Vehicles) Regulations do not provide specifically for the transfer of licences, neither do the Regulations prohibit such transfers.

Because of decisions taken by local authorities on the issue of new taxi licences, the taxi industry has become an effective closed shop. The only method of entry is to obtain a licence by way of transfer. As a result, transfer fees have in recent years become the norm in all taximeter (and "public hire") areas. In Dublin, press reports claim that such transfers have realised up to £50,000

The choices for addressing this issue include:

• Making all taxi licences non-transferable,

• Making new taxi licences non-transferable, or

• Leaving the present situation in place for both existing and any new licences.

While it can be argued that it is fundamentally wrong for the holder of a licence, issued originally by a State authority for some of £27, to transfer that licence for sums of £30,000 - £50,000, the reality is that the "transfer market" has resulted in a significant number of licences changing hands over the last 10 years or so. Many of the existing holders of licences have paid significant sums for their licences under a system which was allowed develop under the Public Service Vehicles Regulations. The fact that the purchaser could recoup the outlay by subsequent resale on leaving the industry was obviously a factor taken into consideration by individuals "buying into" the industry.

A prohibition on the transfer of existing licences would immediately eliminate the monetary value of these licences. To do so at this late stage, having allowed the system to develop, would be very difficult to justify. In any event, the placing of a statutory ban on transferability would be readily open to abuse (e.g. companies holding licences could circumvent the system by changing ownership of the company rather than by transferring the licence to a new name).

It should also be noted that transferable licenses are not unique to Ireland. In most UK cities, taxi licences are transferred in like manner to their Irish counterparts.

The committee, therefore, recommends that the principle which currently applies to licence transferability should be retained for existing licences. However, it is also suggested that the State should, in a specified fashion, place a clear limitation on, and benefit from, this licensed trade…

In relation to new licences, the committee considers that there should be no question of recipients being put in a position to realise an immediate financial gain. Recipients of new licences should be prepared to commit themselves to provide the service for which they are being licensed. Pending its final recommendations the committee considers that a restriction should be placed on new licences to be issued."

Final Inter-Departmental Report – May 1992:

42. A feature of the wider taxi industry was that because of the increasing size of the unmet public demand for taxi services, particularly in Dublin, there was a significant growth in the number of private hire vehicle drivers (hackneys), who were essentially competing for the taxi market though under different rules. For example there were no controls over fares that could be charged by hackneys, there was no geographical control – in other words a hackney in, say, Carlow, could freely provide a service within Dublin, and were not obliged to use meters. In 1983 regulations were introduced which prohibited the use of in-car radio/telephones for the purpose of initiating a hire. But this was seen in the Report as being something that needed to be revisited, especially with the growing use of mobile phone technology which was considered to render meaningless a ban on the installation of telephones in hackney vehicles, and a ban on their use unenforceable.

43. The recommendation in relation to hackneys was as follows:

> "The committee believes that a more positive definition of the role of private hire operators in taximeter areas, accompanied by a clear prohibition and controls against operators providing immediate hire taxi services, represents a better approach. Accordingly it is recommended that private hire operators should be allowed to provide a full service based on the use of radios/telephones to facilitate hires but that they should not be allowed to use radios/telephones to initiate a hire i.e. by direct contact between the intending passenger and the vehicle – this is immediate hire taxi work. All private hire bookings should be initiated through a base with the details of the contract, including the price, agreed in advance of the hire."

44. As to any restriction on the numbers of hackney licences, the Report at paragraph 5.4 states as follows:

> *"As private hire vehicles are prohibited from competing for on-street immediate hire work they must seek out and develop their own markets. Normal market forces can, therefore, be relied upon to dictate the level of operations in each area, and entry can continue to be deregulated. It is recommended that the temporary moratorium which was introduced in October 1991 on the issue of new licences, so as to stabilise the market pending the completion of the review, should now be removed to again allow unrestricted entry to this sector of the market".*

45. This recommendation led to the introduction by the Minister of S.I. No. 172 of 1992 which lifted the moratorium on the issuing of taxi and hackney licences (which had been imposed by S.I. 272 of 1991), and in addition, provided for the grant of 50 wheelchair accessible taxi licences in Dublin. The introduction of these new regulations led to a challenge by way of Judicial Review in Hempenstall v. Minister for the Environment to which I will return. These proceedings were an attempt by a number of taxi owners to quash the lifting of the moratorium in respect of the granting of new hackney licences by S.I. 172 of 1992. This challenge was unsuccessful, but I shall return to the decision in more detail at a later stage.

46. In relation to control of licensed taxis the report said a lot. Having traced the background to the 1978 Regulations, it went on to note the failure to increase licences numbers in line with demand, and to the resulting increase in the number of hackneys, and the high value of existing taxi licences on the secondary market. At para. 5.19 the Report states: *"These issues require that the concept*

of maintaining numerical controls be re-assessed".

47. The pros and cons of complete deregulation were considered in the Report, including by reference to the UK experience. In that regard it notes that in three cities studied numerical controls were retained, and a fourth in which controls were totally removed. In the latter case, it was noted, the number of licences granted had risen by 300% with the effect that, while the value of the licence on the transfer market was eliminated, and the number of hackneys was reduced (though it appears that hackney drivers then applied for and were granted taxi licences), the quality of vehicles seriously deteriorated, taxi ranks became overcrowded, and the police had problems enforcing standards. Controls had then been reintroduced as well as a moratorium on the issue of new licences.

48. Having considered the experience abroad, the Report concluded on this aspect of the industry as follows:

> *"In theory, an approach based on free entry to the taxi market is attractive. Most advocates of the deregulated taxi market suggest that free entry with price competition, subject to strict quality control, is the most efficient strategy for regulating the trade. There is, however, no firm evidence to confirm the deregulation of taxi market actually achieves the desired aims. The experience in Ireland before 1978 and more recently in a number of UK cities would suggest that, while open entry solves immediate problems of supply, it can result in a poor quality unstable market. In any event, once taxi fares are controlled, and given the nature of the service this is considered essential, the normal concept of a free market is no longer applicable. For these reasons the free entry approach is not seen as a viable option at this time.*
>
> *It is considered that any new approach must retain the concept of controls on taxi numbers – the reasons why such controls were introduced in 1978 are still valid. It was the rigid application of those controls and a number of areas, i.e. licence numbers were not increased in line with demand, which was the primary cause of the current difficulties. Rather than recommend deregulation the committee believes that a policy of gradual liberalisation is a more appropriate strategy. The proper application of such a policy resulting in the regular issue of new licences in line with demand would confer the same benefits as open entry… without introducing the negative aspect. While, in theory, it would not eliminate the market for transfer of licences, in practice a more liberal policy in the issue of new taxi licences in line with demand would substantially reduce the value of such licences.*
>
> *The committee recommends that a more liberal approach should now be adopted to the issue of licences; that the level of service being provided by taxes in individual areas should be subject to set periodic reviews; that these reviews should include the carrying out of regular independent surveys in each taximeter area to assess if demand for taxi services is being adequately met by the numbers licensed; and that licence numbers be increased where there is an identified unmet demand. If the recommended approach is implemented, it is considered imperative that the manner in which it operates should be carefully monitored and if desired results do not materialise further corrective action should be taken."*

49. As mentioned, the Minister introduced S.I. 172 of 1992 on the 1st July 1992 which lifted the moratorium on the issue of new taxi licences and new hackney licences which had been imposed on a temporary basis pending the final Report of the Inter-Departmental Committee, and permitted the granting of 50 new wheelchair- accessible taxi licences. Within days of this, six taxi licence holders who had purchased their licences for large sums of money on the secondary market commenced a challenge to these new Regulations, and on the 13th July 1992 obtained leave to challenge same by way of judicial review and an interim injunction restraining the issue of any new hackney licences pending a full hearing of the challenge to the Regulations. That interim injunction was set aside by further order on the 31st July 1992, and a full hearing was set for 21st October 1992 before Costello J.

50. Taxi protests followed in August 1992. One can certainly see a sense of frustration (to put it at its mildest) at ministerial level in the face of resistance by the ITF to the efforts being made by the Minister (as he saw it at least) to deal with the problems in the taxi industry following the issue of the Inter-Departmental Report. This is evident, for example, in a draft statement by the Government Press Office dated 28th August 1992 which has been included in the materials before the Court. I will not set forth the entire draft statement, but a couple of paragraphs serve to give a flavour of the Ministerial reaction to the protests which took place:

> *"…… I find it quite unacceptable that a privileged group of taxi operators, operating under the protection of a regulated taxi system where numbers are limited with taxi licences reselling for vast sums, should with total disregard for the effects on the economy, the business community and the citizens of Dublin, generally launch a further campaign designed to cause disruption.*
>
> *In addition its timing was aimed to create the greatest disruption to tourists at the peak of the tourist season. I ask myself if these people operate in the real world more specially when this continuous action takes place at a time when a major review of the laws in relation to the operation of taxis and hackneys is at such an advanced stage and further following on the approval by me of a fare increase for taxis ……*
>
> *The protests and other actions which have been instigated by taxi operators are they a response to the publication on the 1 July 1992 of an inter-departmental report on the future operation of taxis and hackneys. The Minister indicated that he had decided to give the various interests the opportunity of putting forward their views on the report before formulating proposals for any changes in the law. Only the previous day he had extended the period up to which observations and submissions on the review can be submitted from 28th of August 30 September ……*
>
> *I am committed to the making of necessary amendments to the law on the operation of taxis and hackneys. Such amendments must have regard to the needs and interests of both taxi and hackney operators but, even more importantly must also have full regard to the interests and needs of the general public they serve. And following on this morning's action I must have full regard in my final proposals to the needs of the common good at a time when the business and the public generally are under increasing pressure arising from the depressed state of the world economy.*
>
> *Many peoples' jobs are on the line but the taxi operators are not in [such] a perilous position. The public just cannot continue to be subjected to this morning's type of grossly irresponsible action, more especially from a group which enjoys very definite privileges from the legal code under which they operate. I just do not accept that the holders of taxi licences with the resale value of upwards of £40,000 are on the bread line. They certainly have no right to and cannot be allowed to block strategic bridges carrying cross city, tourist and port traffic."*

51. The *Hempenstall* proceedings were heard on 21st October 1992. Judgment was delivered on the 27th October 1992 – see *Hempenstall v. Minister for the Environment* [1992] 2 IR. 20. The applicants' challenge was unsuccessful. Now is not the moment to

dwell upon the details and ratio of the judgment, except to say that according to the head-note of the reported judgment, the reliefs were refused on the basis that even if the applicants had succeeded in establishing that the 1992 Regulations caused a reduction in the value of their existing taxi licences (Costello J. was not satisfied that they had proven this) such a reduction did not constitute an attack upon their constitutionally protected property rights, as such rights arising in relation to licences which are created by law are subject to the conditions created by law and to an implied condition that the law may alter those conditions. In giving that brief summary from the head-note I am not overlooking what the applicants have referred to as 'the Hempenstall window' created by the words of the judgment itself where Costello J. suggested that there could be cases where the position could be different if *"some invalidity can be shown to exist apart from the resulting property value diminution"*. I will be returning to the submissions made in that regard.

52. Costello J. held also that the making of the Regulations in question constituted a discharge of a discretionary function by the Minister and as such no estoppel could arise. In this latter respect the applicants' had argued that the Minister was stopped from lifting the moratorium on the issue of hackney licences by reason of a statement which she had allegedly made at a meeting with the President of the ITF of which the applicants were members to the effect that the moratorium would not be lifted other than in the context of all the issues, upon which recommendations in the Report had been made, being dealt with.

52. The Minister had a meeting with representatives of the ITF on the 6th November 1992. The formal language of the departmental report of that meeting probably belies a fraught meeting with a frank exchange of views by both sides. ITF representatives expressed concerns about the 1992 Regulations being introduced without an opportunity for the ITF to make full submissions in relation to the proposals. The Minister complained about the protest actions taken by the taxi interests, the unsuccessful court proceedings and the loss of valuable time while those proceedings were determined. The ITF complained about the number of hackney licences being granted since the lifting of the moratorium and said that in fact many of those licences were being granted to applicants who had previously sold their taxi licences for large sums and were now re-entering the market as hackneys. Many other issues appear to have been discussed, but the Minister assured those at the meeting that the Inter-Departmental Report was a discussion document and that *"all options were still open for consideration", adding that "taxi licences are one of the few remaining closed shops",* and further, in response to an ITF request for immediate measures to control hackney operations, that his intention was to make long-term decisions, and that these would not be taken until consultations and discussions had concluded.

53. The devolution by the Minister to local authorities under the 1978 Regulations of the task of determining how many new licences should be issued annually by the Commissioner of An Garda Siochana was considered by the Department at the time to be a sensible approach, as they would be in a position to properly assess the unmet demand, if any, in their area and determine if new licences should be issued to reasonably meet that demand. They were certainly in a better position than the Minister to do so conveniently and speedily.

54. Given that devolution of responsibility to the local authorities for the determination of the number of new licences, the fact that within the Dublin taximeter area no new licences were issued between 1980 and 1991 in the Dublin area in the face of a glaringly obvious unmet demand, evidenced by long queues and increasing complaints from the public about the unacceptable delay in getting a taxi, begs the reasonable question as to why the council members on Dublin Corporation year by year decided that no new licences should be issued. This was not a matter for the City Manager to decide upon. It was a reserved function of the council members themselves. What made them close their eyes to the very obvious evidence of a need for new licences to be granted in order to meet the obvious growing needs of the city? One must look at that question, as it seems to have been this ongoing failure to issue new licences in order to meet that unmet demand that led successive Ministers for the Environment to commission reports from time to time in order to try and come up with a different solution. If sufficient new licences had been issued annually it would seem to logically follow that the taxi service available to the public would be adequate to meet the demand. On the other hand of course, it would have had a negative effect on the sale or rental value of existing licences.

54. Could it possibly be that council members came under pressure annually from the taxi industry to decide that no new licences should be issued, and felt therefore that it was the better course to yield to that pressure rather than risk protests on the streets of Dublin which would see the city brought to a standstill, with all the disruption that inevitably flows, even though there could be no objective reason for deciding that no new licences were needed? An affirmative answer to that question would require some evidence, or at least some evidence from which an inference could be drawn that it was the taxi industry itself who successfully prevailed upon the decision-makers to make successive decisions which brought about the very situation about which they now complain, namely the creation in 1978 and perpetuation thereafter, of a secondary market in taxi licences that grew to such proportions that the actions of the Minister in 2000 by which the industry was liberalised overnight caused so many taxi owners such financial hardship. At the end of the day, this is not something which the Court needs to find as a fact in order to determine the issues arising in these proceedings, but it is part of the conundrum as to why the Minister decided, following the decision of the High Court in Humphrey, to introduce S.I. 37 of 2000, providing for the immediate and total elimination of quantitative restrictions on the issuing of all small public service vehicles – taxi and hackney alike.

55. One interpretation open on the facts as disclosed in these proceedings is that the Minister formed the view by November 2000 that, given the way in which the problems had been grappled with unsuccessfully over two decades, with numerous reports having been commissioned from experts, with discussions within the Taxi Services Council and elsewhere, with reviews followed by reports, with meetings and discussions with stakeholders over a prolonged period to try and find consensual solutions, the time had come to take decisive action by ignoring the need for consensus from within the taxi industry on the basis that no appropriate solution which would see an adequate supply of taxis on the streets would ever meet with the agreement of the existing taxi and hackney owners, a position well demonstrated by their willingness to challenge in the courts any Regulations which they did not like.

55. John Weafer of the Department and some personnel from Dublin City Council were able to throw some light on events post-1992. During the course of his evidence he referred to the Interim Report of the Inter-Departmental Committee which had recommended the immediate issue of 100 new taxi licences for the Dublin area in November 1991. He went on to state that, since at that stage the power to issue new licences was vested in the local authority, that power was taken back by the Minister in order to ensure that this actually happened. That power was retained by the Minister until 1995. The urgency of issuing new taxi licences in late 1991 apparently arose from the knowledge that in the lead up to Christmas 1990 there had been a high increase in the level of public discontent and complaint over the Christmas and New Year period, and this was likely to be repeated if nothing was done in anticipation thereof in 1991. A feature of the problem for Dublin was the lack of any alternative form of public transport late at night. That part of his evidence concluded by reference to what was in his written statement of evidence as follows:

> *"The perceived problems in this service, the growing awareness of the dangers of drink driving, allied to the proposed extension to the taximeter area creates the environment in which an immediate increase in the number of taxi licences in the area is essential." [Day 15, p. 98]*

56. Mr Weafer was a member of the Inter-Departmental Committee which set about the preparation of that report which issued in May 1992, and which had issued its interim report in September 1991 which had recommended an immediate issue of 100 new taxi licences. Up to 120 submissions had been received from the public, from the taxi industry, and other sectors having an interest in having a good taxi service available in the city and other areas. He is adamant that it was never the Committee's view that a gradual liberalisation of the industry was the only option – rather it was just one of the available options at that time, as was full deregulation if gradual did not work. He referred to parts of the report, including that which had stated that the primary purpose of the 1978 Regulations was to control taxi numbers in the interests of securing a higher standard of service, but that as time had proved, the failure to issue a sufficient number of new licences had led to problems with the adequacy of the service provided relative to demand, leading in turn to the development, inter alia, of high values being attached to existing licences. It was these circumstances which led policy makers to look again at the question of numerical controls.

57. Mr Weafer confirmed also that the Committee was well aware, as reflected in the Report, that deregulation or liberalisation of the industry would have a downward impact on the value of existing licences on the secondary market. In fact, according to his evidence, even the issue of 100 new licences at the end of 1992 had seen a drop in the secondary market price of a licence from IR£50,000 to IR£40,000. It was for this reason that the Committee, while holding to its view that restrictions on numbers had to go, it should nevertheless be achieved on a gradual basis by the regular issue of new licences, rather than by an overnight deregulation. He referred to the Committee's recommendation in this regard as follows:

> *"The Committee recommends that a more liberal approach should now be adopted in the issue of licences; that the level of service being provided by taxis in individual areas should be subject to set periodic reviews; that these reviews should include the carrying out of regular independent surveys in each taximeter area, to assess if demand for taxi services is being adequately met by the numbers licensed; and that licence numbers be increased where there is an identified unmet demand. If the recommended approach is implemented, it is considered imperative that the manner in which it operates should be carefully monitored and if the desired results do not materialise further corrective action should be taken." [emphasis added]*

Mr Weaver clarified that the "further corrective action" would be to consider a complete liberalisation in relation to access to licences, as opposed to a gradual approach.

58. Mr Weafer also went on to refer to the Minister's Press Release (in which he had a drafting role apparently) announcing the Report and in which the Minister stated that it was a discussion document and that a process of consultation with interested parties would occur, despite the fact that a small number of recommendations would be given effect to immediately such as an increase in taxi fares and the immediate issue of 50 wheelchair accessible taxis in Dublin which were greatly needed, and which was in line with the Government's stated commitment in relation to people with disabilities.

59. Mr Weafer also referred to part of the Press Release which stated that one of the issues of concern to the Minister and which gave rise to the need for the Report was the very high price being paid for licences on the secondary market, and that this could not be permitted to continue, and that while a strategy of gradual liberalisation was being recommended in the first instance, it did not represent the only way forward and that all options would have to be looked at, taking account of the views of all interested parties.

60. Mr Weafer went on to describe the negative reaction of the ITF and the National Taxi Drivers Union to this Report, to the protests that have already been referred to, and to the commencement of the Hempenstall challenge to the proposed regulations to lift the moratorium on the issue of new hackney licences on the basis that the measure would adversely impact on the value of their taxi licences.

61. He also referred to the fact that the consultation process that followed the publication of the Inter-Departmental Report in May 1992 went on until 1995 and the introduction of the 1995 Regulations (S.I. No. 136 of 1995) which made local authorities responsible for a great many aspects of the taxi/hackney industry including the fixing of maximum fares, and the determination of the number of licences required to be issued in their areas, and the amount of the fee payable – a fee by the way which was to be retained by the local authority in order to defray the cost of administering the industry and issuing licences and so forth. I will come to the argument that there may be seen to be a profit element in these fees given, given its purported relevance to the competition arguments to which I will refer in due course.

62. Mr Weafer was asked if during the three years of consultations (most of which he attended) with the taxi industry and other interested parties, and some of which were attended by the Minister, he had attended any such meetings at which it was ever represented to the taxi industry representatives by the Minister or his officials that there would be no deregulation, or that there would be no new licences issued, or that the value of existing licences would be unaffected in the future. I will not set out his answer in full as it appears on Day 15, pages 118-119, but in short the answer was 'no'.

63. In anticipation of the 1995 Regulations commencing in September 1995 the Taxi Services Council had recommended the establishment by Dublin City Council of the Taxi/Hackney Working Group ("THWG") in July 1995 so that recommendations could be made by it to the Council in relation to the matters delegated to it for decision under the new Regulations, such as increases in fares and the numbers of new licences to be issued annually, if any, these being functions reserved to the Council for decision. In fact all council members of Dublin City Council were members of the THWG, but nevertheless no decisions could be made by that THWG group as such. It could only make recommendations to the Council proper.

64. The THWG advertised for submissions from the public generally and any interested party in relation to the taxi and hackney situation in Dublin. It will be recalled that after the Minister had taken back from the local authorities in 1991 the power to determine the number of new licences, he had in 1991 issued 100 new licences, and in 1992 another 50 wheelchair accessible taxi licences, but had issued no new licences in 1993, 1994 or 1995, so the number of taxis had remained unchanged yet demand was rising. Submissions were received from the Competition Authority/Fair Trade Commission which advocated a complete lifting of all restrictions so that the market could determine the number of licences. At the other end of the spectrum the ITF advocated that no new licences whatsoever should be issued.

65. Just before Christmas 1995 the THWG commissioned a survey in Dublin. That time would be a time of heightened demand coming up to Christmas, but it was considered to be comparable to any other busy period at other times of the year. That survey told the THWG what presumably what it already knew anecdotally, namely that the numbers of taxis was hopelessly inadequate to meet the demand. The survey led to a report (23/1996) containing a number of recommendations to Dublin City Council, including that an additional 200 wheelchair accessible taxi licences should be issued with the fee set at IR£25,000, and annual reviews of demand so that up to100 new licences would be issued each year for the following four years, if required. Regarding the fee of IR£25,000 per licence the evidence of Cyril Meehan of Dublin City Council makes clear that the rationale for such a fee was based upon the known

fact that by then licences were changing hands on the secondary market for sums of up to IR£70,000 (which at the time apparently was above the average price of a house in Dublin), and it was felt that the fee should bear some relationship to the prices available on the secondary market. In its report proposing the issue of an additional 200 wheelchair accessible taxis, the THWG had stated also:

> *"The fee of £25,000 is recommended to maintain, to some extent, the resale value of existing licences and to ensure that the holders of the new licences will make themselves available for a greater number of hours each week in order to recoup the cost of the licence."*

67. At its meeting on the 5th February 1996 Dublin City Council members voted to refer the report back to the a special meeting of the THWG to which all councillors would be invited, prior to its adoption at the Council's next meeting in March 1996. The first such special meeting took place on the 12th February 1996 where, according to the Minutes deputations were received from representatives of a number of taxi industry associations. Those Minutes are silent as to the content of those deputations but note that a second special meeting was held two weeks later on the 26th February 1996 at which all submissions received, both written and oral were considered and the meeting decided that an amended recommendation to that previously made (i.e. 23/1996) to the Council. It would appear that the purpose of this adjournment was to permit a further survey to be carried out before any final recommendation was carried out as it was felt that the Christmas survey might not be representative of the taxi situation at more normal times of the year. Accordingly a further survey was carried out on 16th February 1996. That survey confirmed that even then there were not sufficient taxis to meet the demand, and the group's Report dated 27th February 1996 contained a recommendation by the THWG that 150 new wheelchair accessible taxi licences be issued immediately with a further 50 on the 1st November 1996. The fee was recommended to be £25,000 payable in two instalments. Other recommendations included the introduction of a Customers' Charter, annual reviews of the number of taxi licences over the following four years, and the issue of temporary non-transferable licences over the Christmas period. The report noted also on page 3 thereof that *"a number of changes have been made in the Group's recommendations following the recent representations made by Taxi & Hackney organisations including the phasing of the increase in licences, the payment of the fee by instalments and reductions in renewal fees for both taxi and hackney licences. The Group is anxious to have further discussions with the representatives of the taxi and hackney owners on a range of issues including the setting up of a consultative body …".*

68. At its meeting on the 4th March 1996 an amendment was eventually voted upon and carried which included the above. However, that achievement was short-lived as the decision was rescinded by a vote of a majority of council members present at its next meeting on 27th May 1996. It would appear that a complication had arisen due to the recent division of the Dublin City local authority area into four different areas, namely Dublin City, Fingal, South Dublin, and DunLaoghaire/Rathdown. The Minutes show that before any vote was taken on the motion to rescind and the putting to a vote of an amendment, the Lord Mayor explained as follows:

> *"Prior to debate on the motion the Lord Mayor explained that he had delayed calling a special meeting of the Council which had been requisitioned to consider the recession of the resolution adopted on 4 March 1996 until the consultation process with the other three Dublin Local Authorities had been completed. In the course of debate on the motion the City Manager informed the Council that consultations where at present proceeding on the basis of the March resolution and advised that it would be premature to change that resolution while those consultations were continuing. He also stated that the Law Agent had advised that the motion now before the Council could not be amended in any way. In response to questions the Law Agent advised that after first of September 1996 the Corporation could only exercise taxi/Hackney functions in the administrative area of other Local Authorities with the agreement of those authorities."*

69. At any rate, following the vacating of the Chair by the Lord Mayor, and his replacement as Chair by a counsellor, a vote was taken on the amendment and was carried with the effect that, inter alia, an additional 100 additional wheelchair accessible licences would be issued and the fee was set at 20,000, payable in two equal instalments.

70. The existence of four different local authorities for the greater Dublin area by this time certainly complicated life and elongated the process of trying to find a solution to the ever-increasing problems of inadequate supply on the streets. A Joint Committee comprised of members of all four areas was established in July 1996 to try and achieve an agreed/common approach to decisions as to, inter alia, the numbers of new licences required to meet the demand, and regulation generally. All however agreed that some amount of new licences was required.

71. It can however be noted that between September 1995 and July 1996 a total of 817 new hackney licences had been issued, despite the existence of a moratorium on the issue of such licences from November 1995 which was only lifted in early February 1996 following representations by South Dublin County Council. But the situation in relation to the issue of taxi licences remained dormant despite increasing demand.

71. A briefing note to the Dublin City Manager dated 19th July 1996 sounded a pessimistic note as to how long it would take for any new licences to be issued. Under a heading *"Timescale for issue of any new Taxi Licences"* it stated:

> *"As indicated previously, some of the Committee members are keen to have some new licences issued before Christmas 1996.*
>
> *When the elected members have made a determination in accordance with Article 8 of the Regulation as to the number of licences, a public notice to this effect will be placed in accordance with Article 9.*
>
> *The criteria for assessment of applications is set down in the Six Schedule of the Regulations. The Gardai, who administered the previous allocation of new taxi licences, say that up to 3000 applications can be expected. Having regard to the number of hackney licences issued, and the number of 'cosy' drivers (i.e. person who drives a taxi he/she does not own), this number could well be exceeded. When the applications are sorted, they will have to be submitted to the Gardai who will have to determine if any of them held a taxi licence since 1978. The Gardai say that this examination could take at least two months.*
>
> *The Corporation does not have a dedicated IT process for dealing with such a large number of applications and this matter is being pursued and could take some time. Applicants who are eventually offered new licences will have to acquire a vehicle, which is wheelchair accessible, and arrange to have passed out by the Carriage Officer.*
>
> *Accordingly, it would be reasonable to assume that it could take up to 6 months from the date of the determination order to the time the new taxes appear on the streets."*

72. Matters dragged on and on, and remained substantially unresolved. In September 1996 the Minister set up a review into how the 1995 Regulations had been operating over the first year of their existence. By this time it appears that prices as high as IR£80,000 were being achieved for a licence on the secondary market. It also appears that by November 1996 DunLaoghaire/Rathdown County Council, South Dublin County Council and Fingal were not happy with the decision by Dublin City Council on the 26th May 1996 to issue just 100 new licences, and were mooting the idea of setting up their own taximeter areas, presumably with a view to be able to make their own decisions regarding the issue of licences within their own areas in order to address the clear inadequacy of supply of taxis and the demand for more licences to be issued.

73. I cannot help remarking also that while the Council members appear to have been willing to vote in favour of the issuing of significant numbers of new wheelchair accessible licences, the reluctance to approve the issue of new ordinary taxi licences remained as firm as ever. The higher capital outlay in acquiring a vehicle suitable for adaptation for wheelchair use was a disincentive to these licence being applied for in the same numbers of ordinary taxi licences, and for that reason the suggestion was being made by the Assistant City Manager in February 1997 that the licence fee for wheelchair accessible licences should be half that for ordinary licences (i.e. £10,000). The recommendation at that time was that 250 new licences should be issued – 150 being ordinary licences (fee £20,000) and 100 wheelchair accessible licences (fee £10,000). A paragraph within the Assistant City Manager's report in early 1997 (report 16/1997) contains the following which perhaps throws some light upon the enthusiasm for issuing wheelchair taxi licences which attract the €10,000 licence fee:

> *"50 wheelchair taxi licences were issued by the Minister in the period November 1992 to April 1993 at a special low fee of 100 [sic] and these are in service. The majority of these vehicles are of the Nissan Serena type. This vehicle can also be used as a seven seater taxi and reports received of wheelchair users having difficulty obtaining such attacks it would indicate that they are not operating as intended. While it is desirable that additional wheelchair taxis be made available it is considered that having regard to the high capital cost of such vehicles (in excess of £20,000) not all new licences should be good wheelchair-accessible. This would be in line with approaches adopted by other European Capitals were a proportion of licences are set aside for wheelchair accessibility.*
>
> *It is considered that a cost of £20,000 is considered reasonable for a new licence. It is recommended that Dublin City Council agreed to the issue of 250 additional taxi licences. It is suggested that 150 licences be issued at £20,000 each and 100 wheelchair-accessible licences a cost of £10,000 each."*

74. That recommendation of the Assistant City Manager for 250 new licences 150 of which would be ordinary licences and 100 of which would be wheelchair-accessible licences found its way into a motion before Dublin City Council members on the 3rd February 1997. The motion was defeated, and after a number of amendments were proposed and defeated, eventually a motion was carried which approved the issuing of 200 new wheelchair-accessible licences only and at a fee of £15,000 each. That motion included two other matters which were approved, namely:

> - that the Dublin Taximeter area be altered from its then present radius of 15 miles from the GPO to the geographical areas of Dublin Corporation, Fingal, South Dublin, and DunLaoghaire/Rathdown.
>
> - That the cost of a new hackney licence be increased to £1000
>
> - That other issues arising be decided by the new working group of the four Dublin local authorities.

75. On the 27th March 1997 the City Manager reported to the Lord Mayor and Dublin City Council that a meeting of the four Dublin local authorities had met on the 4th March 1997 and had agreed to the issue of 200 more wheelchair-accessible licences but subject to a number of matters, including that there be *"an independent review of the requirements of the new Dublin Taxi Meter Area be carried out and a report submitted to the Consultative Group on Taxis and Hackneys for consideration and recommendation to the four Councils. This review to begin and the report to be submitted as soon as possible."*

76. A meeting of the four Councils on the 16th April 1997 agreed, inter alia, that the new 200 wheelchair-accessible licences should be non-transferable for a period of five years from the date of grant (except in the case of the death of the owner within that five year period). The City Manager's Report in this regard (Report 97/1997) came before a meeting of Dublin City Council on the 12th May 1997. The debate upon it seems to have caused uproar in the chamber – by whom is not revealed. But the Minutes of the meeting record as follows:

> *"Submitted Report No. 97/1997 of the The City Manager and Town Clerk – Issue of additional taxi licences. During the course of debate at 8.10 p.m. due to grave disorder, in accordance with Standing Order No. 40, the Right Honourable the Lord Mayor Councillor Brendan Lynch suspended the meeting for five minutes. The meeting resumed it 8:15 p.m. It was moved by Councillor MacGiolla and seconded by Councillor Freehill "that the Dublin City Council assents to the proposal outlined in Report No. 97/1997. The motion was put and carried."*

77. It appears that some 969 applications were received in response to advertisements inviting applications for the 200 wheelchair-accessible taxi licences. Changes made in May 1997 by the Department to the points system by which decisions on which applicants were granted licences leaned in favour of them being granted in the first instance to drivers who were already 'cosies'. By November 1997 some 152 such licences had been issued to successful applicants. There was some delay in completing this issue process due to some technical problems relating to the conversion of vehicles, but these problems were eventually ironed out by new Regulations in early 1998. In addition in August 1997 a moratorium was placed on the issue of new hackney licences until such time as a report from independent consultants appointed by Dublin City Council was received and considered.

78. During 1997 Dublin Chamber of Commerce was exercised about the ongoing taxi situation and its negative effect on the commerce of the city. It issued a report on the situation highlighting the shortage of taxis, the increase in the number of hackneys, and the very high prices being achieved for the sale of licences on the secondary market. The report favoured a restructuring of the taxi industry, and not simply the issuing of new licences. Its recommendations included the deregulation of taxis and the hackney service and the introduction of a single license; the phasing out of current licences over a three-year period with additional licenses going to existing licence holders; new licences should not be restricted by number but should be subject to qualitative criteria; the establishment of an independent body with overall responsibility for all aspects of the taxi service. Other suggested measures included a system of taxi sharing, simplicity and transparency of fares. Presumably in recognition of the downward effect on the values of existing taxi licences by virtue of any deregulation, the Chamber stated at paragraph 3 under the heading "Phasing out period":

> *"3. In order to find a fair solution for those who have invested in taxi plates, a phasing out period over a suggested three-year duration would be implemented. During this period, each existing taxi plate holder would be issued with a*

second plate to allow them to recoup their initial investment. After the deadline, an unlimited amount of licences would be available with open entry into the market."

79. Terms of reference for an independent review were approved by the four Dublin local authorities. This review would result in what has been referred to as the Oscar Faber Report which did not issue in its final form until well into 1998. However, an interim report was issued by Oscar Faber in December 1997 which recommended the immediate issue of a further 200 wheelchair accessible licences at a fee of £15000. This was in addition to the previous 200 already issued earlier that year.

80. In late 1997 Dublin Taxi Forum was the established by An Taoiseach comprising representatives of Dublin taxi organisations, the Departments of the Taoiseach, Environment, Local Government and Public Enterprise, An Garda Siochana, two nominees of the Dublin Transportation Office ("DTO") Consultative Panel representing business and personal customer interests, as well as nominees of the Managers of the four Dublin local authorities. The forum was chaired by the Chairman of the DTO.

81. The final Oscar Faber Report issued in June 1998 and it is really from this point onwards that the issue of a deregulation achieves some momentum as the preferred method of addressing the now chronic and intractable problems of supply that had beset the taxi industry for decades, particularly in Dublin. This Report was detailed, comprehensive, and well-researched both here and abroad. The report noted the rapid expansion of the city, the growth in tourist numbers, the economic growth of the city, and the fact that there was an increasing awareness of the drink driving laws, all of which conspired to make clear that there was a serious imbalance between supply and demand, especially at peak times, and that this problem was chronic and needed to be addressed with urgency.

82. The report considers various approaches to resolving the problems seen to exist, having examined how they were dealt with in other jurisdictions and the effects, particularly in relation to deregulation in relation to entry to the market. Having explained why deregulation was recommended as the preferred option, it immediately went on to consider how, within the concept of deregulation, it should be achieved in order to reasonably respect the undoubted adverse effects that deregulation and a consequent significant rise in the number of taxis would have on the level of income that would be earned in the future by existing taxi licence holders, and the reduction in the capital value of the licence plates which would occur upon deregulation. Three options for the improvement in the supply of taxis were set forth and considered in the report as follows;

> Option A: The issue of a minimum of 350 taxi licences per annum over a ten year period at a licence fee of £15,000. At the end of this period, additional licences would be issued on the basis of the criteria of unmet demand.
>
> Option B: A commitment to full entry deregulation with a long transitional period of, say, 10 years during which 350 licences would be issued per annum at a licence fee of $15,000; or
>
> Option C: A shorter period to entry deregulation could be set, say 5 years, with a mechanism to compensate existing plate owners being introduced with the issue of 200 plates per year at no charge.

83. The three options were discussed in the report and, having considered the pros and cons of each the authors came down in favour of recommending Option B as the preferred approach. Of the tree options, only Option A did not involve deregulation on some basis. Its discussion of Option B was in the following terms:

> *"A transitional period of 10 years would apply after which full entry deregulation would be introduced. In each year in the period, 350 licences would be issued on the basis of a points system similar to the one which currently applies to licence issue (consideration should be given to allowing hackney licence holders to compete for taxi licences on an equal footing). Existing plate owners are compensated by having a 10 year period in which to remunerate the cost of their plate. Initially, the licence fee would be set at the current level of £15,000. However, this would be reduced progressively during the ten year period, or more quickly if there proved to be insufficient demand for the new licences at that price. The number of licences must be kept small in the transitional period to ensure that above normal incomes can be earned by existing plate owners, thus ensuring that they are compensated for the reductions in licence plate values."*

84. The rationale for 350 new licences per annum over the recommended 10 year lead in period to deregulation was that at the time of the report the current shortfall in the numbers of taxis in the city was 3500, and that this number should be made up over the ten year period rather than allowing overnight deregulation which would allow the market in effect to determine how many new licences were granted immediately, with the risk of an overnight total devaluation of the existing licence plates. In other words, the more gradual approach would give existing licence holders a softer landing over time while at the same time adding numbers each year to the taxi fleet on the streets. The authors did, however, recommend the lifting of the moratorium in respect of new hackney licences. Paragraph 4.4.2 of the Report sets out the authors' discussion about the need for transitional arrangements pending a full entry deregulation in relation to taxis. In that regard the authors state:

> *"Full and immediate entry deregulation could bring benefits in terms of allowing the supply of taxis to adjust more quickly to demand. However, there are economic and social reasons why immediate deregulation may not be desirable.*
>
> *There is also some concern that full and immediate entry deregulation might lead to excessive entry into the market which would then take some time to reach equilibrium. That is, potential entrants might gauge the returns to be obtained from supplying taxi services on the basis of those obtaining in the current market, and enter the market in large numbers. This would lead to low actual returns followed by a substantial level of exits from the market. A lead-in period in which the number of licences was gradually increased would allow time for potential entrants to gauge the extent to which market demand remained unsatisfied as supply increases.*
>
> *However, the principal reason why full and immediate entry deregulation is not desirable is social. Entry deregulation would impact very severely on a minority of individuals who have recently bought licence plates on the open market. Some of these purchasers have invested life-savings or redundancy monies in a plate in the expectation that the value of the plate would at least be maintained. Under full entry deregulation the market value of the plate will virtually disappear. To some extent, purchase of the plates is regarded as a substitute for pension arrangements.*
>
> *It might be argued that all investments are subject to some risk and that plate purchasers like other investors should not be entitled to compensation when their investment does not make a good return. However, the scale of the investment relative to their income and the fact that many of the plate holders would have no other assets on which to rely argues for some easing of the impact of entry deregulation on them."*

85. In a Press Release in June 1998 the Chairman of the Joint Taxi/Hackney Committee of the four Dublin local authorities issued a Press Release welcoming the Oscar Faber Report and said that it was proposed to set up a Consultative Group representative of service providers, the public and other interested groups in order to examine the report and make recommendations to the elected members of the local authorities as quickly as possible.

86. From January 1998 the Dublin Taxi Forum had been meeting regularly and discussing various issues of concern and relevance to the taxi/hackney industry, all with a view to improving the service provided to the public. Following the publication of the Oscar Faber report the Dublin Taxi Forum met and considered same, and made recommendations in relation to the way forward. In its report in August 1998 the Forum made a number of specific recommendations, including that *"to meet market demand taxi numbers should be increased on a phased basis over the next four years to give a total of 3200 taxi licences at the end of the year 2002".* There was a general acceptance among Forum members of the need for more licences. Among these recommendations was that "the Minister should provide that fares and entry to the taxi market continue to be regulated, their functions to be exercised by the Local Authorities", and another that *"new licences should only be for vehicles which are accessible to the elderly and are wheelchair accessible".*

87. In late October 1998 the Taxi/Hackney Consultative Body, having met on three occasions since the publication of the Oscar Faber Report, set out its views on the recommendations contained in that report, and provided them to the Joint Taxi/Hackney Committee of the four Dublin local authorities, so that that Committee in turn could make recommendations to the elected members of the local authorities for implementation. Indeed, at its first meeting it had the benefit of a presentation by the Oscar Faber consultants. Among the Body there was general agreement that a substantial increase in taxi numbers was needed, and also that fares and standards needed to be regulated. As to how many new licences were needed there was some disagreement with the figure of 826 new licences over a four year period which had been recommended by the Taxi Forum. A minority view was that such an increase was insufficient. However the majority favoured the issue of 826 new licences. Ultimately of course, the number of new licences to be made available in any year would be the decision of the elected members of Dublin Corporation. The Consultative Body was also in favour of the recommendation that the moratorium on the issue of hackney licences should be lifted.

88. Having been provided with the views of the Taxi/Hackney Consultative Body, the Joint Taxi/Hackney Committee in turn made recommendations to Dublin Corporation, including that 820 new licences be issued over a three year period – 350 in 1999, 235 in 2000 and 235 in 2001, that they were non-transferable for 5 years except in the case of the death of the owner, and that at the end of the three year period, the impact of these new licences would be assessed before any further decision would be taken to issue further new licences.

89. At the Council meeting on the 10th December 1998 the elected members of Dublin City Council after some debate eventually voted to adopt this recommendation for an increase of 820 new licences on a phased basis over a three year period, and that at the end of that three year period the position would be reviewed in order to assess the impact of that number of new licences, and before any further new licences would be issued. Before the vote was taken on the motion as originally put, namely that *"Dublin City Council adopt Report 300/1998 and the recommendations of the Taxi/Hackney Committee of the four Dublin Local Authorities on Taxi/Hackney services as set out in the report"*, there were three amendments put, debated and lost. The second of these amendments (which was not carried) was one which moved that section 2 of the motion be amended to read: *"to meet the enormous present and future unmet demand for taxis, and to protect the investment of those who have recently purchased a taxi plate, there should be full entry deregulation into the taxi trade with a long term transitional period of ten years during which regular annual issues of 350 licences will occur".* This amendment would have reflected Option B as recommended by the Oscar Faber report. However the amendment was defeated by a majority of Council member votes.

90. During his direct evidence, Owen Keegan who at the time of the Oscar Faber Report was in charge of the Office of Director of Traffic in Dublin Corporation, was asked if the recommendations of that report reflected the general approach of Dublin Corporation. By way of answer he stated:

> *"I think I would prefer to say that the recommendations, the preferred recommendation, which was Option B, which I think was a ten-year liberalisation with a set number being issued and then full liberalisation after ten years, they would certainly have reflected the views of myself and my officials but we would have felt that that was an option that we could get the agreement of the elected members and that, at the end of the day, was the crucial issue. It didn't really matter what I felt or what the consultants felt, it had to be something that we could get the necessary approval of the elected members".*

91. By way of summary it can be seen that Oscar Faber had recommended Option B, namely 350 new licences to be issued per year over a ten year period which would be followed by full entry deregulation. The Dublin Taxi Forum on the other hand was in favour of 820 new licences being issued over a four year period under a modified points system and for wheelchair accessible taxis only. It should be said that even the issue of 820 new licences as supported by the Dublin Taxi Forum would inevitably have some effect on licence values, even though spread out over four years – at least according to the Department (see John Weafer's evidence, Day 15, p.132, Qs. 398-399). The Forum's view on 820 new licences over a four year period was adopted by the Joint Taxi/Hackney Consultative Body established to review the Oscar Faber Report, and this Body made a strong recommendation to the four Dublin local authorities for 820 new wheelchair accessible licences over a three year period, with a review to take place thereafter before any further licences should be issued. That is what was adopted by a majority of Dublin City Council elected members on the 7th December 1998, rather than the Option B preferred approach which as recommended by the Oscar Faber report which would have seen a ten year lead-in period to full deregulation. It will be recalled that part of the thinking for Option B was that the ten year lead-in period prior to full entry deregulation would provide existing licence holders with a 'soft landing' onto full deregulation eventually when the value of the licences on the secondary market would effectively disappear completely.

92. Taxi licence owners, at least those in Dublin, may well have considered that with the adoption by the Council of the proposal that numbers should be increased over a three year period, with a review thereafter before any further increases, the question of a full deregulation whether after ten years or otherwise was off the table so to speak, since the power to determine numbers had been returned to the local authorities in 1995 and had remained with them thereafter. There can be no rational doubt that the taxi industry did not favour any proposal that would see full entry deregulation introduced since it would inevitably impact adversely on the value of their licences on the secondary market, and eventually see that value disappear completely. Any new regulatory regime that fell short of entry deregulation was likely to be viewed as preferable, even if outside experts considered that the situation in Dublin demanded a deregulatory solution eventually. In fact the expert group would no doubt have favoured a faster track to full entry deregulation if it had not felt it necessary to recognise the reality of the secondary market that had developed since 1978 and the serious impact that overnight deregulation would have entailed for licence holders. It clearly considered that the solution had to be a proportionate one which reasonably took account of those who would be negatively impacted by deregulation if it was to happen.

93. At local authority level any adoption of a measure leading to deregulation was likely to be problematical as those making the decision would be a majority of elected members, and they presumably would have to had one eye on the political reality that measures that did not meet with the approval of the taxi industry itself would have resulted in more street protests by taxi drivers, and in the past they had demonstrated an ability to organise such protests very effectively, bringing large parts of the city to a standstill with consequent disruption to large sections of the public. Elected members were lobbied by the taxi industry during this period, and would have been aware of the views of the taxi industry representatives. Nevertheless they were mandated to do something constructive to address the appalling situation in which people seeking taxi services in the city were finding themselves on a regular basis and particular at times of peak demand.

94. The process by which the first 350 licences would be issued in 1999 would inevitably take some time to achieve. In answer to a question asked by one member at a meeting of the elected members of Dublin Corporation on 10th May 1999 about the progress being made in implementing the report of the Joint Taxi/Hackney Committee as to new licences, the City Manager informed the members that 820 new licences would be issued over the three year period, and that the applications that had been received in relation to the first tranche of 350 for 1999 were at that time being considered. Nevertheless, it was not until September 199 that even the first 180 new licences were issued. The remainder were expected to be issued by year-end.

95. I should refer to another report or study that was issued in 1998 in the form of what has been referred to as the Fingleton report. This was in fact a study by three co-authors John Fingleton, John Evans and Oliver Hogan which was published by the Policy Institute at Trinity College in Studies in Public Policy under the title *The Dublin Taxi Market: Re-regulate or Stay Queuing?*. It was published after the Oscar Faber report and refers to that report. It favoured a firm decision being taken immediately towards full entry deregulation after three years, albeit with some ameliorating measures to take account of existing licence owners' interests. Its view on the alternative proposals which had been put forward, namely deregulation after ten years or no deregulation at all, was that neither would eliminate taxi queues within five to ten years. The authors opined that small annual increases over a number of years could lead to history simply repeating itself with a resulting stagnation until the next crisis presented itself and having to be addressed once more.

96. This study referred to all the problems that beset the taxi industry in Dublin and which are evident from what has already been said, and to the virtual unanimity that more licences had to be issued, and that "the debate by this time centred on whether entry should be deregulated or the speed with which new licences should be issued on the market". In its executive summary it stated, inter alia, that "ironically, the issue of more licences may perpetuate the problem, because it may reduce the pressure for the fundamental reform: namely the removal of entry controls". In a clear call for full entry deregulation over a period of not more than three years the authors stated at para. 15 of the Executive Summary:

> *"Further consultation or discussion of these issues is neither necessary nor acceptable. The time for action has arrived. Local authorities and central government must now deliver comprehensive re-regulation of the taxi market. They should substantially increase taxi licences over the next 2 to 3 years, committed to removing entry barriers, and reform the system for regulating the market. Alternative policies could be open to the interpretation that they amount to window-dressing, with the inference of continued capitulation to the vested interests of a small industry lobby over the broader consumer welfare. Alternatives may give partial relief of the problem for a short period of time, but they will not address the fundamental problem that is created by the restriction on entry to the market. Unless this is tackled resolutely, Dublin will continue to lack an effective taxi service."*

97. It is clear from parts of the Fingleton report that from its studies of the industry, it saw the taxi industry as a strong lobby leaning towards maintaining the number of new licences at as low a number as it could achieve, and certainly as being against anything like full entry deregulation, and that the authors considered this influence on decision-making as leading to a less than effective resolution of the problems in the longer term. One passage within the study serves to illustrate this point. It appears on page 18 as follows:

> *"In the same period as Faber (1998) was written, the Taoiseach established a Forum on the Taxi Industry. This body brought together representatives of government departments, regulatory bodies, and the taxi industry. The Forum's recommendations, issued in September 1998, were that control on the number of taxis should remain, but that 200 new licences should be issued each year for four years, after which new licences should be issued only if there is "significant unmet demand".*
>
> *Given the absence of representatives of consumers or hackneys it is not surprising that the proposals reflect the taxi lobby's views. This is illustrated by the lack of acceptance that regulation of entry has failed in the past and the absence of any proposal to rectify this for the future. It is also illustrated by statements like "competition between taxes and hackneys is unfair" and "taxes… need to be protected from the hackney business". The fact that a body that represents the interests of taxi drivers recommends new licences might seem like progress in the debate. However, it is reasonable to speculate that this is a strategy designed to defuse support for deregulation of entry and therefore to release the steam that has built up behind the case for fundamental reform of the market."*

98. The authors' consideration of whether, and if so how, entry to the market should be regulated or deregulated are contained in para 6.2 of their Recommendations as follows:

> *"6.2 Entry to the market*
>
> *Entry to the market should be deregulated over a period of 2 to 3 years. There is no compelling theoretical argument for regulating entry to the taxi market. The experience of the Dublin market suggests that market supply cannot respond to demand, no matter how often the market is reviewed. Deregulation of entry has been successful elsewhere in eliminating the problem of excess demand.*
>
> *Deregulation cannot be done immediately because it would reduce the value of taxi licences on the secondary market to 0. This would be no lies those licensees who recently purchased a licence and would generate enormous opposition in the market. We therefore propose a staggered approach to increasing the supply until deregulation of occurs. However, it is imperative that this be done as soon as possible and we would propose that firm commitment should [now] be made to deregulation of entry, with three years being the maximum period for this to occur.*
>
> *Before deregulation of entry, supply should be increased by giving each existing licensee a second licence. The 800 licensees who most recently purchased a licence on the secondary market should get the additional licence immediately and the remainder one year later. There should be no restriction on the sale of these licences to suitably qualified individuals.*

This proposal would apply to only the 1974 licences that existed in November 1997. The authority would examine the records on licence transfers and identify the 800 hundred licensees who most recently purchased a licence.

This group would be awarded a second licence immediately. The fact that the excess demand is at least double the current supply means that 800 new licences would still result in a substantial value for a licence on the secondary market. This group could choose to sell one or both licences in order to be compensated for the loss in the value of the licence recently purchased.

The remaining 1174 would be awarded a second licence one year later. Members of this group would have purchased their existing licence at least eight years previously, and so would not require the same compensation as the first group. This would be reflected in the fact that the value of these licences would be lower because the excess demand in the market would have abated. One year later, licences would be awarded to any applicant who met the required standards and paid the relevant licence fee. The fast pace of entry would also mean that "cosies" (existing second drivers) would be in the best position to purchase new licences as they would be suitably qualified.

It would be wholly inappropriate for the government to compensate existing licence holders directly for the value of their plates. The value of taxi plate on the secondary market reflects a monopoly profit in the market. Government policy (following membership of the European Union and in the 1991 and 1996 Competition Acts) toward monopolies in markets with a single monopoly supplier is not just to eliminate this monopoly profit, but also to impose heavy fines (up to 10% of turnover) for abuse of any such dominance. In this case, the only difference is that the monopoly situation is occupied jointly by a group of suppliers. Deregulation accompanied by such compensation would be equivalent to admitting that crime was being committed continually and rewarding the criminal for stopping. Moreover it would set a dangerous precedent for other markets, increasing the incentives for suppliers to lobby for the licensing of entry to their markets.

There is precedent for the policy we outline. When licensed haulage was deregulated in 1978, each existing licence was converted into six licences and full deregulation of entry followed in 1986. Barrett (1991, pages 86 – 89) shows how this resulted in an expansion of the freight market as its efficiency increased." [emphasis in original]

99. Notable of course within the authors' conclusions is their favouring of a graduated approach to any deregulation (albeit over a two/three year period) and not one that would take place overnight, this view indicating a recognition that existing taxi licence owners stood to lose value in the secondary market value of these licences. The view of this timescale towards deregulation was, according to John Weafer's evidence, that it would have had a very significant negative impact upon the value of taxi licences (Day 15, p. 126].

100. At any rate, even by the end of 1999 the problems in the city arising from a lack of an adequate number of licences had not been resolved in any meaningful way. The evidence is that queuing was still a serious problem for both citizen and tourist alike. Discontent still abounded amongst the taxi consumer market, and this was a concern for the Government of the day. In its Action Programme for the Millenium in November 1999 the Government stated *"We will introduce measures to increase progressively the number of taxi licences in Dublin as quickly as possible in order to ensure a proper balance between supply and demand".* What that would entail was not spelt out. The matter was raised in the Dáil on the 16th November 1999 in the form of certain questions raised concerning ongoing problems of supply in the taxi market. During the course of his answers the Minister of State at the Department of the Environment (Robert Molloy TD) stated, inter alia:

"The Action Programme for the Millennium, as reviewed by the parties in Government, undertakes to introduce measures to increase progressively the number of taxi licences in Dublin as quickly as possible in order to ensure a proper balance between supply and demand in the market. pending finalisation of particular measures in relation to this proposal, which will be developed as soon as possible, it is not possible to detail the structures or other particular arrangements for taking it forward."

101. Some urgency was injected into the process by a memorandum for the Government dated 29th November 1999 prepared for a meeting of the Government the following day 30th November 1999. That memo put forward certain proposals including that *"one new taxi licence will be offered to each individual who holds or will hold a taxi licence in Dublin by the end of 1999"*. This number was estimated to be 2600. Of these new licences 500 were to be for wheelchair accessible licences only, and in addition another 500 new taxi licences would be granted under the then-current points assessment scheme - i.e. with a bias towards 'cosies'. Applications for these licences were to be made to Dublin Corporation by 31 January 2000.

102. This memorandum traced briefly the history of the taxi problems and referred to the Oscar Faber Report's proposal for an additional 350 new licences annually over a ten year period. In that regard it went on to state:

"In the event (and partly under the influence of the Government sponsored Dublin Taxi Forum, in which the taxi industry also participated), a somewhat commuted version of this policy is now being followed by Dublin Corporation with some 1220 new taxi licences (all four people share accessible taxis) issued or due to be issued between 1997 and 2001."

103. As to the proposed measures, the Memorandum stated that the 2724 taxi licences to be available in Dublin by the end of 1999 were held by a total of 2644 individuals (i.e. 95% of licence holders holding a single license). The Memorandum went on to state:

"It is likely that the proposed degree of liberalisation of the Dublin taxi market will have a considerable effect on the value of taxi licences (which currently trade at prices in the region of £80,000). In addition the proposals to mobilise quickly major additions to the Dublin taxi fleet will involve terms less onerous than those which have applied in recent years brackets i.e. £15,000 licence fee plus c. £30,000 for a wheelchair accessible vehicle). In bringing forward the current proposals some efforts have been made to mitigate these concerns for existing taxi licence holders file also achieving a speedy increase in taxi numbers".

104. This Memorandum to Government anticipated resistance within the taxi industry to the measures being proposed. In that regard, it stated:

"It is probable that the proposed measures will be strongly contested by existing Dublin taxi interests as compromising their economic investment in their industry. They may refer to the lack of consultation in contrast to the situation which prevailed in relation to the Dublin Taxi Forum. Legal challenges to relevant existing or amending regulations may also arise. It is also possible that they will disrupt agreed plans to introduce a pilot scheme for taxi sharing which is to be launched in Dublin on 1 December 1999."

105. In relation to how the proposed measures would be delivered, the Memo went on to state:

> *"At present, responsibility for the determination of new taxi licence numbers and of licence fees is delegated by regulation to Dublin Corporation. The Minister considers that it will in practice be necessary to control from Dublin Corporation over taxi numbers and licence fees in Dublin and to prescribe all elements of the desired solution directly. It will then be a matter for Dublin Corporation (and for the Gardai in relation to vehicle fitness) to arrange for the grant of licences within this framework. This approach may be criticised for removing powers and responsibilities from a major local authority without consultation. Devolved Administration of taxis will be returned to Dublin Corporation when these proposals have been implemented."*

106: On the 30th November 1999 the Government approved of the proposed measures for the offer of one new licence to each existing licence holder with 500 thereof to be for wheelchair accessible licences, and for an additional 500 ordinary taxi licences to be allocated in accordance with the existing points system for assessment.

107. In the Dáil later on the same day, the Minister of State at the Department of the Environment and Local Government, Mr Molloy, when responding to a Fine Gael motion in relation to Public Transport in Dublin, outlined some of the history of the difficulties in the taxi market and the efforts made to address those difficulties, and referred to some recent improvements in the taxi and hackney service in Dublin, acknowledging the input from Joint Committee of the Dublin Local Authorities, the Office of Director of Traffic, and the Dublin Taxi Forum. Having done so he continued as follows:

> *"However, the gradual nature of these improvement policies has disadvantages. The major disadvantages that Dublin, as capital of a rapidly growing economy, would have to wait until at least the year 2008 before eliminating the problem of current demand for taxi services. In fact, strong growth in business, tourism and leisure demands in Dublin since the Oscar Faber Report of 1½ years ago makes it virtually certain that the report's estimates of present demand for taxis are conservative.*
>
> *As the capital of a rapidly expanding economy, Dublin has seen a rapidly increasing demand for mobility in all travel modes. Numbers passing through Dublin Airport have more than doubled since 1993 and are expected to reach 12.9 million in 1999. There are now in the region of hundred and 22 hotels in Dublin compared to 88 in 1995, and tourism has become a major industry in the Dublin region.*
>
> *The present inadequate supply of taxes and Dublin risks harming the capital's reputation in the eyes of international business people and other visitors; it would also remain a source of frustration to residents of the city. A continuation of this situation for another 8 years, albeit subject to gradual improvements, is not supportable.*
>
> *All of these factors have persuaded the Government that we need a more urgent and accelerated approach to matching Dublin taxi supply and demand. At the same time, we are conscious of the significant investment which many existing taxi providers have made in their industry and livelihood. The Courts have made it clear that the State is under no duty to uphold present traded values of taxi licences. But as far as possible, the Government wishes to devise solutions which will in practice be fair to existing taxi service providers as well as also providing good service to the public.*
>
> *The government has therefore determined that a sufficient number of new taxi licences should as soon as possible be issued to make good supply shortages in Dublin taxi service. A new taxi licence will be offered to all individual taxi licence holders in the Dublin taxi meter area. 500 of these licences will be for wheelchair accessible taxis, the balance for ordinary taxi licences. It is proposed that the taxi licence fees will be £2500 in the case of ordinary taxi licences; £250 in the case of the wheelchair accessible taxi licences; the granting of these wheelchair accessible licences will be determined on the basis of a lottery of applications to be designed and carried out by Dublin Corporation.*
>
> *In addition to this, a further 500 taxi licences will also be granted on the basis of the current points assessment system for the award of taxi licences. This encourages the uptake of licences by existing taxi drivers or "cosies" who have not been taxi licence holders*
>
> *In the event that existing taxi licence holders either do not apply for a new licence or failed to pursue applications, it will be arranged that any shortfall will be taken up by means of a further offer of licences under the current assessment system. In all, these proposals are designed to increase the Dublin Taxi Meter Area taxi fleet by some 3100 to in excess of 5800 by the end of 2000, including 1300 wheelchair accessible taxis.*
>
> *The arrangements to implement these proposals will be determined in regulations to be prepared by my Department as a matter of urgency from these will temporarily suspend the present delegation of certain powers to Dublin local authorities. However, this delegation will be restored at the earliest possible date and to allow the Dublin local authorities to maintain the equilibrium of taxi supply and demand into the future.*
>
> *I would like to state that I'm confident that this initiative will benefit the public and the Dublin taxi industry alike. The Dublin taxi market, like many other sectors of Dublin's economy, is capable of significant and sustained growth. As such, is can well support a larger and service driven industry to the mutual benefit of all concerned.*
>
> *The government has acted decisively and well beyond the proposals of the present motion to ensure a high quality taxi service for the Dublin public. I hope that our actions will have the support of all members of the House".*

108. Mr Molloy met with taxi industry representatives on the 16th December 1999 and the 4th January 2000 to discuss their concerns in relation to these proposals. He followed up with a letter dated 5th January 2000 to Mr Joe Herron who was Chairman of the Dublin Area Taxi Association's Steering Committee, in which he purported to address some of the concerns raised at these two meetings and by letter to the Minister dated 4th January 2000. In his letter Mr Molloy expressed his view that the fees for the proposed new licences were reasonable and considerably below recent fee levels in Dublin. He also clarified that the new licences proposed to be issued under the new arrangements would be transferable licences so that owners could if they so wished dispose of them to others who might wish to purchase them, and further that any existing restrictions on the transfer of licences would be lifted. He stated *"the Government has sought to devise solutions which will be fair to existing taxi service providers as well as also providing good service to the public"*.

109. John Weafer of the Department stated in his evidence in relation to these meetings with the taxi representatives that it was very clear that they had a very negative attitude to what the Minister was proposing to do, but that the Minister was determined to

proceed as he proposed (Day 15, p. 137). Mr Weafer recalled when giving his evidence that there had been a blockade of Dublin Airport by taxis as well as other forms of street protests in the wake of these proposals.

110. On the 13th January 2000 the Minister made new Regulations to give effect to his proposals, namely the Road Traffic (Public Service Vehicles)(Amendment) Regulations, 2000 (S.I. 3 of 2000). These regulations maintained quantitative restrictions but at a level that the Minister considered would achieve a reasonable solution to the problems of supply over as short a period as was feasible in all the circumstances, and in a way which he considered was fair, in the sense of taking into account, as he saw it, the interests of existing licence holders who could now apply for an additional licence which they could dispose of on the secondary market. The regulations did not themselves provide for the grant of licences, but rather they provided for a process whereby existing licence holders would be able to apply for one new licence as explained above.

111. Any optimism the Minister may have felt by the end of January 2000 must soon have evaporated when he learned that on the 7th February 2000 leave to challenge these new Regulations was granted in the High Court at the behest of four hackney licence owners, who wished to obtain a new taxi licence but who could not do so under the 2000 Regulations. They claimed, inter alia, that s. 82 of the Act did not permit the Minister to restrict the issue of new licences to existing licence holders, and that the Regulations were therefore ultra vires. The Minister will also have learned that an injunction had been granted restraining the issue of any new licences on foot of these new Regulations until such time as those proceedings were determined. That determination was made in October 2000 as set forth in the judgment of Mr Justice Murphy in Humphrey and others v. Minister for the Environment and others [2001] 1 I.R. 263.

112. A number of issues were raised in *Humphrey*, but as Murphy J. stated in his judgment at p. 295 *"the central issue for judicial review is whether the Minister is empowered under s. 82 of the Road Traffic Act, 1961 to restrict the number of taxi licences, to favour incumbents already holding taxi licences, and whether he has the power to delegate to local authorities the power to restrict, and the power to set a licence fee".* This decision will be discussed in more detail in due course when addressing the parties' legal submissions, and it suffices for present purposes to summarise the conclusions reached by reference to some of the head-note of the reported judgment. Murphy J. concluded, inter alia, that (1) that, by virtue of the fact that the Minister was empowered by s. 82 of the Road Traffic Act, 1961, to grant, or indeed refuse, applications for licences in respect of public service vehicles, the Minister was *ipso facto* exercising quantitative control over the licensing of such vehicles [and] therefore the Minister was not prevented by s. 82 of the Act all 1961, from exercising quantitative control *per se* over the licensing of such vehicles; (2) that s. 82 of the Road Traffic Act, 1961, while providing for the control and operation of taxes through the introduction of regulations, did not expressly or necessarily give power to restrict numbers and that the Minister, in restricting the number of licences issued in respect of public service vehicles for reasons unrelated to qualitative standards of the vehicles and of drivers, had fettered the discretion conferred upon him by s. 82 of the Road Traffic Act, 1961; and (3) that any such fettering of the ministerial discretion which affected the rights of citizens to work in an industry for which they may be qualified was impermissible and *ultra vires*, and that there must be a serious doubt over the constitutionality of any such scheme.

113. Some three weeks after leave had been granted, the National Taxi Drivers' Union and Thomas Gorman (in his capacity as General Secretary of that Union sought and were granted leave to be joined as respondents to the proceedings. Some of the arguments put forward by those parties in Humphrey are referred to by the State respondents in the present proceedings, and it is argued that some of the arguments now being put forward as a basis for their present claims are inconsistent with some arguments made by them in *Humphrey*. If necessary, I will return to that matter when addressing the parties' legal submissions.

114. The Minister did not lodge any appeal against the *Humphrey* decision. But the National Taxi Drivers' Union and Thomas Gorman did so. I am unsure of the date upon which that appeal was lodged, but it was presumably prior to the 21st November 2000 which was the date upon which the Minister signed new Regulations (S.I. 367 of 2000) which, although S.I. 3 of 2000 had been quashed by the decision in Humphrey, specifically revoked same. Not only did these new Regulations revoke, inter alia, S.I. 3 of 2000, but they also fully liberalised the issue of taxi licences so that the imposition of any quantitative restrictions was no longer possible, and there were no longer any mechanisms in place to protect existing licence holders from the removal of value in their licence plates. The secondary market was eliminated overnight, because anybody who wished to apply for a taxi licence could do so, provided certain conditions were met, and upon payment of quite a modest fee.

115. In the immediate aftermath of these new Regulations, there was inevitably a serious protest by taxi licence holders in the form of a complete withdrawal of taxi services in Dublin, as well as street blockages and disruption at Dublin Airport. This went over a week.

116. There was then an ex parte application by Mr Gorman to the High Court on the 28th November 2000 for leave to challenge S.I. 367 of 2000 by way of judicial review . Kelly J. directed that the application be on notice to the respondents. In due course on the 7th December 2000 he granted leave to bring the challenge the new Regulations, and an injunction restraining its operation until the determination of the proceedings. The granting of this injunction, it would appear, enabled the union leadership to persuade its members to call off their protests.

117. An early date for hearing of the proceedings was given which commenced before Carney J. on 19th December 2000. One of the grounds, and the only one ground on which the applicants were ultimately successful, was that the making of this new statutory instrument interfered with their right to have their appeal in the Humphrey case determined in the Supreme Court, and that it therefore constituted an unwarranted interference in the judicial process. When delivering judgment in March 2001 Carney J. agreed, and accordingly quashed one provision in S.I. 367 of 2000 namely 3(1)(a) which revoked the earlier Regulations (S.I. 3 of 2000) which had in any event been quashed by the Humphrey decision. The other grounds of challenge to S.I. 367 of 2000 were rejected, and accordingly the Minister therefore proceeded on the basis that the balance of S.I. 367 of 2000 remained in place.

118. Existing licence owners immediately saw the asset value of their licence plates disappear. While undoubtedly they could still earn a livelihood through their ownership of their licence, many had paid large sums of money in order to buy their licence on the secondary market - some indeed had done so very shortly before the new regulations came into force. Some had taken out large bank loans for the purpose, including by way of mortgage on their home. Others had invested a redundancy lump sum or their life savings. It was inevitable that the prospect of the taxi market being flooded by many more taxi owners who could purchase a licence for a fee of just €5000 was hard to swallow. Quite apart from the fact that new licence owners did not have to pay large sums on the secondary market for their licences, it was inevitable also that existing owners would feel that in order to maintain the same level of income as previously, they would need to work much longer hours. These and other reasons gave rise to a great deal of anger and resentment on the part of the existing taxi owners.

119. Some steps were taken by the Minister to alleviate the effects of deregulation such a refund of the difference between the fees recently paid and the new fee for a new licence under the new arrangements; the off-setting of capital outlay against their income tax over a five year period, and eventually the setting up of what became known as the Taxi Hardship Scheme. This body did not get

into the business of paying amounts by way of compensation, but rather by way of compassionate payments in identified cases of significant hardship resulting from deregulation. According to Mr Weafer's evidence the total amount paid under this scheme (which was independent of the Department) was in the order of €17.3 million.

The plaintiffs:
120. In February 2002, Alphonsus Muldoon and Thomas Kelly commenced their proceedings by way of Plenary Summons. In November 2002, Vincent Malone did likewise. They each sought certain declaratory orders and damages under a number of headings but all in some way based upon the fact that because the Minister and/or the local authorities permitted a licensing regime to operate as it did over so many years, they suffered immediate and significant losses as a result of the overnight deregulation or liberalisation of the market as soon as the regulations contained in S.I. 367 of 2000 were introduced in November 2000.

121. There is no need to trace in detail the pleadings history in this case because soon after the opening of these cases before me I made a ruling which resulted in the plaintiffs amending and reformulating some of their claims to include effectively a new claim that the 1978 Regulations were *ultra vires* the powers of the Minister conferred by s. 82 of the Act of 1961, not because the section did not enable the Minister to make regulations in relation to quantitative restrictions per se, but rather that this power was one that had to be exercised by the Minister, and could not be delegated by regulation to the local authorities.

122. While the original pleadings had pleaded that the 1978 Regulations were *ultra vires*, it was pleaded on a different basis, namely that the power vested in the Minister by the section to make regulations in relation to the *"control and operation of public service vehicles"* did not include a power to control numbers. As pleaded in this way, the plaintiffs obviously faced the obstacle presented to them by the judgment of Costello J. in *State (Kelly) v. Minister for the Environment* which, in relation to S.I. 268 of 1977 had found that s. 82 of the Act of 1961 did indeed embrace the power to impose numerical controls, hence the need to alter the means of attack.

123. As far as delay is concerned, the plaintiffs argued that it was not until November 2000 when all quantitative restrictions were removed overnight by S.I. 367 of 2000 that they suffered their losses, and that in such circumstances time should be considered to run from that time only.

124. Before setting out the various heads of claim by the three different plaintiffs, it is necessary to set out their individual factual backgrounds. These three plaintiffs are said to be representative of the large number of taxi licence holders who await the determination of these proceedings. Obviously every individual taxi licence holder's facts will be slightly different, but generally speaking the present plaintiffs are said to be representative of all.

125. Alphonsus Muldoon and Thomas Kelly have similar factual circumstances and can be grouped together. Mr Muldoon had been a hackney driver for four years prior to purchasing a licence on the secondary market in Dublin in 1998 for the sum of £80,000. He used £40,000 of savings belonging to himself and his wife, and he obtained the balance of £40,000 by way of a loan from Bank of Ireland, which was secured by a mortgage on his home. He paid a fee of £3000 to Dublin City Council for the transfer of that licence to him.

126. Mr Kelly bought his licence in Ennis on the secondary market in 1999 for the sum of £107,000. He took out a ten year mortgage to enable him to do so, and in addition paid a fee of £3000 to Ennis Town Council for the transfer of the licence to him.

127. Vincent Malone's factual background is very different as he purchased his licence as far back as 1973 and paid only a sum of £3 for it. His claim arises somewhat differently from the other two plaintiffs herein since he did not suffer his losses because he paid a high price for his licence on the secondary market. But nevertheless his claims for loss arise due to the overnight devaluation in the value of his licence plate, or the loss of the rental value of same.

Overview of the plaintiffs' claims:

128. Reliefs sought by Alphonsus Muldoon and Thomas Kelly against the Minister and Ireland:

> 1. Declaration that the Minister and the State, their servants and agents, enacted and maintained an unlawful, void and illegal regime for the licensing of small public service vehicles between the years 1978 and 2000 – i.e. the regime which includes the 1978 Regulations (S.I. 292 of 1978) and the 2000 Regulations (S.I. 367 of 2000). These plaintiffs claim that this regime which provided for the imposition of quantitative restrictions was unlawful, void and illegal because:
>
> (a) the 1978 Regulations were ultra vires the Road Traffic Act, 1961 because s. 82 thereof did not empower the Minister to make regulations which delegated to local authorities a power to determine and/or fix the number of taxi licences to be issued in specified areas;
>
> (b) the 1978 Regulations and the 2000 Regulations entailed an unreasonable exercise of statutory power by the Minister and a breach of duty and/or statutory duty;
>
> (c) the 2000 Regulations breached the plaintiffs' constitutionally protected rights to property, right to earn a livelihood, and right to be held equal before the law; and
>
> (d) the 1978 Regulations and the regime that ensued until November 2000 was in breach of the Treaty of Rome, and in particular Article 86.
>
> 2. Damages in respect of the loss and damage caused and/or occasioned to the plaintiffs by reason of the ultra vires acts of the Minister and the State, their servants or agents;
>
> 3. Damages for breach of duty and/or statutory duty;
>
> 4. Damages for breach of constitutional right to property, right to earn a livelihood and right to equal treatment;
>
> 5. Damages for breach of Article 86 of the Treaty of Rome;
>
> 6. Damages under a number of other headings – misfeasance in public office; negligence and/or negligent misrepresentation; unjust enrichment; breach of legitimate expectation;

129. Claims against by Alphonsus Muldoon against Dublin City Council:

1. Declaration that Dublin City Council maintained an unlawful, void and illegal regulatory regime for the licensing of small public service vehicles between 1978 and 2000 because:

(a) the 1978 Regulations were ultra vires the Act of 1961;

(b) by their acts and omissions in respect of the issuing of taxi licences, the Council breached the plaintiffs' constitutionally protected rights to property, right to earn a livelihood, and right to be held equal before the law;

(c) the acts and omissions by the Council in respect of the issuing of taxi licences entailed an unreasonable exercise of statutory power and breach of duty and/or statutory duty;

(d) the acts and omissions by the Council in respect of the issuing of taxi licences were contrary to the prohibition in competition law on abuse by an undertaking of its dominant position in the market.

2. Damages in respect of the loss and damage caused and/or occasioned to Mr Muldoon by reason of the *ultra vires* acts of Dublin City Council;

3. Damages for breach of duty and/or statutory duty;

4. Damages for breach of constitutional rights;

5. Damages for breach of Article 82 of the EC Treaty;

6. Damages for negligence and/or negligent misrepresentation;

7. Declaration that the defendants or some of them have been unjustly enriched as a result of the illegal regulatory regime operated and/or approved by them;

8. An order by way of restitution by Dublin City Council in respect of said unjust enrichment;

9. Damages for breach of legitimate expectation that Dublin City Council would maintain a lawful and valid regulatory regime for the licensing of small public service vehicles and/or that the plaintiff would not suffer serious financial loss by reason of such unlawful and illegal regulatory regime.

Claims by Thomas Kelly against Ennis Town Council:

130. The claims maintained by Thomas Kelly against Ennis Town Council are made in identical terms to those made by Mr Malone against Dublin City Council. While there are different facts subtending the claim made by Mr Kelly as to the manner in which Ennis Town Council maintained what he regards as an unlawful, void and illegal regulatory regime for the issuing of licences, essentially the claim is the same as Mr Malone's, namely that the Regulations were *ultra vires*, the Town Council failed to issue a sufficient number of licences (thereby creating a secondary market leading to a very high price being paid by him for his licence), the acts and omissions in that regard of the Council entailed an unreasonable exercise of statutory power and a breach of duty (including statutory duty), and were contrary to the prohibition in competition law on abuse by an undertaking of its dominant position in the market. The same legal principles fall to be considered in both cases.

Claims made by Vincent Malone against the Minister and the State:

132. The factual background to Mr Malone's claims is, as already noted, very different to both Mr Muldoon and Mr Kelly, as he did not buy his licence on the secondary market which arose after the 1978 Regulations since he was granted his licence in 1973 and for which he paid a fee of £3 at the time. He therefore is not seeking any declaration that the Minister and the State enacted and maintained an unlawful, void and illegal regime for the licensing of small public service vehicles between the years 1978 and 2000. But he maintains a claim for damages, because the value which his licence had acquired by the time the 2000 Regulations came into force was all but wiped out, meaning that he could not sell the licence; nor could he, if he so chose, rent it out in order to provide himself with an income stream should he for example wish to retire. He claims damages against the Minister and the State for breach of duty and/or statutory duty, damages for breach of his constitutionally protected property rights, and in addition seeks an order for all necessary accounts and inquiries, interest and costs.

Claims made by Vincent Malone against Dublin City Council:

133. Because of the way he is differently situated factually from Mr Muldoon, the reliefs sought by Mr Malone against Dublin City Council are confined to claims for damages for breach of duty and/or statutory duty, damages for breach of his constitutionally protected property rights, and an order for costs.

The Ultra Vires Claims made against the Minister and the State by both Alphonsus Muldoon and Thomas Kelly:

(a) Delegation in the 1978 Regulations to local authorities of the power to decide on numbers of licences to be issued was beyond the powers given to the Minister by section 82 of the Act of 1961:

134. One of the bases upon which these two plaintiffs seek damages against both the Minister and the State is that the regulatory regime which existed between 1978 and 2000, whereby quantitative restrictions were imposed on the number of licences to be issued in any particular year which in turn created the secondary market in licences as already set forth in some detail, was unlawful, void and illegal because the Regulations themselves which saw that secondary market develop and flourish were *ultra vires* the Minister's powers under section 82 of the 1961 Act. They do not of course seek to challenge the 1978 Regulations in a judicial review sense, since, if for no other reason, they are hopelessly out of time for doing so. Indeed, until the 2000 Regulations were enacted and the quantitative restrictions were removed, these plaintiffs entered into the market voluntarily and plied their trade within it to their advantage. It gave them a decent income with the possibility of a retirement income stream or pension. The extent of any particular taxi owner's advantage would depend on a number of factors, such as when, where, how and for how much they bought their licence on the secondary market. But however situated each may be, the claim remains the same, namely that the loss claimed to have been sustained derives under this heading of claim from the contention that the Minister was not empowered by section 82 of the 1961 Act to make Regulations which delegated to local authorities the power to determine and/or fix the number of taxi licences to be issued in particular areas.

135. This basis for this particular *ultra vires* claim (i.e. no power for the Minister to delegate to local authorities) did not emerge until the plaintiffs' case was being opened by Michael Collins SC. Previously on the pleadings and in very extensive written submissions, the basis for the claim that the Regulations were ultra vires was stated as being that the power given to the Minister in section 82 (1) of the Act of 1961 to make Regulations in relation to *"the control and operation of public service vehicles"* did not extend to the regulating for the imposition of quantitative restrictions. Given the decision of Costello J. in *State (Kelly) v. Minister for the Environment* (later affirmed by the Supreme Court) it is hard to see how this claim could have been considered worthy of even being pleaded, let alone argued with any expectation of success, even allowing for the fact that the Kelly case was a challenge to earlier Regulations made in 1977. Albeit dealing with a different regulation, it was clearly decided that the word "control" appearing in section 82 was broad enough to include restricting or limiting the number of licences. This inevitable change of tack by the plaintiffs led to an objection by Brian Murray SC for the Minister and the State, supported by the other defendants. However, following lengthy submissions, I permitted the plaintiffs to amend their Statement of Claim in this respect for reasons set forth in my earlier ruling in that regard.

136. In passing, I should refer to one other matter in relation to the Supreme Court's upholding of the decision of Costello J. in the *Kelly* case. There is no written judgment of the Supreme Court, but there is a note of what was stated by Henchy J. contained on the Departmental file. The plaintiffs seek support for their present submissions from a part of that very brief note which records that Henchy J. indicated that he would have some concern about the delegation of powers under section 82 of the Act to councils. The note indicates nothing in that regard beyond a concern. There is nothing to show that the point was the subject of any submission or argument in that case in the Supreme Court, and in so far as the note may be an accurate reflection of what Henchy J. stated, it must in any event and very clearly be an obiter remark. Without in any way intending any disrespect to such an eminent judge, this Court cannot place any weight upon it for the purpose of determining the present case where very extensive submissions have been made by all sides.

137. If the plaintiffs are unsuccessful in seeking a declaration that the Minister and the State enacted and maintained an unlawful, void and illegal regulatory regime by means of the 1978 Regulations and other Regulations made between that date and 2000 because the Minister was never empowered to delegate to local authorities the power to control the numbers of licences, it must follow that their claims for damages against the Minister and the State on that basis falls away fail also.

138. In so far as there appears now to be an acceptance by the plaintiffs that section 82 of the Act of 1961 is broad enough to provide a power for the Minister to impose restrictions on the number of licences to be issued, as part of his power to make regulations in relation to the "control" of public service vehicles, they nevertheless submit that it is a power which enables the Minister alone to do so. It has been submitted that on a proper construction of section 82 of the Act of 1961 it is ultra vires for the Minister to delegate to local authorities the power to determine the number of licences which may be issued in their particular area. It is submitted also that this delegation under the Regulation is unlawful because section 82 provides no guidance either to the Minister or the local authorities as to the basis upon which any decision as to the number of licences to be issued should be made, and that only if the principles and policies by which such decisions are to be made can be found in the Act could the Regulation be seen not to offend against Article 15.2.1 of the Constitution which vests in the Oireachtas the sole and exclusive power to enact legislation. The plaintiffs submit that given the absence of such guidance by reference to principles and policies in the Act, the 1978 Regulations have given the local authorities a free and unguided hand, as it were, to decide how many licences to issue, or as happened in the Dublin area in particular over many years, that no new licences would be issued, even in the face of an increased and unmet demand.

139. While the proceedings do not mount a challenge to the constitutionality of the 1978 Regulations, nevertheless the plaintiffs rely on the contention that the regime that existed as a result of these Regulations was a regime which lacked any proper legal foundation, and yet they were forced by the way in which these Regulations were operated in their particular areas to seek out and purchase for very large sums of money a taxi licence on the secondary market created by these Regulations, and that were it not for this unlawful regulatory regime they would not have suffered the losses arising from the total liberalisation of the taxi market following the introduction of the 2000 Regulations (S.I. 367 of 2000).

140. It is fair to say, I think, that there is no real controversy between the parties as to the applicable principles which should guide this Court in determining whether Regulations made by the Minister offend against the constitutional imperative set forth in Article 15.2.1 of the Constitution. As often happens, it is the application of those principles upon which the parties disagree.

141. The plaintiffs in both their written and oral submissions have referred to many of the leading authorities in relation to delegated powers and Article 15.2.1 of the Constitution. In their written submissions they have helpfully summarised seven core principles from those cases which they seek to emphasise in support of their arguments, namely the following:

- Where the Oireachtas has delegated a power to make regulations "the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation… otherwise it will be held to have been invalidly exercised as ultra vires – see Henchy J. in *Cassidy v. Minister for Justice, Equality and Law Reform* [1978] IR 297.

- It must be implied that the power to make subordinate legislation (i.e. to make Regulations) should be exercised reasonably, and must not be arbitrary, unjust or partial – see e.g. Denham J. in *Crilly v. T & J Farrington Limited* [2001] 3 IR 251.

- The Minister in exercising the power to make regulations must do no more than give effect to principles and policies which are contained in the statute itself, and if the regulations go further than merely filling in the detail of what is authorised by the statute, then they are not "authorised" and thus amount to a purported exercise of a power to legislate which is restricted to the Oireachtas alone – see e.g. *Cityview Press Ltd v. AnCo* [1980] IR 381; Meagher v. Minister for Agriculture [1994] 1 IR 329

- The scope of the regulations and the manner in which they affect the constitutional rights of citizens to work in an industry for which they may be qualified may raise doubts as to how far they exceed what was intended by the Oireachtas – see e.g. *O'Neill v. Minister for Agriculture and Food* [1988] 1 IR 539 at 556.

- Where a regulatory power has been exercised in a way that brings about a result not contemplated by the Oireachtas the Courts have a duty to interfere, since not to do so would be to tolerate the creation of subordinate legislation which lacked any lawful authority – see e.g. O'Higgins C.J. in *Cassidy v. Minister for Industry and Commerce* [supra].

- In order to determine whether what was regulated for was within the ambit of the power conferred, it is necessary to properly construe the statutory provision that conferred the power, and to apply the double construction rule in order properly determine its ambit, and where necessary to give the provision a restrictive interpretation to ensure that its scope does not stray beyond the power give and encroach impermissibly upon the exclusive law-making power given to the Oireachtas alone under Article 15.2.1 of the Constitution – see generally e.g. Cooke V. Walsh [1984] IR 710; *McDonnell v. Bord na gCon* (No.2) [1965] IR 217; *East Donegal Co-*

operative Livestock Mart Ltd v. Attorney General [1970] IR 317. Thus, although a section may appear to give a wide power to make regulations, it may have to be more narrowly construed in order to pass constitutional muster, and any regulation passed on the basis of a wider interpretation may be considered to have been ultra vires.

142. I would suggest that none of the above is in any way controversial as statements of principle. I am of course cognizant of the fact that the written submissions presented to the Court were prepared in the context of the plaintiffs' unamended *ultra vires* pleading on the basis that the imposition of quantitative restrictions by Regulations was *ultra vires* as being outside the concept of "control" in section 82 of the Act of 1961, and were not directed specifically at the unlawful delegation issue. Nevertheless, the same principles identified from this body of case law were relied upon in oral submissions in relation to the amended claim.

143. As originally pleaded, the plaintiffs' case was that the power to impose quantitative restrictions in the 1978 Regulations had devastating consequences for the plaintiffs, and many hundreds, if not thousands, of other taxi owners which manifested only in 2000 when the market was liberalised, and the value in these licences disappeared for all practical purposes. Now however, the submission is altered to one which contends that the fact that the power to impose number restrictions was vested in local authorities as opposed to residing in the Minister constitutes the *ultra vires* nature of the Regulations made in 1978. That in my view is a much weaker argument than even that which was focussed upon quantitative restrictions per se, since, if one accepts, as in my view one must, that the ability to "control" small public service vehicles by restricting the numbers of licences that are issued is within the meaning properly to be attributed to the word "control", then it seems to be of little moment who imposes those numerical restrictions, as far as their effect on individual taxi licence holders is concerned. In fact, proponents of the subsidiarity principle might well argue that by delegating the power to local authorities to decide on the number of licences that are needed in any particular local authority area (all being different in size, scale and nature) the democratic power of decision-making was being returned by the Minister to a point closest to those immediately to be affected by the decision – i.e. the local population, be that the taxi users of an area or the licence holders and prospective holders. There must be a very strong argument to be made that the local council in a particular are is best placed to make a decision as to the number of licences needed in a particular functional area.

144. It should also be borne in mind that, as the history of taxi regulation already set forth demonstrates, the problems of supply and demand existed primarily in Dublin, and it was mainly from within the Dublin area that the clamour came from the taxi owners themselves for the Minister to impose some sort of control over the number of taxi licences to be granted. This was done by indirect, almost furtive means, at first, namely by restricting the number of windows of opportunity to apply for a licence, given the view taken at the time that numerical restrictions may not have been within the ambit of the Minister's powers under section 82 of the Act of 1961. But, clearly, market conditions in Dublin would bear no comparison or resemblance to market conditions in even other large cities such as Cork, Galway and Limerick, let alone other less populated regional areas. In such circumstances, a Minister was always going to have difficulty regulating on a 'one size fits all' basis, once a decision was taken that some form of numerical control was necessary, even if the main driver for such controls was the desire of the existing cohort of licence holders to stop the market being saturated. Given that the Minister was under constant pressure from persons lobbying on behalf of the industry to bring in some form of effective numerical controls, and given the intractable difficulties experienced in reaching solutions that would meet the industry's demands and expectations, and avoid some form of industrial action from what appears to have been a very vocal and easily mobilised group, it is little wonder that, quite apart from any lofty notions of bringing democracy closer to the people affected in deference to the principle of subsidiarity, he decided that it would be best to give to the local authorities the power to decide upon what numbers of licences were required to meet the public demand for taxi services in a particular area.

145. But I return to something said earlier. Once numerical controls are within the contemplation of the Oireachtas when it empowered the Minister to make regulations in relation to the control and operation of the taxi industry, and that has been decided to be the case, then it seems to matter not who imposes those restrictions from any sort of causation perspective. That in my view speaks against the plaintiffs' submission that the Regulation is *ultra vires* not because of the fact that it permits quantitative restrictions to be imposed, but because that power was delegated to the local authorities.

146. In their submissions the plaintiffs have made the point that *State (Kelly) v. Minister for the Environment* was about earlier 1977 Regulations, and not the 1978 Regulations which provided for quantitative restrictions from 1978 up to 2000. That of course is correct as a statement of fact. The plaintiffs go on to submit that therefore this Court should not consider that the judgment of Costello J. (and upheld in the Supreme Court) has concluded that in all other contexts the Minister can be considered to have the power to restrict taxi licence numbers under Regulations made under section 82 of the Act of 1961. They point to the fact that in State (Kelly), or at least as appears from the note of Costello J's decision, it does not appear that either Article 15.2.1 of the Constitution or the numerous fundamental principles of administrative law to which the plaintiffs have referred in their very extensive submissions were referred to at all before Costello J. Again, that submission was made in the context of the plaintiffs' case on *ultra vires* being the fact that quantitative restrictions were permitted, rather than the new delegation ground. But, adapting the submissions somewhat to take account of the new delegation ground, it is submitted that the question is not simply whether section 82 of the Act of 1961 is wide enough to permit the Minister to make the Regulations limiting numbers between 1978 and 2000, but rather, having regard to the presumption of constitutionality and the application of the double construction rule, whether the section is wide enough to permit of a constitutional interpretation which permits secondary legislation to be made not simply as to the imposition of numerical restrictions by the Minister, but that he may in turn delegate that decision-making power to local authorities as he did in 1978. The plaintiffs say that manifestly the section does not go that far when the section is read constitutionally, as it must be. They go on to submit that if the Oireachtas had intended that persons other than the Minister could be given the power to decide on licence numbers, it could and would have said so easily and directly in the Act, just as it did in section 84 of the same Act when it gave power to the Commissioner of An Garda Siochana to make bye-laws (with the consent of the Minister) in relation to certain matters including *"fixing the maximum number of street service vehicles which may stand for hire at any one time at any particular appointed stand",* and notwithstanding that in the same section at (d) thereof the Commissioner was empowered to make bye-laws for the purpose of *"regulating and controlling the use of appointed stands by street service vehicles".* I note with interest, however, that while section 84 gives the Commissioner a power to make bye-laws in relation to certain matters, that power can be exercised only with the consent of the Minister, and only after the relevant local authority has been consulted. In other words, it is a very restricted power when one compares it with that given to the Minister under section 82 (1) of the same Act.

147. The plaintiffs' submissions on the new delegation issue are concisely set forth in their 'overview document' which they were directed to file in order to precisely define what claims they were making following the opening of their case. For convenience I will set out a passage from paragraph 3 (i) thereof:

> *"… section 82 must be construed on the basis that it does not entail:*
>
> *(a) an impermissible delegation of the law-making power which Article 15.2.1 of the Constitution confers 'sole[ly] and exclusive[ly]' on the Oireachtas; or*

(b) the conferral of power to infringe fundamental rights which are protected by the Constitution (including the right to earn a livelihood, property rights and the right to be treated equally before the law);

Accordingly, section 82 must be construed on the basis that it does not:

(a) confer a power on the Minister to determine principles and policies or to delegate to local authorities a power to determine principles and policies (e.g. as regards the fixing of the number of licences to be issued and/or the basis upon which the number of licences to be issued and/or the basis upon which the number of licences to be issued is to be fixed and/or as regards the creation and/or maintenance of and/or profiting from a secondary market for the transfer of taxi licences), or

(b) confer power on the Minister to qualify a limited number of persons to enter the taxi industry and disqualify all others who may be equally competent to earn their livelihood in that industry; or

(c) confer power on the Minister to create and maintain a secondary market for the sale and transfer of taxi licences from one person to another for substantial and ever-increasing prices and which is the only effective means of earning a livelihood in the taxi industry.

When section 82 is construed thus, as it must be (in accordance with the requirements of the Constitution), it is manifest that the Quantitative Restriction Regulations were ultra vires and thus, unlawful, void and illegal; the Quantitative Restriction Regulations entailed, inter alia:

o the delegation to the Councils of a power to determine and/or fix the number of taxi licences to be issued in specified areas, the basis upon which the number of licences to be issued is to be fixed and the creation and/or maintenance of and/or profiting from a secondary market for the transfer of licences;

o the exercise of that power by the Councils and the consequential severe restrictions of entry to the taxi market;

o the establishment, maintenance and implementation of a regulatory system that created an official market for the sale and transfer of taxi licences from one person to another for substantial and ever-increasing prices; and

o a system whereby substantial fees were payable to the State and/or the Councils upon the transfer/continuance in force of taxi licences purchased in the secondary market for the sale and transfer of taxi licences.

The conclusion that the Quantitative Restriction Regulations were ultra vires is strongly reinforced by Article 15.2.1 of the Constitution and the authorities … " [a lengthy list of such authorities is then set forth in the original]

148. The starting point for the State defendants' submissions is, firstly, that the question of whether or not section 82 empowered the Minister to restrict the number of licences as part of his power to "control" public service vehicles has been definitively determined in 1978 by the judgment of Costello J. in *State (Kelly) v. Minister for the Environment*, and upheld in the Supreme Court, (and they note that the plaintiffs in their Amended Claim and over-view document on the *ultra vires* part of the case no longer contend otherwise); and secondly, given that numerical restrictions per se are accepted by the plaintiffs as being within the power under the section, it cannot be the correct that, while the Minister may himself under Regulations numerically restrict the number of taxi licences that may be issued intra vires, it is nonetheless *ultra vires* for him to do so by delegating to local authorities the power to decide upon the appropriate number of licences in a particular area.

149. In so far as the plaintiffs may still be submitting that *State (Kelly)* is not necessarily determinative given that Costello J. was looking at the word "control" in the context of a different Regulation, the State defendants submit that this overlooks the fact that the principal issue in that case was what meaning should be attributed to the word "control" in section 82, and therefore the fact that a different Regulation made under the same section is now under consideration is irrelevant to the binding nature of this authority. In so far as the plaintiffs have argued also that it appears that in its consideration of the case in both the High Court and Supreme Court Article 15 of the Constitution was not argued, the State defendants say firstly that in any event the present case is not one where it is sought to strike down the 1978 Regulations, and secondly, it cannot be presumed that it was not the subject of argument and submission simply because in a short note of the decision it is not mentioned.

150. However, given the complete change in the nature of the *ultra vires* claim being put forward, and the fact that it is no longer based on a lack of power to impose quantitative restrictions per se but rather the delegation of that power, the debate about *State (Kelly)* is somewhat moot at this stage. The only issue under this part of the claim is whether the power to make Regulations under section 82 enables the Minister to delegate to local authorities the power to decide upon the number of licences to be issued.

151. Ultimately, the determination of the issue now under consideration is to be made not as if these proceedings are a challenge to the constitutionality of the Regulations based on an infringement of Article 15 of the Constitution, where of course the Court would have to consider and determine whether the Act under which the Regulations are made contained sufficient in the way of principles and policies in order to give the necessary guidance as to the extent of the power being given, and the manner in which it should be exercised. This is not a case where the plaintiffs are saying that if the Court finds that the word "control" does not include a power to restrict numbers of licences, or alternatively where the plaintiffs contend that if the power to delegate that power to local authorities is found to be within the power to "control" the section is unconstitutional. Nor are these proceedings a challenge by way of judicial review where the Court might be asked to quash the Regulations on the basis that in making them the Minister exceeded his powers. It is a relatively straightforward claim for damages at the end of the day, and for present purposes and as now pleaded, it is a claim for damages arising from what is claimed to be an unlawful regime created by the Minister in 1978 whereby instead of regulating so that he decided upon the numbers of licences to be issued in every part of the State, he did so by delegating that power to local authorities. In view of the way the claim has been amended under the present heading, it must follow, I think, that the plaintiffs are saying that because the number of licences was restricted by the local authority rather than the Minister himself and from which the secondary market developed, they suffered losses as claimed when the 2000 Regulations were introduced. The issue of causation in such circumstances is hardly stateable. It will be visited again when the Court is considering the different question of breach of statutory duty, but I make the comment now nonetheless since it puts some context on the claim now for the declaration sought.

152. In my view, the issue of whether the Minister was empowered by section 82 of the Act of 1961 to delegate to local authorities the power to determine the number of licences in any particular area can be decided by looking at the words of the section, and by reference to the ordinary and plain meaning of the words used by the Oireachtas to express its intention. If they do, this Court will

not be striking them down in any fashion because that is not what the plaintiffs are seeking, but the Court would make a declaration which could assist the damages claims. But of course, other considerations would come into play when considering those claims given the hurdles which the plaintiffs would need to overcome if they are to recover damages in respect of an unlawful exercise by the Minister of a statutory power, or indeed by a local authority.

153. The long title to the Act of 1961 states that it is *"an Act to make provision in relation to ……the use of mechanically propelled vehicles for the carriage of passengers …… and to make provision for other matters connected with the matters aforesaid".* The Part of the Act which is relevant to taxis generally is Part VII which is headed "Control and Operation of Taxis". The relevant Minister for the purposes of the Act is defined in section 3 as meaning The Minister for Local Government. Section 82(1) gives power to that Minister to make regulations in relation to the control and operation of public service vehicles. It is clear that this is a wide and general power given subsection (2) which provides that *"Regulations under this section may, without prejudice to the generality of subsection (1) of this section, make provision in relation to all or any of the following matters: (a) the licensing of public service vehicles ……"* and there follows a number of very specific matters which the Oireachtas clearly specified as matters that might be the subject of Regulations, as the Minister might decide. The power to make any such specific regulations or under the general power to make regulations is a discretionary power (viz. the use of the word "may" as opposed to the word "shall"). The word "may" of course can be read also as being an empowering section, but nevertheless the absence of the word "shall" implies a wide degree of latitude to the Minister as to whether and how he would so regulate for the purposes of "the control and operation of public service vehicles". It must be accepted by now that this power to regulate includes the power to regulate so as to restrict the number of taxis. That restriction could be done perhaps by some Regulation which provided that there may not be more than a certain number of taxi licences in the entire country, whereby a licence would not be confined to any geographical area. A Minister who regulated in that manner might well be open to criticism from all sides, public and taxi industry alike, since the disadvantages of such a scheme are manifest and obvious. But I use it as an extreme for the purpose of demonstrating how obvious it is that a Minister wishing to regulate the question of taxi licences, numerically or otherwise, would rationally and sensibly do so on the basis that each functional area, be that a county/rural area, large town or large city, will inevitably have differing needs, depending on geographical size and population, including tourist and business population. The needs of each will be very different, requiring an individual approach.

154. The taxi industry, particularly in Dublin and other large centres of population, was very unhappy with the regime as it operated while the control and operation of the industry resided solely with the Minister. The history of the problems which beset the industry even up to the introduction of the 1978 Regulations has been referred to in the background set forth earlier. In para. 11 ante I have stated:

> *"the evidence suggests that by 1970 the number of licensed taxis had significantly increased in the Dublin taximeter area. There was a 116% increase in taxi numbers in the period 1958-1968. In the period 1968 – 1976 the number of taxi licences held increased from 1208 to 1866".*

155. This lack of control over the numbers of taxi licences was of grave concern to taxi owners, and they constantly demanded that successive Ministers do something to restrict the numbers. There were concerns also in relation to vehicle standards and quality. These problems were particularly of concern in the Dublin area, where the increases seen were greatest for obvious reasons. I have set out the various efforts that were made by Regulation to restrict numbers by reducing the available 'windows' for applying for a licence. Again, as already noted, the view within the Department (a view not shared by the Irish Taxi Federation at the time) was, until the decision in State (Kelly), that section 82 of the Act of 1961 did not provide a basis for imposing restrictions on numbers.

156. Following the State (Kelly) decision the Minister was able to make a Regulation which would enable the numbers of licences to be controlled, without any risk that it would be found to be *ultra vires* his powers as had been previously thought within the Department. They could be 'controlled' in either direction of course – by being increased or decreased as the need might arise. But once the decision was made by the Minister that some control over numbers was now possible and permissible, he would have been faced immediately with the difficulty that he had not faced before, namely how was he as a Minister for Local Government to make a decision, not just for Dublin, but for any taxi area, as to was the appropriate number of taxis required to meet the local need for year to year. One would have thought that it was immediately obvious that the most appropriate way to ensure that local needs were identified each year was to engage local decision-makers in the process of so determining. This, I would have thought, was a decision the nature of which demanded that it be taken at local level, rather than at Departmental level.

157. I say this because in my view it points up the fact that when looked at in this light there is nothing "daft or off the wall" or otherwise irrational, absurd or otherwise inappropriate about the Minister for Local Government, whose responsibility it is to regulate in relation to the control and operation of the taxi industry, including in relation to controlling up or down the number of licences required, deciding that this task is best done by those democratically-elected members of local authorities in question, who are best placed to be aware of local needs, be they met or unmet.

158. I am completely satisfied that it was within the wide and general regulatory power conferred upon the Minister in section 82 of the Act to delegate to local authorities in the manner in which he did so in the 1978 Regulations. To so conclude does not in any way do violence to the language used by the Oireachtas when granting that power. It does not involve a construction of the section which, by way of offending the double construction rule or otherwise, yields an unconstitutional result. The section enjoys the presumption of constitutionality. Its meaning is clear in my view, and what the Minister did by introducing the 1978 Regulations was not ultra vires his powers, and I therefore refuse to make a Declaration in that regard as sought.

(b) Breach of Constitutional Rights:

159. The next basis upon which Mr Muldoon and Mr Kelly contend that the State defendants maintained an unlawful, void and illegal regime for the licensing of small public service vehicles between 1978 and 2000 is that the 1978 Regulations and those made between that date and the 2000 Regulations breached certain rights which are protected under the Constitution, and in particular their right to earn a livelihood, their property rights, and their right to be held equal before the law. They also claim, as does Mr Malone, that the 2000 Regulations, which brought to an end the quantitative restrictions regime which had operated throughout those years and which overnight wiped out the value that had built up in existing licences held by owners, are unlawful, void and illegal because they breached the same constitutional rights of the plaintiffs because they lacked proportionality, and were introduced without any proper scheme for compensating licence holders for the destruction of the value of their licences. Mr Malone makes no complaint in relation to the 1978 Regulations given that as already set forth he purchased his licence for £3 back in 1973, though he relies upon the existence of an unlawful regime resulting from the 1978 Regulations for a value building up in his licence, and which was later taken away from him when the 2000 Regulations were introduced without any scheme for compensation being put in place. But for convenience I will refer to the claims being made under this heading as being "the plaintiffs' claims".

160. As with the *ultra vires* ground it is important to bear in mind that the plaintiffs are not simply seeking a declaration in relation to

a breach of their constitutional rights, but are making a claim for damages for breach of those rights.

161. To determine this aspect of the plaintiffs' case it is necessary to consider the nature of the licence at issue, what it permits the owner to do, whether and to what extent it constitutes property, and if so, the extent of the protection and vindication to which its owner is entitled. It will also be necessary to consider a number of decided cases to which each party relies, and to refer to some decisions of the ECt.HR on which the plaintiffs seek to place some reliance, and which they say are supportive of their contention that in the present case the actions of the Minister in 2000 when he removed the quantitative restrictions and wiped out the value of their licences were unjustified, excessive and disproportionate to any lawful objective which he sought to achieve, and have resulted in a breach of the identified property rights for which they are entitled to be compensated by way of an award of damages to be measured in terms of the value of their licences on the date of the introduction of the 2000 Regulations when the value disappeared.

162. At the outset, I should say that the State defendants understandably take no issue with the plaintiffs' general proposition that constitutional rights are capable of enforcement, that a breach of same may give rise to a claim for damages, that the State may interfere with such rights in the interests of the common good; and that any such interference must be proportionate. However, the defendants submit that on the facts of this case there has been no attack, disproportionate or otherwise, on the constitutionally protected rights claimed to have been infringed; and contend further that in any event before the Court could conclude that the plaintiffs are entitled to damages for breach of constitutional rights they must establish that the ordinary common law of tort is insufficient to protect their constitutional rights. The State defendants make the point also that the mere fact that the State may, by some legislative measure affecting a regulated sector of the economy, cause a loss to some persons operating in that sector does not of itself constitute a breach of constitutional rights, entitling them to maintain an action to recover damages for those losses. However, I will return to those submissions having considered the plaintiffs' submissions on this part of the case.

163. The plaintiffs' say that it is beyond question that money is a species of property, and also that a licence is a species of property, each of which is entitled to protection under the Constitution. It follows in their submission that the value which the licences had by 1978 is something to which the Constitution gives protection, and not simply the licence per se. The plaintiffs refer to the judgment of Costello J. in *Hempenstall and others v. Minister for the Environment* [1994] 2 IR 20, and rely on the fact that in his judgment he concluded, inter alia, that the applicants' challenge to certain 1992 Regulations which lifted a temporary moratorium on the issuing of hackney licences which had been in place since certain 1991 Regulations, failed because the applicants had *"failed to establish that the Minister's actions have resulted in a diminution in the value of their taxi licences and accordingly have failed to establish that an attack on their property rights has taken place".* Costello J. dealt with this matter in greater length through pages 27-28 of his judgment. The plaintiffs submit that, unlike the unsuccessful applicants in Hempenstall who did not adduce any evidence of diminution of value, they have in the present case shown by clear evidence that the value that existed in their licences up to the introduction of the 2000 Regulations was wiped out completely and beyond argument once those Regulations came into force.

164. Another passage from *Hempenstall* is relied upon heavily by the plaintiffs. It is the part of the judgment at page 28 -29 where Costello J. states the following:

> *"A change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. There are many instances in which legal changes may adversely affect property values (for example, new zoning regulations in the planning code and new legislation relating to the issue of intoxicating liquor licences) and such changes cannot be impugned as being constitutionally invalid unless some invalidity can be shown to exist apart from the resulting property value diminution. In this case no such invalidity can be shown. The object of the exercise of the Ministerial regulatory power is to benefit users of small public service vehicles. It has not been shown or even suggested that the Minister acted otherwise than in accordance with his statutory powers. Once he did so then it cannot be said that he has thereby 'attacked' the applicants' property rights because a diminution in the value may have resulted" [emphasis added].*

165. It is the underlined passage which the plaintiffs wish to emphasise, and they say that unlike the Hempenstall applicants they are able to show that there is an invalidity that exists (namely the Regulations are made in breach of statutory duty and are *ultra vires* for the reasons being argued) and that this provides what in argument has been referred to as *"the Hempenstall window".*

166. A very significant judgment in the context of the claims now being made by the plaintiffs is the judgment of Carney J. in *Gorman v. Minister for Environment and Local Government* [2001] 2 IR 414. It is a judgment which on its face is very much against the plaintiffs' case, but they urge this Court not to follow the judgment, and they raise a number of issues which they say are either per incuriam or distinguish the case from the present case. In the Gorman proceedings the applicants had challenged the 2000 Regulations on the ground, inter alia, that by introducing the Regulations which had the effect of removing the quantitative restrictions and eliminating the value on the secondary market of their licences, and at the same time making no provision for compensation for those adversely affected thereby, the Minister had made an unjust attack on their constitutionally protected rights in their taxi licences. In fact the proceedings were successful on a ground not relevant to the present case, but it was a victory which was Pyrrhic in nature and of no benefit to the Gorman applicants. It is the comments and conclusions of Carney J. on other issues raised in the proceedings with which the present plaintiffs take issue and find fault, and to which the State defendants point as supporting their submissions that this ground of claim by the present plaintiffs must fail.

167. I will set forth a passage from the judgment (pages 429-430) of Carney J. because it is one on which each party makes submissions:

> *"…The nature and extent of the property rights enjoyed by the applicants in this case were described thus by Costello J. in Hempenstall v. Minister for the Environment [1994] 2 I.R. 20 at p. 28:-*
>
> *'Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions.'*
>
> *The decision of the High Court (Costello J.) in Hempenstall v. Minister for the Environment [1994] 2 I.R. 20, far from having no relevance to the factual scenario which presents itself in this case, clearly defines the scope of the property rights enjoyed by the holder of a taxi licence. In addition, it would appear to be on all fours with the facts of the instant case. The applicants in Hempenstall v. Minister for the Environment also claimed that they had been subject to an unjust attack on their property rights as a result of a change in the law. The temporary nature of the moratorium does not seem to have been in any way central to the High Court decision in that case.*
>
> *The applicants in this case accepted a similar restriction on the exercise of their property rights ab initio. They must have been aware of the risk inherent in the licence that legislative change might affect its value. Dramatic legislative*

changes had been introduced by means of Regulations in 1978 and 1995 and the applicants were under no misapprehension that changes in the licensing scheme effected by means of Regulations could have a considerable impact on the value of their investment. Indeed, such conditions must be necessarily implied if the Minister of State is not to be unduly hampered in exercising his powers under statute in the public interest.

The applicants in the instant case, as well as the applicants in Hempenstall v. Minister for the Environment … have in the past reaped the benefits of legislative change. It is not open to them to complain about such changes in the law having a detrimental effect on the value of their licences. It follows therefore that the actions of the respondents in introducing a scheme of deregulation by means of the second Regulations of 2000 cannot constitute an unjust attack as this restriction is inherent in the very nature of a licence. As Costello J. commented in Hempenstall v. The Minister for the Environment … at p. 28:

'… a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights.'

Such a legislative change per se cannot be unconstitutional in the absence of some further invalidity. Therefore, to the extent that the regulations do not fall foul of Article 6 of the Constitution and the principle of the separation of powers, they must stand."

168. The plaintiffs in submitting that the judgment of Carney J. should not be taken as the last word on the issues decided, point to nine particular matters in their written and oral submissions which should in their view suggest that this Court should not follow Carney J.

- firstly, they say that the decision in Gorman was never appealed to the Supreme Court which therefore has not had an opportunity to express its view on whether the 2000 Regulations entailed an unjust attack on constitutionally protected rights of the plaintiffs in the present case. The defendants herein say of course that this is irrelevant to the decision's value as precedent, and that unless this Court was to find itself in some fundamental disagreement with same, it ought to follow it as is the conventional approach in the interest of not having conflicting judgments from judges of equal jurisdiction.

- secondly, the plaintiffs say that Carney J. erred in saying that the factual situation in both Hempenstall and Gorman appeared to be "on all fours", whereas in fact they are different. They point to what they say is the different factual context of the two cases, and that whereas Hempenstall was all about whether the Minister was entitled to lift a temporary moratorium on the issue of hackney licences where to do so would have an adverse effect on the value of a taxi licence, since any person was free to apply for a hackney licence, the Gorman case was concerned with the overnight abolition of statutorily imposed quantitative restrictions on the issuing of taxi licences, and where no compensation was provided for in relation to the loss of value in those licences held by existing licence holders. They point also to the fact that Hempenstall failed because of a lack of any evidence as to the loss of value in the licences. The defendants on the other hand say that while for obvious reasons there were factual differences, the context was very similar, because by reason of the 2000 Regulations the applicants in *Gorman* faced increased competition for the public's business. They submit that any mere factual differences such as the length of time that the moratorium had been in place compared to the length of time the quantitative restrictions had been in place, are of no importance, and the principles are equally applicable in the present case.

- the third reason which the plaintiffs give why this Court ought not follow *Gorman* is the reliance placed by Carney J. on Costello J's observations already set forth regarding a licence being at all times subject to the possible that the regulatory regime may change, and that any property rights that may exist in a licence must be seen as subject to the risk that its value may reduce. The plaintiffs contend that these were *obiter* remarks, since the case was decided upon an issue as to whether in repealing the new 2000 Regulations and bringing in the new 2000 Regulations the Minister had unlawfully deprived the applicants of a right of appeal to the Supreme Court in the Humphrey case, and not therefore of any binding effect. They submit that it does not follow from these remarks that there has not been an unjust attack on the plaintiffs' property rights, and they say that when properly analysed, there has been an unjust attack, as well as an infringement on the right to earn a livelihood, and the right to be held equal before the law. The defendants repeat what they have said in relation to the issue just dealt with in the previous paragraph hereto, and they submit that the plaintiffs have demonstrated no reason why the Hempenstall and Gorman principles should apply to the present plaintiffs.

- the fourth basis advanced for distinguishing the issues in Hempenstall and Gorman is that in neither was the constitutionally right to earn a livelihood addressed and determined, nor the right to be held equal before the law. The defendants submit that it is clear from the evidence that the plaintiffs bought their licences for the very purpose of earning a livelihood, and since the licence was not taken away from them they may still earn a livelihood from it for as long as they choose to do so. In so far as the plaintiffs may be saying that the effect of the 2000 Regulations was to reduce the level of that income given the increase in the number of taxis that the Regulations enabled, the defendants submit that it cannot be correct to say that the Minister should, or was obliged to, regulate the industry in the financial interests of the taxi licence owners particularly where the common good required otherwise. It is unclear in what manner the plaintiffs say that they have been treated unequally or not held equal before the law.

- fifthly, the plaintiffs say that the issues in Hempenstall and Gorman were not determined in the light of the European Convention on Human Rights, and in particular the jurisprudence of the ECt.HR under the provisions of Article 1 of the First Protocol to the Convention. To this the defendants respond by saying firstly that the Convention was not argued in either case; but more fundamentally, the defendants say that the ECt.HR cases to which the plaintiffs have referred in support of their case are cases where the licences at issue had been either been revoked or withdrawn, or they had been otherwise deprived of them in a way that was found to lack proportionality. They say that in the present case there is no question of the 2000 Regulations having removed the plaintiffs' licences or otherwise deprived them of their licence. Thirdly, the defendants submit that in any event the events that gave rise to these proceedings occurred prior to the European Convention on Human Rights Act, 2003 coming into effect, and it cannot therefore be invoked – see *Dublin City Council v. Fennell* [2005] 2 ILRM 288.

- sixthly, the plaintiffs take issue with the comment by Carney J. in Gorman that those applicants accepted a similar restriction on the exercise of their property rights ab initio [i.e. to the restrictions which had been accepted by the Hempenstall applicants]. The plaintiffs in the present say that unlike the applicants in either Hempenstall or Gorman (in so far as they were found to have "accepted" the restrictions inherent in a taxi licence – i.e. the risk that the conditions under which it is held might change), they cannot be taken as having accepted, when they bought their licences, that the Minister could simply dismantle overnight the secondary market he had created in 1978 without making any proper provision for those so adversely affected. They distinguish their case from Hempenstall and Gorman on this basis. The defendants respond by saying that when referring to those applicants as having "accepted" that their licences were subject to certain restrictions, Carney J. did not mean that they had made a concession in that regard, but rather that there had to be an implied acceptance by them when they bought their licences on the secondary market that

there was an inherent risk to the licence from possible changes in the law at some future date. They submit that the same must be said of the present plaintiffs.

- the seventh point of distinction which the plaintiffs seek to draw from the Gorman decision is that while the applicants in Gorman was said to have "in the past reaped the benefits of legislative change" (i.e. the quantitative restrictions) and were in some way therefore estopped or otherwise not to be heard to complain when that regime was ended, the plaintiffs say that the present plaintiffs cannot be so criticised, since Mr Muldoon and Mr Kelly each bought their licences quite close to deregulation and for large sums of money, and thus cannot be seen as having reaped any benefit from the impugned regime. The defendants in response acknowledge that those plaintiffs paid a high price for their licences and that there is that distinction from the applicants in Gorman. Nevertheless, they say that it is still the case, as Carney J. stated in Gorman, that these licences were bought for the purpose of buying a job in effect, and that they bought their licences in the hope that they would retain their value, and even increase in value. On that basis, the defendants submit that the plaintiffs were happy to enter the industry which was subject to that regime where quantitative restrictions existed by virtue of Regulations which they now say were unlawful, and it is submitted that this inconsistency is merely highlighted by the remark of Carney J. as to *"reaping the benefits of legislative change".* They submit that there is no reality to the distinction which the plaintiffs seek to draw between their situation and that of the applicants in Hempenstall and Gorman, and that their complaint is really one simply that they cannot now achieve the price for their licences that they may have achieved prior to the 2000 Regulations and the liberalisation of the industry.

- Eighthly, the plaintiffs distinguish the present case from Gorman because in Gorman Carney J. had referred to a reduction in the value of property not being unconstitutional unless there was some other invalidity to be found, and they say that in the present case, as they hoped to establish, there is another invalidity, namely the *ultra vires* nature of the Regulations which gave rise to the secondary market, and what they say are *"multiple breaches of the duties of the [State defendants]".* The defendants fail to see how this is a point of distinction from the Gorman case, since, if the plaintiffs turn out to be correct, they will have established just the sort of invalidity that Carney J. was referring to, and will therefore be relying upon the decision in Gorman, rather than distinguishing it.

- Finally, the ninth issue taken really amounts to a disagreement with certain comments made by Carney J. in Gorman about the inappropriateness of a scheme for compensation in circumstances where licence owners acquired their licences knowing or being taken as knowing that there was inherent risk of legislative change. They say that his comment in Gorman that the interference with rights was "minimal", and say that this is not so in the case of the present plaintiffs. The defendants submit that this point is not a point of distinction, but simply a disagreement with the views of Carney J.

169. The decision of Carney J. is an important one in the context of the present case, as is the prior decision in Hempenstall upon which Carney J. draws heavily. That is why I have set out in some detail the efforts made by the plaintiffs to persuade this Court to depart from it or at least not to follow it. Clearly every case is different in one sense. Facts will never be quite the same. There may be cases where the facts are so different as to diminish the applicability of the legal principles emanating from the decision. But there are cases where despite certain factual distinctions that can be justifiably drawn, the legal issues are nevertheless similar, and the principles from the one can be equally applied to the other. This in my view is the case here. I respectfully agree with the judgment of Carney J. in Gorman and with his reasoning, albeit on the facts of that case. I will reach my own conclusions in the present case, without simply stating that I agree with what has been so clearly stated by Carney J. But I will not be seen to be in disagreement with him in any way.

Conclusions of breach of constitutional rights:
170. All three plaintiffs claim damages arising from elimination of value in their licences as soon as the 2000 Regulations were introduced because those Regulations took away their asset value without any adequate scheme of compensation, and were disproportionate to any justifiable objective which the Minister was pursuing by introducing them. They say, and in this regard I refer back to the background history which is set forth in the first part of this judgment, that the method by which the Minister sought to liberalise the taxi industry so that more licences would be issued in order to satisfy the undoubted public need for more taxis on the street was the very method that successive reports and recommendations had suggested should not be done – i.e. an overnight deregulation without compensation. It will be recalled that those reports available to the Minister had recommended a phased introduction of an increased number of licences, or other ways where the negative effect on existing licence values would be softened by numbers being increased over a number of years. Different reports recommended different periods for phasing in the new regime in ease of the existing licence holders, but all seem to have agreed that some consideration needed to be given to the existing taxi owners who would undoubtedly suffer a loss of value in the licences which they held, and many of whom had had to purchase on the secondary market created by the 1978 Regulations, and indeed in particular those who may have bought at the very height of that secondary market and in the period immediately leading up to the 2000 Regulations. In this way the plaintiffs claim that the 2000 Regulations breached their property rights. For that claim, Mr Muldoon and Mr Kelly rely also on what they say is the existence of an unlawful regime created by the 1978 Regulations which meant that the only way they could enter the taxi industry and earn their livelihood as a taxi owner was to purchase a licence on the secondary market. Mr Malone it will be recalled had already purchased his licence some years prior to 1978; but he claims damages for the destruction of the value built up in his licence as a result of the secondary market which was created after he bought his licence, but from which he could have benefited were it not for the introduction of the 2000 Regulations.

171. The claim by Mr Muldoon and Mr Kelly that the 1978 Regulations breached their right to earn a livelihood and their right to equal treatment before the law is founded upon the claim that were it not for the 1978 Regulations they would have been able to enter the taxi industry and earn a livelihood by simply making an application to the Council for a licence whenever they chose to, without having to pay exorbitant sums for their licences on any secondary market, and without having to pay £3000 to the Council in respect of a transfer fee, and furthermore were it not for the 1978 Regulations they would not have lost the value they paid for the licences and any uplift in that value prior to the 2000 Regulations. They also see this background as constituting unequal treatment before the law, presumably on the basis that others seeking employment do not have to buy their job by the expenditure of such large sums of money, and in this way they have been discriminated against.

172. I want to deal first with the claims that the regime since 1978 breached the right to earn a livelihood and the right to be held equal before the law. I am satisfied that these claims cannot succeed. First of all, each plaintiff so claiming chose to enter the taxi industry. They knew that in order to do so lawfully they needed a licence. They also knew that while they could make an application for a licence, it was unlikely that any new licences were being issued by the relevant councils at the time and that they would have to purchase a licence on the secondary market. That is what they did. I accept of course that they may have had to wait a while until a licence was being sold by an owner, but I do not accept that this is sufficient to maintain a claim that by having to wait their right to earn a livelihood was breached to the point where they are entitled to damages. I leave aside altogether for the moment the other question that arises, namely whether there can be any claim at all for a breach of constitutional rights *simpliciter*, absent some other claim existing in tort. Equally, I see no possible basis for a claim that the plaintiffs have not been held equal before the law. The

1978 Regulations applied equally to everybody who wished to make application for a licence.

173. As far as the plaintiffs' claim for a declaration and damages for an alleged breach of their property rights arising from the introduction of the 2000 Regulations is concerned, I want at the outset to consider whether, as they claim, they have a right at all under the Constitution to a particular value or any value at all of their taxi licence. One must ask at the outset what is a licence, and what in particular is a taxi licence. Before reaching a conclusion in that regard, I must immediately note again that in the present case we are not talking about a situation where any property of the plaintiffs has been taken away from them such as where land is compulsorily acquired by a local authority for road-widening, and where the Constitution would mandate that the deprived owner is entitled to some form of reasonable compensation. In the present case the impugned Regulations did not revoke or otherwise deprive the plaintiffs of their licence. They retained it along with the right to earn a livelihood from it for as long as they might wish to do so. That is an important feature of the present case to bear in mind.

174. Fundamentally, a licence issued under a statutory scheme of regulation to a person or legal entity is a permit which allows that person or legal entity to do something or possess something which the person may not lawfully do or possess without such a permit. One can readily think of simple examples of such licences. Gun licences, dog licences, television licences, driving licences, planning permissions, intoxicating liquor licences, solicitors' practising certificates, auctioneers' licences, and street traders' licences are but a few that readily come to mind. Each permits its holder to lawfully do or possess something, and in some cases to earn a living thereby. Some licences are *in personam* and some *in rem*, and others are a combination of the two. For example a gun licence will be in respect of a particular owner who is considered suitable to hold a licence in respect of a particular weapon or type of weapon, whereas a television licence is given to a particular person but will not identify the particular television in respect of which it is held. This reflects the fact that the purpose of one type of licence may simply be a way of gaining revenue for a government or other agency, whereas another will be to regulate the issue of licences in the public interest perhaps by restricting their issue to particular persons who meet certain criteria, or restricting the number of licences where that sort of control on numbers is deemed necessary or desirable in the public interest and the common good.

175. A taxi licence is similar in its nature. It permits its holder to use his mechanically propelled vehicle as a taxi, so as to earn a living. As with any of the above examples, the Constitution will protect and vindicate the holder's right to have the licence that he/she has; nevertheless laws may exist whereby the licence can be revoked for some good reason, or limited in some way that restricts its use in the interest of the common good. Numerous cases have confirmed the limited nature of the rights which holders of a licence enjoy. It is a restricted right. The conditions under which a licence are held when granted or acquired may be changed by further legislation where such change is deemed to be necessary or desirable in the public interest or the common good. The right to property is certainly engaged in relation to the holding of a taxi licence. But as with many other rights, it can be restricted. Article 40.3.2 of the Constitution provides:

> *"The State shall, in particular, by its laws protect as best it can from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen" [emphasis added]*

Article 43 of the Constitution makes specific provision whereby it recognises that *"the State … may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good".*

176. The ability of the State to control and regulate certain sectors has often been the subject of litigation – see for example *Hand v. Dublin Corporation* [1991] 1 IR 409 where a challenge was brought to the constitutionality of section 4(6) of the Casual Trading Act 1980 which provided that if the holder of a street traders licence was convicted of two or more offences under that Act he/she would be disqualified from holding such a licence. It was asserted by the plaintiff in that case that the section constituted an unjust attack upon his right to earn a livelihood, and was disproportionate. However, Griffin J. stated:

> *"… assuming, without deciding, that the right to earn a livelihood is a property right, the question which arises is whether [the section] constitutes an unjust attack on the rights of the plaintiffs to enable them to obtain a licence to enable them to trade. The right to trade and earn a livelihood is not an unqualified right. In modern times there must be few professions, occupations, trades, or industrial or commercial undertakings which are not subject to what Costello J. in Attorney General v. Paperlink Ltd … referred to as "legitimate legal restraints" (p.384). This Court in Moynihan v. Greensmyth [1977] I.R. 55 in its judgment delivered by O'Higgins C.J. at p. 71 said:*
>
> *'It is noted that the guarantee of protection given by Article 40, s.3, sub-s.2 of the Constitution is qualified by the words 'as best it may'. This implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good.'*
>
> *The stated object of the Act of 1980 is to provide for the control and regulation of casual trading. In enacting the legislation, the Oireachtas, having regard to the requirements of the common good, has to strike a balance between the legitimate rights and interests of those who may be affected by the legislation …… In the opinion of the Court where the Oireachtas has to legislate for the control and regulation of casual trading in a public place to which the public have access as of right and on land occupied by and in the functional area of a local authority, and designated by that authority as a casual trading area, it is open to the Oireachtas to provide for strict control and regulation of that trading having regard to the exigencies of the common good. This the Oireachtas has done."*

177. In similar vein is McCracken J's judgment in *Shanley v. Galway County Council* [1995] 1 IR 396. Both cases involved arguments about whether there was an unjust attack upon the right to earn a livelihood. In the present case in my view there is no sustainable argument in relation to the plaintiffs' right to earn a livelihood. The licence they each hold enables them to do that and continue to do that. It has not been removed or revoked in any way, or even delimited in any manner whatsoever as far as the ability to earn a living is concerned. The gravamen of the plaintiffs' claim is that the value of their licence has been removed without any proper scheme of compensation. They claim that their constitutionally protected property rights extend to the protection of the value of the licence from what they consider is an unjust attack.

178. Whether any monetary value exists in a particular licence will depend on the nature of the licence and what it permits its holder to do, and whether it is a licence that is by law transferable directly or indirectly to somebody else. If one views a planning permission as a licence permitting the owner of the land to build on certain land, the land may gain an increased value as a result. But that licence itself does not have value separate from the enhanced value of the land in respect of which it is granted. In other words, the permission itself cannot be sold in order to permit the same structure to be built on some other land. That is the nature of a planning permission. It is non-transferable other than in conjunction with a sale of the particular land in respect of which it has been granted.

179. On the other hand, an intoxicating liquor licence may attach to a licensed premises, and for as long as that situation pertains the

owner of the premises and the licence can trade in that premises as a public house or hotel perhaps. However, if that owner decides for whatever reason that he no longer wishes to trade as a public house, and instead wishes to trade as a supermarket, he can sell the intoxicating liquor to another person. Such a licence has a value on the open market. The purchase of that licence by another person can assist that purchaser having another premises licensed to trade as a public house, because certain provisions of the intoxicating liquor licensing statutory code require that where a person wishes to open a new public house in a town, he must first surrender an existing licence. In that way the Oireachtas ensures as best it can that in the interests of the common good there should not be an uncontrolled proliferation of public houses in the cities, towns and villages of Ireland. That regulatory scheme results in a monetary value in a licence that can be made available for purchase. However, it is incidental to the statutory scheme. It exists because there is a market for such licences as a result of certain aspects of the statutory scheme. But it cannot in my view be sensibly argued that, because that scheme has existed for many decades, and because some licence holders may have spent considerable sums of money acquiring an intoxicating liquor licence on the open market, the Oireachtas could not, if it so decided, change the statutory scheme, perhaps by removing the requirement that an applicant for a new licence for a new public house must first surrender an existing licence, if for example it considered that in 2015 with the increases in population generally in the country it was no longer necessary in the public interest to maintain the requirement to surrender a licence before a new premises could be licensed. That could not properly be seen as an unjust attack on the property rights of existing publicans who had had to pay for a licence in order to have it extinguished as a condition of their new premises being granted a licence to trade.

180. In my view, the holder of a taxi licence is in a similar position. What is protected from unjust attack is the licence itself and what it enables its owner to do. It cannot for example be revoked or otherwise taken away from its owner unless for some lawful and justified reason such as a breach of a condition under which it was granted, or some other reason permitted by law. The cases from the ECt.HR to which the plaintiffs have referred make this clear even under the Convention, though it is the Constitution which is in play for present purposes. But as I have already referred to, the Convention cases upon which the plaintiffs have relied are cases where a licence was revoked or refused in circumstances which were found to be a breach of Convention rights. As I have explained, the present case is very different indeed. The plaintiffs' have not had their licences revoked or removed in any way. They can still ply their trade and earn a livelihood.

181. It has been recognised in many cases to which the Court has been referred by the defendants that the Oireachtas may regulate in the public interest even if to do so diminishes the value of certain owners' property. These cases have been consistent in their conclusion that when the owner of a licence acquires it, he/she is aware, or at least must be taken to be so aware, that the conditions under which the licence are held, or the regulatory scheme itself, may be so altered that the value of what he/she has acquired may be diminished or disappear. Such a conclusion is evident for example in *State (Pheasantry Ltd) v. Donnelly* [1982] ILRM 512, *Tara Prospecting v. Minister for Energy* [1993] ILRM 771, *Hempenstall v. Minister for the Environment* [1994] 2 I.R. 20.

182. The obligation on the State not to unjustly attack the plaintiffs' property rights in their licences does not in my view extend to any value that may have existed in the licence at the time the 2000 Regulations were introduced. It follows therefore that even if the Minister left himself open to the criticism by the taxi industry that of all the options for reform of the industry that appeared open to him he opted for that which would inevitably and forthwith have the greatest effect upon the value that had built up in these licences on the secondary market, the 2000 Regulations did not breach a constitutionally protected right in the property i.e. the licence. That criticism however would have to be tempered by the obvious fact that before introducing the 2000 Regulations under consideration herein, the Minister had introduced an earlier 2000 Regulations which, if they had not been challenged successfully, would have ameliorated the position of existing licence holders at least to an extent. It would seem that upon every attempt to bring in some mechanism whereby the public, especially in Dublin, would be better served by a greater number of taxis appearing on the streets he was met with opposition from within some sector of the industry. Ultimately, a Government must govern. A Minister who has statutory powers to regulate the industry must try and exercise those powers effectively in the public interest and not necessarily in the interests of the taxi owners. Inevitably a Minister will try to reach a consensus in relation to any proposed changes, particularly with those who may be adversely affected, but if that consensus proves to be elusive, as the evidence has amply demonstrated in the present case if one considers the number of years and attempts to do something constructive in the face of mounting criticism and public discontent, then the Minister may be forced to act pursuant to the powers which he has, and within the powers and discretion which he has, and do what seems to be in the best interests of the public, regardless of what reaction this may provoke.

183. Neither did the Regulations interfere, much less unjustly attack, the plaintiffs' right to earn a livelihood. They could continue to earn their livelihood. This conclusion is consistent with what Costello J. stated at some length in Hempenstall, and what Carney J. stated, partly in reliance on Hempenstall, in Gorman. Allowing for the plaintiffs' contention that some of those remarks are obiter in the strict sense, and that therefore I am not obliged slavishly to follow them, I nevertheless can and do respectfully agree with them, while reaching my own conclusions in this particular case and on the particular facts of the present case. I have set forth the plaintiffs' submissions in relation to the nine issues taken with what was stated by Carney J. in *Gorman*. I have also set forth the defendants' responses. For the most part I agree entirely with the latters' submissions, and do not find favour with the formers' objections.

184. The submissions in relation to the loss of value in the licences are made in the main by reference to the effect of the 2000 Regulations on the value in those licences. I should add however that in so far as the plaintiffs maintain a submission in this regard which is premised upon the 1978 Regulations, which created the environment in which that secondary market value thrived, I agree with Mr Murray who submitted that the Minister cannot be criticised for doing the very thing which the decision of Costello J. in *State (Kelly) v. Minister for the Environment* said he was permitted to do - i.e. introduce Regulations which enabled the number of licences to be restricted – something of course that the taxi industry had been pressing him to do.

185. In view of these conclusions it is unnecessary for me to address the submissions made by both parties in relation to the ability or not of the plaintiffs to recover damages for breach of a constitutional right.

(c) Breach of Duty and/or Statutory Duty:

186. The next basis upon which Mr Muldoon and Mr Kelly contend that the State defendants maintained an unlawful, void and illegal regime for the licensing of small public service vehicles between 1978 and 2000 is that the 1978 Regulations and others made subsequently (the quantitative restrictions regulations) entailed an unreasonable exercise of statutory power by the Minister and a breach of duty and/or statutory duty. It is submitted that they were forced by this regime to spend very significant sums in order to purchase their licences on the secondary market created as a result of the 1978 Regulations and those which followed them, and from which a benefit was derived not only by the Minister and the State but also the local authorities in question. They submit that were it not for those Regulations and the regime which they facilitated, at least as operated by the Councils in question, the plaintiffs would not have suffered the losses which they have suffered because they would not have had to spend those sums of money, and would have been able to apply for a licence at a time of their choosing without having to wait until one became available on the secondary market.

187. Mr Malone makes no claim for breach of statutory duty arising from the 1978 Regulations directly, because of course he acquired his licence in 1973 at a cost of only £3. But he does seek a declaration and claims damages in relation to what he sees as a breach of statutory duty by the Minister in introducing the 2000 Regulations, since the value of his licence, which had developed during the period when the 1978 Regulations were in force and from the manner in which it was operated by Dublin City Council, was wiped out following the 2000 Regulations. In fact he had transferred his licence to his daughter in the 1990s but nevertheless he claims that he is at the loss of the pension he might have derived from that licence.

188. Mr Muldoon and Mr Kelly make claims arising from the 2000 Regulations, and say that in bringing in those Regulations and wiping out the value in their licences, the Minister acted in a manner which was, as stated in the overview document, *"unreasonable, disproportionate, discriminatory, arbitrary, unfair, illogical, partial and unjust having regard, in particular, to the rights and interests of people like [them] who were forced to spend very significant sums of money in purchasing a taxi licence in the secondary taxi licence market which was created as a result of the regulatory regime for the issuing of taxi licences which the Minister, the State and the Council operated, maintained and profited from".* They say that but for these Regulations, they would not have suffered the losses claimed.

189. The claim for breach of statutory duty in relation to the 2000 Regulations, is essentially that of all the methods of addressing the taxi shortages on the streets of Dublin which the Minister was in a position to consider as options as a result of the various reviews, reports and consultations which he had from all interested parties over a considerable period of time, and recommendations made therein, he decided upon the one method which nobody was recommending since it would have the most draconian and immediate effect upon the value of the licences held by existing licence holders, and which effectively reduced to nil the value of the licences held at that time. This is what is said to have been an unreasonable and disproportionate exercise of his powers, and therefore a breach of statutory duty by the Minister. I will address separately this head of claim made against Dublin City Council and Ennis Town Council in due course.

190. It is of course necessary for the plaintiffs not only to identify the precise duty which the Minister is said to have breached, and it appears to be the duty that he acted fairly, reasonably and proportionately, but also to establish that in so far as he was under that claimed duty, the plaintiffs are within the class of persons which the Act indicates as those to whom that duty is owed. They must also show that the Act evinces an intention on the part of the Oireachtas that damages should flow in respect of a breach of statutory duty by those obliged to act. The defendants submit that these matters are problematical for the plaintiffs in this case, and that they have failed to overcome those hurdles.

191. The plaintiffs have referred to the judgment of Clarke J. in *Atlantic Marine Supplies Ltd v. Minister for Transport* [2010] IEHC 104 in which he stated at para. 6.3:

> *"In relation to statutory duty it is clear from cases such as Moyne v. The Londonderry Port and Harbour Commissioners [1986] I.R. 299 and Sweeney v. Duggan [1991] 2 I.R. 274, that the question of whether a plaintiff is entitled to claim damages for breach of statutory duty must start with the consideration of whether, taking the relevant statutory regime as a whole, it can be said that it 'was intended by the legislature that an aggrieved plaintiff would be entitled to claim damages' ".*

192. The plaintiffs refer to the statutory regime as a whole in the present case, and they say that when the facts of the present plaintiffs' claims are considered in the light of that whole statutory regime it is clear that the plaintiffs have a cause of action under this head of claim, and that the Minister breached the duty owed by him to the plaintiffs, namely that he exercise his powers in a manner that was reasonable fair and just. They submit that this obligation is made clear in cases such as *Kennedy v. The Law Society* [2002] 2 I.R. 458, *Deane v. Voluntary Health Insurance Board*, unreported, High Court, 22 April 1993, as well as *East Donegal Co-operative v. Attorney General* [1970] I.R. 317. I do not intend to refer in detail to the parts of these judgments upon which the plaintiffs have placed reliance, because the defendants do not take any real issue with the general principles upon which the plaintiffs rely, but they go on to submit that the facts of the present case are very different to those cases, and cannot support the principles which these cases establish and from which they do not demur. The plaintiffs themselves have referred to the comment of, for example Costello J. in *Moyne v. The Londonderry Port and Harbour Commissioners* [supra] where he commented that little assistance is to be found in decided cases since each case must turn on a construction of the relevant statutory provisions. This is undoubtedly the case. Each case must depend on its own facts, and there is no one size fits all solution possible. Nevertheless, the principles are clear and uncontroversial, and the plaintiffs must establish facts which meet those principles, and that they must come within the principles. One such first principle is that already referred to, namely that the duties in question must be seen to be for the protection of a particular and identifiable class of persons of whom the plaintiffs are three – see Keane C.J. and Fennelly J. in *Glencar Exploration plc. V. Mayo County Council* (No. 2) [2002] 1 I.R. 84 by way of example. Statements to like effect can be found also in the judgment of Henchy J. in *Waterford Harbour Commissioners v. British Railways* [1979] ILRM 296, and that of Costello J. in *Moyne v. The Londonderry Port and Harbour Commissioners* [supra].

193. As I have said, the defendants do not take issue with this and other legal principles relied upon by the plaintiffs. But they submit that there is nothing in the Act of 1961 or the statutory scheme generally which imposes any duty upon the Minister (or the Councils, but that will be addressed separately) to exercise his statutory powers other than in the interests of the general public in order to regulate for a taxi service which meets the public need, and specifically that there is no duty upon him arising from the Act and the scheme that imposes a duty upon him to exercise his powers in a way that finds favour with the taxi owners, or in their interests, or in a way only that does not adversely affect the underlying value in their licences.

194. In answer to the defendants' submission that they have failed to specify or otherwise identify what particular statutory duty which is owed to the plaintiffs has been breached by the Minister, the plaintiffs submit that the evidence has established that the regime introduced by the Minister under the 1978 Regulations (albeit implemented by the local authorities) for the purpose of properly regulating the taxi industry and to provide an adequate number of taxis on the streets of, in this case, Dublin and Ennis, and permitted by him to operate from 1978 to November 2000, failed to ensure that a sufficient number of taxi licences were issued, thereby creating the secondary market in which the plaintiffs were obliged to pay very substantial sums of money to acquire a licence in order to enter the market. This they say is a breach of the statutory duty to act reasonably and fairly in the public interest or at all, and in so far as the plaintiffs are members of that public, they as taxi licence owners have *"suffered a particular injury over and above the type of harm suffered by the public generally"*- to use the words of Costello J. in Moyne where he quotes from Mann J. in *Bourgoin S.A. v. Ministry of Agriculture* [1986] 1 QB 716.

195. The plaintiffs say also that the evidence has clearly established that the 2000 Regulations had a devastating effect on the value of their licences, and that this measure was wholly disproportionate to the objective sought to be achieved by the Minister in seeking to ensure that greater numbers of taxi licences would be made available, and that he acted unreasonably, unjustly and in breach of the principle of proportionality, and that they as plaintiffs are entitled to a declaration that he so acted unlawfully, and are entitled to

claim damages in respect of the losses suffered.

196. In my view, the plaintiffs are not in a position to bring a claim for breach of statutory duty based on any breach alleged by reference to the 1978 Regulations, whatever about the 2000 Regulations. In relation to Mr Malone, he acquired his licence prior to 1978, so he can hardly claim that he was owed a duty by the Minister not to bring in a regime under which local authorities could decide upon the number of licences that should be issued after 1978. Regarding Mr Muldoon and Mr Kelly, the fact is that these Regulations had been in existence and operating without objection from the taxi industry for about two decades before they each entered the same industry by purchasing a licence on the secondary market which developed after 1978. As the defendants ask not just rhetorically,'what harm was done to them by those Regulations specifically?' After all each entered the market voluntarily, and in the knowledge, to be implied to them if necessary, that the regulatory regime could change, and that there was risk involved in the purchase of their licences – that risk being that the licence might not hold the value paid for it. The defendants ask also what duty was owed to the plaintiffs as licence holders under these Regulations which they say has been breached? After all, they availed of the very Regulations which they now seek to impugn or at least rely upon for the claim for damages for breach of statutory duty. The defendants submit that these and other questions have not been adequately answered and addressed by the plaintiffs. They point to the fact that in any event, the 1978 Regulations did not establish the secondary market in the sale of licences. It may have been an unintended consequence (unintended by the Minister at least, whatever about the taxi industry itself) of the Regulations but the Regulations make no reference to such a market or eventuality. I cannot be satisfied that any loss was caused to the plaintiffs by the 1978 Regulations. They entered the taxi industry by availing of the Regulations. Any loss to the value of the licences occurred as soon as the 2000 Regulations were introduced. In any event, the plaintiffs are way out of time to challenge, albeit collaterally, the 1978 Regulations.

196. I should add that I am satisfied also that in so far as the Minister owes a duty to act reasonably, fairly, justly and proportionately in the exercise of the powers given to him in section 82 of the Act of 1961, his obligation is to do so in the interests of the general public, and it is the public generally to whom these duties are owed, since it is the general public, and not the individual taxi licence holders, for whom the taxi service exists. It is a public service provided by the owners of small public service vehicles. The Minister's duties arise in relation to the regulation of that public service. If he is in breach of his statutory duties, it is the consumers of that public service who may be heard to complain in relation to issues related to insufficiency of the service provided, and therefore about the lack of sufficient taxis on the streets. There is nothing in section 82 of the Act or the statutory scheme generally which suggests, much less requires, that those regulation which the Minister might make within the powers granted to him must be such that the underlying value on the secondary market value of the existing licences must not be reduced. To impose such a wide and imprecise duty upon the Minister would require a specific provision in which that duty was clearly stated. Otherwise the task of regulation by the Minister would become impossible, and be reduced to him having to do only that which found favour with representatives of the taxi owners. The evidence clearly shows that for many years the taxi representatives after 1978 resisted, lobbied and demonstrated against measures that might open up the licensing regime to greater numbers. Although the Minister by the 1978 Regulations had delegated to local authorities the task of deciding upon the number of licences to be issued in any year to meet the public demand for taxis, it is notable that the elected public representatives in Dublin consistently, and against the very obvious evidence to the contrary on the streets, determined that no new licences should be granted. I have no evidence that the taxi industry brought pressure to bear upon those elected members who made up the majority vote each year not to permit an increase in numbers. But neither do I have any evidence that the industry lobbied their representatives to increase the numbers, yet they complain now that it was the fact that the 1978 Regulations were not properly operated which led a regime to exist which they claim was unlawful, and failed to provide enough licences. It is difficult to view with credibility the claims made by the plaintiffs when one considers the efforts made by the taxi industry and its representatives to resist changes over such a lengthy period which would have seen more taxis on the streets.

197. This resistance to change is something to which Carney J. referred in his judgment in *Gorman*, and it is consistent also with some of the evidence which has been heard in this case:

> *"The taxi leadership grudgingly accepted this regime [that introduced by S.I. 3 of 2000 under challenge in Gorman]. It was quite an achievement that they were brought to this position because I am satisfied that while they have come to accept that there must be more taxis on the streets they have always continued to want deregulation or liberalisation to be so gradual that there would be taxi queues on the streets of Dublin for at least a decade to come; although perhaps in declining numbers year by year. They do not for obvious reasons couch their argument in these terms but this is the logic of the position they take in relation to the liberalisation being gradual. Taxi queues or shortages are necessary to preserve the values of £80,000 and upwards which have been paid for licences in recent years. If demand for taxi services equalled supply there would be no reason for premium prices being paid for licences in a secondary market".*

198. As for the claim by the plaintiffs that the Minister was in breach of his duties to the plaintiffs when he introduced the 2000 Regulations in November 2000 which saw the elimination in the value of their licences, I have to reject that claim. For the reasons given already, the duties owed by the Minister in the exercise of his power under section 82 to regulate "in relation to the control and operation of public service vehicles" is a duty to do so in the public interest. There is nothing in the Act of 1961 to indicate the imposition of a duty to regulate in a way that does not interfere with the interests of individual taxi licence holders. Specifically there is nothing to suggest a duty on the Minister to regulate so as not to interfere with the value, if any, in a licence. That is for the very simple reason that the Act of 1961 predates the 1978 Regulations following which licences started to be commercially traded between private citizens. But this trade in licences was not the subject of any regulation as such, even though it was something permitted eventually by S.I.111 of 1977, allowing for the first time an *inter vivos* transfer of a licence to a new owner. Indeed prior to the introduction of those 1977 Regulations the view within the Department was that this would be something that was unnecessary and it was not envisaged that much use would be made of it. Time was certainly to prove that prediction wrong.

199. Quite apart from the absence of any duty upon the Minister to act other than in the public interest, and if one for a moment supposed that the Minister was obliged to act reasonably in the interest of taxi owners (which he is not in my view) one must consider the lengthy lead up to the introduction of the 2000 Regulations. The problem of shortage of supply of taxis on the streets was appalling by any standard, and had been for many years. The evidence has shown that the Minister was under a constant barrage of pressure on all sides whenever he was seen not to be addressing the problem and also when he was trying to address the issue. One can see from the background history, even to the limited extent that I have tried to summarise it in this judgment, the lengthy history of reviews, reports and consultation process embarked upon at various stages in an effort to decide upon a course of action that would (a) solve the problem of shortage, and (b) meet with the least resistance from within the industry which had shown itself well capable of bringing the city of Dublin to a standstill as a mark of their disenchantment with a proposed measure. It was perfectly reasonable for a Minister to take (b) into account as a matter of Ministerial or political pragmatism. Any sensible Minister would choose a course which might reasonably meet (a) and (b). That would be an ideal way for any Minister acting reasonably and sensibly to proceed in the public interest. But where (a) and (b) cannot coexist, it is not unreasonable, unfair and/or unjust for a

Minister to take a line which addresses (a), but runs the risk of protest from the industry. In the present case, the Minister had a number of reports at his disposal which suggested a number of approaches. Each expressed in different ways a preference for deregulation in a manner which would have only a gradual impact upon the interests of the taxi owners, and would address the numbers problem over varying numbers of years. None would solve the problem instantly except that which these reports did not recommend, namely an overnight liberalisation. That was not recommended for the very obvious reason that it would reduce immediately the value of existing licences, leading inevitably to protests on the streets by those affected. Such a proposal was seen as possible only if some form of reasonable compensation was made available – something that for policy reasons was seen as not desirable.

200. The course the Minister first decided upon was one which he considered fair in an effort to meet the concerns of taxi owners, namely that existing taxi licence holders would be eligible to apply for one additional new licence under Regulation S.I. 3 of 2000. These regulations then became the subject of a successful challenge by hackney owners on the basis that they were excluded from the scheme – the *Hempenstall* proceedings referred to.

201. The problem of supply had by that time become acute and it had to be addressed with urgency if the Minister was to be seen to be fulfilling his statutory obligations to the general public under the Act. In my view, given the urgency with which the problem had to be addressed, and given all the consultations, reviews and reports, gathered over a lengthy period of time, and which he had at his disposal and considered, and given the problems which he encountered on each occasion when he tried bring the industry on board towards a consensual solution, or attempted to deal with the problem with some element of political pragmatism, the Minister should not be found to have acted unreasonably, unfairly and/or unjustly when deciding eventually that the course he should adopt was to simply introduce liberalisation overnight. He was entitled with his discretion to consider that any of the phased approaches recommended in the reports whereby liberalisation might occur over, say, three, five, seven or ten years, were unlikely to produce the required new numbers of taxis on the streets in a sufficiently short time to make a difference to the urgent need of which there was no doubt. His duty to sort out this problem once and for all was one owed to the general public to provide a proper small public service vehicle service.

202. Therefore, even overlooking the fact that no individual duty was owed to individual taxi owners, I am of the view that the Minister acted reasonably and proportionately when he introduced the 2000 Regulations. Put simply, he was entitled within the scope of acting reasonably and fairly, to consider that by the end of the year 2000 there was no option other than to regulate as he did, even if that would result in loss of value in existing licences, and opposition from within the industry.

203. I therefore reject this ground put forward by the plaintiffs in support of their claim for the declaration sought and damages for breach of statutory duty.

(d) 1978 Regulations were made in breach of Treaty of Rome competition rules, and in particular Article 86 (now 106 TFEU):
204. At the outset I should say that Mr Malone does not make any claim by reference to competition law breach by the Minister, or indeed against Dublin City Council. It is Mr Muldoon and Mr Kelly who make such claims against the Minister (and against Dublin City Council and Ennis Town Council respectively - I will address those claims in due course).

205. In support of their claim in respect of the Minister/the State for a declaration that the 1978 Regulations and the regime that ensued are unlawful, void and illegal, and for damages, the plaintiffs submit that the Minister and/or the State breached Article 86 of the EC Treaty (now Article 106 TFEU) by granting special or exclusive powers to local authorities (who they submit are "public undertakings" for the purpose of competition law) to fix and maintain quantitative restrictions on the number of persons entitled to operate in the taxi industry in a given geographical area.

206. The plaintiffs say that the Minister and/or the State created a regulatory regime whereby a local authority was able to, and did, grant special and/or exclusive rights to "undertakings" (i.e. individual taxi owners) within the meaning of Article 86 of the Treaty of Rome, as amended, in that the right to provide taxi services was granted to a limited number of such "undertakings" (taxi owners) by means of orders made by a local authority which restricted the number of taxi licences in a given geographical area, in a manner that was not in accordance with objective, proportional and non-discriminatory criteria.

207. In addition the plaintiffs claim that the Minister and/or the State made and/or maintained in force for a period of some 22 years legislative and/or regulatory measures which were contrary to the rules contained in the Treaty of Rome, as amended, and, in particular Article 86 taken in conjunction with Article 81 and/or Article 82 and having regard to Article 10. They point to the following features of that regime:

(a) Between 1978 and November 2000 persons operating in the taxi industry were unable to satisfy the demand for taxi services.

(b) The inability to satisfy that public demand was caused by the legislative/regulatory intervention of the Minister and/or the State (and/or the local authorities) in the taxi industry, and in particular by:

- the imposition and maintenance in force of quantitative restrictions on the number of persons entitled to operate therein;

- the failure to grant any taxi licences during the period from 1978 to in or about 1990;

- the granting of a wholly inadequate number of taxi licences from 1991/1992 to November 2000;

- the failure to enable and/or require the granting of additional taxi licences during 1978 – 2000;

- the relieving of the taxi industry and/or persons operating therein wholly or partially from the discipline of competition; and

- the creation and/or maintenance in force of a statutory/regulatory secondary market in taxis.

208. The Overview document provided to the Court by the plaintiffs goes on to claim that the Minister and/or the State breached Article 86 for reasons set forth as follows:

> *"These State measures brought about a distortion of competition in the market for the provision of taxi services and created an anti-competitive effect:*
>
> *(a) which the taxi drivers themselves could not have attained by their own conduct without infringing Article 81; and*

(b) which the Councils could not have attained by their own conduct without infringing Article 82.

Article 86 operates in conjunction with Article 81 in that the above-mentioned legislative and regulatory measures restricting the number of taxi licences and imposing controls on the prices charged by taxi drivers created an anti-competitive effect which the taxi drivers could not have created by their own conduct other than by a form of anti-competitive agreement or concerted practice contrary to Article 81.

Article 86 operates in conjunction with Article 82 in that the above-mentioned legislative and regulatory measures produced effects similar to those of abusive behaviour by the Councils in limiting production and the issue of taxi licences to the detriment of consumers.

A system of undistorted competition, as laid down in the Treaty can be guaranteed only if equality of opportunity is secured as between the various economic operators and the State measures prevented this from happening because of the fundamental difference in treatment of those who were already in the taxi industry and had licences and those who wished to enter the taxi industry and were unable to obtain licences save at great cost."

209: The above sets forth the basis for the Mr Muldoon's and Mr Kelly's competition law claims against the Minister/the State. It will be evident that the plaintiffs are not claiming that the Minister himself is an "undertaking" (though it is submitted that in some circumstances he could be so found) and therefore they do not say that he has abused a dominant position in the market. This much was conceded or clarified by Mr Collins during his opening of the case. Their claim against the Minister/ the State is confined to Article 86 which provides as follows:

" (1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

(2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

(3) The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

210. As will be seen when I address the competition law claims made against Dublin City Council and Ennis Town Council, I have concluded that neither Council is an undertaking under competition law. I have reached that conclusion because the licensing of taxis under powers given to them by the 1978 Regulations is not in my view an economic activity. It is an administrative/regulatory activity or function carried out by the Councils. I have no difficulty accepting as a matter of law that a local authority may, in circumstances where it is itself participating in an economic activity in addition to having a regulatory function, be considered to be an undertaking in relation to that economic activity. But its regulatory function must be severed from that other economic activity, so that when it is performing that purely regulatory function it is not to be considered an undertaking, and therefore is not subject to the competition rules under the Treaty. It follows from the fact that neither council is an undertaking, that neither can be considered to be a public undertaking for the purpose of Article 86. The competition rules do not apply to them. As Article 86 (2) makes clear *"undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing authority shall be subject to the rules contained in the Treaty …".* The Councils are not undertakings, as will be explained in due course.

211. In so far as Article 86 is directed to Member States as opposed to, say, Article 82 which is directed to undertakings to ensure that they do not abuse a dominant position they hold in the market, I should add that in so far as the plaintiffs say that by enacting and maintaining in force the regulatory regime commencing with 1978 Regulations whereby quantitative restrictions were made possible under the powers given to local authorities, the Minister/the State was in breach of Article 86, the position is that Article 86 is not a free-standing Article. For Article 86 to be engaged at all, there must be shown to be a breach of Article 82 by the Councils. In other words, if the position was found to be that the Councils were undertakings, that they were engaging in an economic activity by the issuing of licences, and were by a "measure" (i.e. the 1978 Regulations) permitted to and did restrict the number of taxi licences other than in an objective, proportional and non-discriminatory manner, the State could find itself exposed to a complaint that it was in breach of Article 86 by maintaining such a regime. But that is not the case here, given the findings which I shall be making in relation to the Councils not being public undertakings in the first place when performing their purely regulatory function, and the finding also that the purely regulatory function they were performing under the Regulations cannot be rightly considered to be an economic activity. In my view, the fact that, particularly in the case of Dublin City Council, it is clearly established that the elected members consistently voted in favour of either no new licences or an inadequate number, and that demand was left unmet for many years, does not expose the State to a claim by the plaintiffs under Article 86, or assist the plaintiffs in establishing that the regime enabled by the 1978 Regulations breached Article 86.

212. The plaintiffs submit, however, that each individual taxi owner is an *"undertaking[-] to which Member States grant special or exclusive rights"* and accordingly as provided in Article 86 (1), the State may not enact or maintain in force any measure, and they emphasise the wide nature of this requirement, which is contrary to the Treaty rules, and in particular Article 12, and Articles 81-89. In this regard, they submit that the 1978 Regulations not only had the effect of limiting the number of persons who could enter the market, but had an adverse effect on the market such that it constitutes a breach of Article 86. For the same reasons as I have just stated in the previous paragraph, I am not satisfied that there is merit in the submission outlined above and which appears set forth in paragraph 23 (iii) and (iv) of the Overview document.

213. It follows from the conclusions thus far reached that the First Relief as set forth in the Overview document cannot be granted, namely a Declaration that the Minister and the State, their servants and agents, enacted and maintained an unlawful, void and illegal regime for the licensing of small public service vehicles between the years 1978 and 2000 – i.e. the regime which includes the 1978 Regulations (S.I. 292 of 1978) and the 2000 Regulations (S.I. 367 of 2000) because:

- the 1978 Regulations were ultra vires the Road Traffic Act, 1961 because s. 82 thereof did not empower the Minister to make regulations which delegated to local authorities a power to determine and/or fix the number of taxi licences to be issued in specified areas;

- the 1978 Regulations and the 2000 Regulations entailed an unreasonable exercise of statutory power by the Minister and

a breach of duty and/or statutory duty;

- the 2000 Regulations breached the plaintiffs' constitutionally protected rights to property, right to earn a livelihood, and right to be held equal before the law; and

- the 1978 Regulations and the regime that ensued until November 2000 was in breach of the Treaty of Rome, and in particular Article 86.

That relief is therefore refused in respect of Mr Muldoon and Mr Kelly, and as far as relevant also in respect of Mr Malone.

213. It follows inevitably that the second, third, fourth and fifth reliefs, being claims for damages based on arguments dealt with under relief one, must also be refused.

214. The sixth relief set forth in the Overview document is one made by Mr Muldoon and Mr Kelly in which they seek damages against the Minister for misfeasance in public office on the following bases, and as more lengthily set forth in the Overview document:

(i) the Minister knew that neither he nor the Council had power to regulate the taxi industry in the manner in which he and the Councils purported to regulate it via the 1978 Regulations.

(ii) the Minister knew that he and the Councils were regulating the taxi industry in a manner that was ultra vires, contrary to the Treaty of Rome, in breach of the plaintiffs' constitutional rights and in breach of the Constitution, to the detriment of those seeking to get into the taxi industry, and contrary to the public interest.

(iii) the Minister knew that his acts and omissions and those of the Councils would cause injury and loss to, inter alios, the plaintiffs, or he was reckless as to whether there would be such consequences.

(iv) In relation to the 2000 Regulations they claim that the Minister is guilty of misfeasance in public office for much the same reasons, and specifically because he knew that by introducing these Regulations he would cause losses immediately to, *inter alios*, the plaintiffs, or was reckless as to whether or not such losses would be caused.

215. Given the failure by the plaintiffs to establish the grounds for obtaining the First Relief they seek, it follows that the basis for claiming misfeasance in public office against the Minister must also fail. Specifically in relation to the 1978 Regulations, the Minister was doing what the decision of Costello J. in *State (Kelly) v. Minister for the Environment* specifically concluded that he could do, namely restrict numbers of licences under his power to bring in regulate in relation to the "control" of the industry. It is unarguable in my view that to do what is lawfully permitted, as so found not only in the High Court but as upheld in the Supreme Court, could result in a finding that the Minister was guilty of misfeasance in public office. It must in any event be highly questionable whether the plaintiffs herein can argue that issue at all, given that they entered the industry under the conditions that pertained as a result of the 1978 Regulations, and, as they claim, knowing that in their view it was an unlawful regime. There is certainly no evidence, nor can it be inferred, that the Minister was motivated by any form of malice or bad faith towards the taxi industry when he introduced, at their behest even, the 1978 Regulations, and left them in existence until 2000, or in November 2000 was reckless to the effect that the 2000 Regulations would have. Indeed the evidence shows that numerous reviews, reports and consultations were obtained and sought out before any decision was made in the form of the Regulations finally introduced. There can be no question raised as to the power of the Minister under section 82 to issue new licences under his power to "control" just as on that same basis he has power to restrict the number of licences.

216. Prior to S.I. 367 of 2000, the Minister had of course attempted to introduce a new Regulation (S.I. 3 of 2000) which, admittedly, would have had a lesser negative effect on existing licence holders, or at least an effect that would have been more gradual, and eased by existing licence holders being entitled to apply for one new licence. However, those Regulations were quashed in the Humphrey proceedings, and he was forced to act differently. I can see no possible basis on which the Minister can be considered to be guilty of misfeasance in public office, given the criteria that must be met in order to succeed in such a claim – for example, as stated by Lord Steyn in *Three Rivers D.C. v. Bank of England* (No.3) [1996] 3 All.E.R. 558, a decision adopted with approval by the Supreme Court in *Kennedy v. Law Society of Ireland* (No.4) [2005] 3 I.R. 228.

217. Quite separate also is the undoubted fact that in the lead up to the 1978 Regulations, it was the taxi industry itself through its very able representatives who endeavoured at all times to try and persuade the Minister to do the very thing about which complaint is now made, and against which the Minister resisted on the basis, mistakenly as it turns out, that in he was not able within the powers given to him in section 82 of the Act of 1961 to lawfully restrict the numbers of licences that could be issued. This is almost a standing/estoppel point, but I need to go there in any detail given that the findings already made in my view preclude any such finding against the Minister.

218. The seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth reliefs set forth in the Overview document as being sought against the Minister/the State are really make-weights, and while not abandoned by the plaintiffs, it was intimated by Counsel that they were not being primarily relied upon, or argued beyond what is contained in the written submissions. That was certainly an appropriate indication for the plaintiffs to give to the Court during the course of the opening of the case, and I intend no discourtesy to the written submissions when I simply indicate that there has been no evidence adduced before me which could possibly enable those particular claims to succeed.

The claims for damages by Mr Muldoon and Mr Malone against Dublin City Council for breach of statutory duty:

219. Apart from the declaration of illegality sought in respect of the 1978 Regulations on grounds that include the plea that, apart altogether from the Minister/the State, the Council maintained an unlawful, void and illegal regulatory regime for the licensing of small public service vehicles between 1978 and 2000 on the four bases already described, the essence of these plaintiffs' claims against Dublin City Council is one for damages on the basis that following the devolution to it by the 1978 Regulations of the power to determine numbers of licences, it failed to exercise that power in a fair and reasonable manner, because firstly it failed to recommend the issue of sufficient licences to meet the clear public need for taxis, and secondly, it created a barrier to entry which created the secondary market in licences, which in turn led to significant losses to existing licence holders when the 2000 Regulations were introduced. That appears to be the particular duty which the plaintiffs say was breached, and which they say was a duty owed to them under the statutory scheme when read as a whole. The evidence has been, and it is not contested, that while 150 new licences were recommended to be issued in Dublin in August 1979 after the 1978 Regulations were introduced, an entire decade followed thereafter during which the elected members of Dublin City Council determined annually that no new licences should be recommended despite the clear evidence of unmet demand and public complaint about that situation.

220. Their claims against the Council for unlawfulness of the 1978 Regulations on the grounds that they were *ultra vires* and also breached the plaintiffs' constitutionally protected property rights can be dismissed for the same reasons that have been given in relation to those claims made against the Minister. It remains to address the claim for breach of statutory duty and the competition law claims (i.e. abuse of dominant position in the market).

222. The plaintiffs say also that it was entirely foreseeable by Councils that if they failed to recommend the issue of a sufficient number of new licences annually to meet the ever-increasing needs of the taxi-using public, this would result in an increasing value attaching to existing licences on the secondary market, and it was equally predictable that significant and immediate losses would arise to that clearly identifiable class of persons (i.e. the existing taxi licence holders) whenever liberalisation of the market for licences occurred, as happened in November 2000. They also refer to the fact that under the Regulations each local authority was required to report to the Minister on how the public demand for taxis was being met, and the evidence has been that such reports were not made. Not much turns on that particular matter but it is nevertheless pointed to as indicating a cavalier attitude by Dublin City Council in relation to the fulfilment by it of its statutory obligations under the Regulations.

223. Much of the plaintiffs' submissions are directed at establishing the principles by which a court will assess whether or not there has been a breach of statutory duty owed to a class of persons such as the plaintiffs such that they are entitled to an award of damages in respect thereof. In truth there is no great controversy between the parties as to the applicable principles. The contest is, inter alia, whether there is on the facts of this case shown to exist within the statutory scheme as a whole a duty owed to the plaintiffs by the Councils and breached, and if there is, then whether there is an entitlement to damages at all.

224. The general statement by Clarke J. in paragraph 6.3 of his judgment in Atlantic Marine Shipping Limited v. Minister for Transport [2010] IEHC 104 is accepted by all parties to reflect the correct statement of the law regarding the first question to be addressed when considering whether a plaintiff is entitled to claim damages for breach of statutory duty, as follows:

> *"In relation to statutory duty per se it is clear from cases such as Moyne v. The Londonderry Port and Harbour Commissioners [1986] I.R. 299 and Sweeney v. Duggan [1991] 2 I.R. 274 that the question of whether a plaintiff is entitled to claim damages for breach of statutory duty must start with the consideration of whether, taking the relevant statutory regime as a whole, it can be said that it was intended by the legislature that an aggrieved plaintiff would be entitled to damages."*

225. The plaintiffs contend that when the statutory scheme is read as a whole, it is clearly established on the facts of this case that the Councils breached the obligation upon them to exercise their powers reasonably, fairly and justly. They refer to *Kennedy v. Law Society of Ireland* [2002] 2 I.R. 458 and *Deane v. Voluntary Health Insurance Board*, unreported, High Court, 22 April 1993 for the submission that a failure to exercise statutory powers in a manner that is fair, just and reasonable can lead to a finding that a duty has been breached and an award of damages. The Council however points to the very different factual context of those cases, and say that there is no duty within the 1978 Regulations (or for the sake of completion the 1995 Regulations or any other regulations within the statutory scheme under consideration) which imposed any duty upon the Council to carry out its functions and obligations in the interests of the taxi licence holders, whoever they may be at any particular time. They say in relation to the duty to determine the number of licences that may be appropriate at any given time, that was a duty owed to the public at large – those who may wish to avail of a taxi service. They say that if it were to be the case that a duty was owed to the taxi licence holders, a question would arise as to what precisely that duty would consist of.

226. Just as the Minister when addressing this question asked, perhaps rhetorically, whether such a duty would be not to act in any way that impacted adversely the taxi owner interests, or not to increase the number of taxi licences except where the level of increase was such as not to impact materially upon the existing value of the licences held, or whether it was that the Councils could do so only if the Minister had in place some form of compensation scheme whereby losses to the value of existing licences could be recouped in some way, the Councils pose the same questions in order to demonstrate the lack of any definable duty to the plaintiffs within the statutory scheme relied upon by the plaintiffs .

227. The plaintiffs say that they come within a particular class of persons (i.e. taxi licence holders) who were intended to be protected by the statutory scheme. They rely upon the judgment of Henchy J. in *Waterford Harbour Commissioners v. British Railways* [1979] ILRM 296 where he held that it was *"well established by judicial authority that, because [inter alia] the plaintiffs came within the range of persons intended to be protected by s.70 (1) , […] the plaintiffs acquired the necessary locus standi to sue for damages for breach of the duty created by the statute"*. They point also to the judgment of Costello J. in *Moyne v. The Londonderry Port and Harbour Commissioners* [1986] I.R. 299 where he concluded:

> *"Here it cannot reasonably be argued that the duty to maintain the pier was imposed for the benefit of the Irish public generally. The benefit which was being afforded by the pier was being conferred primarily on a definable class of persons, namely those living in the clearly defined geographical area of the Inishowen peninsula, and particularly those living and working on its eastern seaboard. Parliament must have been aware that a breach of the duty it was imposing on the Commissioners could well result in pecuniary loss to at least some of those for whose benefit the duty had been created and I can find nothing in the special Acts or in the Harbour, Docks and Clauses Act, 1847 to suggest that Parliament intended that no action would lie if this occurred."*

228. While the plaintiffs submit that the evidence has established that the individual taxi licence holders, being those already holding licences when the 1978 Regulations were introduced, such as Mr Malone, as well as all others who, like Mr Muldoon and Mr Kelly, might in the future acquire a licence on the secondary market or on application to a local authority, were intended to be protected by the 1978 Regulations in the sense that the powers given to local authorities were required to be exercised in a way which protected their interests, I can find nothing in the statutory scheme read as a whole, or even in part, which confirms that to be the case. First of all, the 1977 Regulations which for the first time enabled *inter vivos* transfers of licences to occur, had only just come into force the previous year, and the view at the time within the Department was that this was something that was not likely to be availed of very much. It cannot therefore be the case, certainly in the absence of express reference, that when it came to enacting the 1978 Regulations, the Minister had in his mind the interests of all those who might in the future (however long that might be and how many licence holders would be involved) and intended that the powers that he was conferring upon the Councils would exercised only in a way that did not damage or otherwise run counter to their interests, and specifically in a way that did not significantly reduce the value (as yet not seen) that might attach to licences traded on a secondary market that might ensue. That secondary market in licences only evolved gradually as has been seen. It must also be seen as an unintended consequence of the 1978 Regulations, and not something envisaged by the Minister, and therefore something in respect of which he imposed an obligation upon the local authorities which required them to exercise their powers in the interests of that class of persons which comprised taxi licences then already existing, as well as anyone who might later acquire a licence. I cannot accept that such a far-fetched and contrived statutory duty is evinced by the 1978 Regulations or any other regulation that makes up the quantitative restrictions regulations.

Those regulations taken individually or together are regulations for the control and operation of small public service vehicles in the public interest. They relate to a public service being regulated in the interests of the public, and not in the interests of closed group of individuals who own a licence which enables them to participate in the taxi industry. There is no duty within that scheme which is directed to the protection of taxi owners, even if, almost perversely, the Minister was regulating for something which the taxi industry representatives had been pressing him in relation to over some years, namely to curb the number of licences that were being issued. The fact that following the decision in *State (Kelly) v. Minister for the Environment* [supra] he was doing something which he had always considered the law did not permit him to do, but which the taxi interests were urging upon him, does not mean of itself that the 1978 Regulations were for the protection of those interests. The Minister's duty was to regulate in the interest of the general public in relation to a necessary public service. By delegating power to local authorities to decide on the appropriate number of licences, he was not creating any obligation upon those authorities to act other than in the same public interest. None of the statutory scheme suggests, much less states, the contrary.

229. The plaintiffs in my view have so clearly failed to surmount that first obstacle in their way, that it is unnecessary to address the other matters that would arise for consideration where that first obstacle had been successfully negotiated, including the very difficult obstacle of satisfying the criteria for an award of damages against a local authority for breach of statutory duty in the absence of something akin to *mala fides* or misfeasance in public office. Neither of those features have been shown by any evidence to be present, even if the plaintiffs have produced evidence which demonstrates clearly, certainly in the case of Dublin City Council at any rate, that for whatever reason a decision (and much to the liking of the taxi industry at the relevant times as it happens) the elected members consistently over an entire decade, and despite a mounting unmet demand and howls of protest from the taxi-going public, ignored the need for more licences and failed to recommend any increase. Whatever failure that may amount to, and whatever may be the reasons for such a contrary pattern of voting by the elected members, it is not a failure which constitutes a breach of any duty owed to the taxi owners, whatever about to the general public. This claim for damages must fail.

The claim for damages by Mr Kelly against Ennis Town Council for breach of statutory duty:

229. The claims made by Mr Kelly against Ennis Town Council must also fail for the same reasons just given in relation to that claim by Mr Muldoon and Mr Malone against Dublin City Council. While different facts and evidence apply in his case, the fact remains, as with Mr Muldoon and Mr Malone, there was no breach by Ennis Town Council of any statutory duty owed to him under these Regulations. Without the establishment of such a duty and its breach, the claim for damages cannot succeed.

The claims by Mr Muldoon against Dublin City Council, and by Mr Kelly against Ennis Town Council, arising from an alleged abuse of a dominant position contrary to Article 82 of the Treaty of Rome (now Article 102 TFEU) and section 5 of the Competition Act, 2002:

230. It is accepted by the plaintiffs that if they fail to establish that the Councils were "undertakings" when performing their regulatory function in relation to the licensing of small public vehicles, then these claims founder. If they were not undertakings for that purpose then the competition rules simply do not apply to that activity. That question involves determining the type of activity these Councils are involved in, as a matter of law, when carrying out their function of determining the number of licences that should be issued in any year, and issuing same, and of critical importance is whether this function comprises an economic activity, or whether instead it is a purely administrative or regulatory function.

231. Very comprehensive submissions have been made by reference to case law from the ECJ as well as Irish case law in relation to whether and in what circumstances a body carrying out a regulatory function is an undertaking for the purpose of the competition rules. I intend no disrespect to those submissions if I do not set them out in complete detail, both written and oral, helpful though they have been, since I do not consider that to be necessary. Once again, there is not much controversy about the applicable legal principles. It is the application of those principles to the facts of this case where the parties disagree.

232. The term "undertaking" is not defined in the Treaty. But it was defined in section 3 of the Competition Act, 1991 which was the operative Act during the currency of the 1978 Regulations, and until it was repealed by section 48 of the Competition Act, 2002. The statutory definition is unchanged in section 3 of the Act of 2002, so it is unnecessary to spend any time considering whether the definition under the previous Act remains that which must be considered. It remains as it was, namely:

> *"a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service". [emphasis added]*

234. The abuse by an undertaking of its dominant position is prohibited by section 5 (1) and (2) of the Act of 2002 in the following terms:

> *"(1) Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.*
>
> *(2) Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in -*
>
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers,*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,*
>
> *(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts." [emphasis added]*

235. The right of action for damages (including exemplary damages) which these plaintiffs seek to invoke in relation to the abuse prohibited under section 5 is provided for in section 14 of the Act of 2002.

236. The short title of the Act of 2002 states, as relevant, that the Act *"makes new provision, by analogy with Articles 81 and 82 of the Treaty …, and in the interests of the common good, for the prohibition of activities which prevent, restrict or distort competition in trade in the State or which constitute an abuse of a dominant position in such trade …".* [emphasis added]

237. Article 82 of the Treaty (now Article 102) provides:

> *"82. Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.*
>
> *Such abuse may, in particular, consist in:*
>
> *(a) directly or indirectly imposing unfair purchasing or selling process or other unfair trading conditions;*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts." [emphasis added]*

238. Before these plaintiffs can begin to assert any claim against the Councils under competition rules, they must satisfy the Court that by determining the number of licences and issuing same in return for a licence fee these Councils are *"engaged for gain in the production, supply or distribution of goods or the provision of a service"* – in other words, engaged for gain in an economic activity.

238. Questions which arise include whether a taxi licence or the issue of same can be considered to be "goods" or "the provision of a service", and whether the fee payable by the successful applicant for such a licence should be considered sufficient to fulfil the requirement of being "engaged for gain". More generally, it is necessary for the plaintiffs to satisfy the Court that the regulatory role delegated to the local authorities and as operated by them constitutes an economic activity. Unless it is an economic activity, the councils cannot be considered to be undertakings when performing that function.

239. The plaintiffs called an eminent economist and an expert in the application of economic analysis to competition law issues to give his opinion in relation to whether or not Dublin City Council and Ennis Town Council are properly to be considered to be undertakings for the purpose of competition law. Both in his report and in his oral evidence he stated that this is a legal question, as indeed it is. But he went on to say that it was possible for him as an economist to point to certain conditions which need to be satisfied in order to constitute an undertaking, and in his view these conditions were satisfied in the instant cases. He expressed his view that the councils are engaged in an economic activity because they are supplying a 'good' (i.e. a licence) onto what he referred to as the 'upstream market' for a fee, and that in doing so restrictively this activity had an effect on the 'downstream market (i.e. the market in the actual provision of the taxi service by licence owners), particularly by creating a secondary market in which these same licences were traded at very high prices. He also went on to opine that this licensing activity is something which in principle he could envisage being delegated to and carried on by other private operators so that they could make a profit from the activity. He pointed also to the fact, as he sees it, that the fee set by the local authorities for the licences did not appear to bear any relationship to the actual cost of issuing the licence, and this assisted his view that the councils were engaged in the issuing of licences 'for gain'. His view that the councils are engaged in an economic activity when determining the number of licences and issuing same is not a view shared by other economists called respectively by the State defendants and by Dublin City Council, each being acknowledged experts in the competition matters, and each of whom emphasised the essentially regulatory nature of the activity involved in the issuing of taxi licences (albeit that a fee is charged), and also that it is something that is done in the public interest.

240. The plaintiffs submit that the licence fee paid on the issue of a licence to an applicant constitutes a "gain" for the council as that word has been interpreted by Finlay C.J. in *Deane v. Voluntary Health Insurance Board* [supra] in the context of its use in section 3 of the 1991 Act where, albeit in the context of an undoubted economic activity he concluded that the word "gain" as used in the section did not necessarily mean "profit" and that a non-profit organisation can be considered an undertaking within the meaning of the section. He went on to state at page 320 that *"the true construction of this section is that the words 'for gain' connote merely an activity carried on or a service supplied […] which is done in return for a charge or payment",* adding also that *"[w]hat would be saved from application of the Act, by reason of the insertion of the words 'engaged for gain' is […] a charitable association providing the spending of money and the supply of goods or services free of any charge or payment".* It follows, in the plaintiffs' submission, that the charging of a licence fee (indeed one that was above the economic cost of issuing the licence though, as submitted, that is an unnecessary element since profit is not required) constitutes being *"engaged for gain".*

241. They submit also that the nature of the entity under scrutiny is not material - in other words, the fact that it is a local authority does not exclude it from being considered to be an undertaking. They make the point again that the term 'undertaking' is not defined in the Treaty itself, and that under the jurisprudence of the Court of Justice as well as on Irish authority, the concept of an undertaking is a broad one. In that regard they have referred to such as Case C-41/90 *Hofner v. Macrotron GmbH* [1991] 1 – 1979, para. 21, a number of other cases as footnoted in their written submissions including Joined cases C-180/98 to C-184/98 Pavlov [2000] ECR 1-1651, para. 74, and *Competition Authority v. O'Regan* [2007] 4 I.R. 737 at 760. They refer also to the statement by the Supreme Court in *Hemat v. The Medical Council* [2010] 3 I.R. 615 that "the Court of Justice seeks by its judgments to ensure the useful effect of the competition rules" and *"thus it does not permit the Member State to escape from their effects by designating or creating bodies in accordance with public law which, at the same time, engage in economic activity".*

242. The plaintiffs rely upon the statement by Advocate General Jacobs in two cases, namely Cases C – 67/96 *Albany* [1999] ECR 1-5751, and Case C-475/99 *Firma Ambulanz Glockner v. Landkreis Sudwestpfalz* [2001] ECR 1-8089 to the effect that the basic test is whether the entity in question is engaged in an activity, which consists in offering goods or services on a particular market, which could, at least in principle, be carried out by a private actor in order to make profits. They rely on the evidence of Dr. Mike Walker for their submission that "at least in principle" there is no reason why some private actor or indeed actors could not be tasked with the job of issuing taxi licences, and go so far as to contend also that these putative private actors in the issuing of taxi licences could even compete with each other on price in the market for the issue of licences. By this argument they seek to establish that in the performance of their licensing obligations the local authorities are engaged for gain in an economic activity, even though it may be fulfilling a regulatory role, since the "for gain" element is met by the imposition of a charge, and that it is an activity which at least at the level of principle could be done by another actor or actors with a view to profit.

243. The plaintiffs submit that it is clear that when assessing whether an activity is an economic activity for the purpose of the competition rules, the Court of Justice adopts a functional approach – in other words it looks to the nature of the activity rather than the nature of the entity carrying out that activity. They say, and there is no real controversy about this, that for example a body such as a local authority can be correctly considered to be an undertaking for one part of its activities, and yet be considered not to

be such in relation to one or more of its other activities.

244. The Court has been referred to a number of authorities dealing with how an activity should be assessed or considered as to whether it is an economic activity for the purpose of the competition rules, or whether the activity is outside the rules because of its essentially regulatory nature. Such cases are *Hemat v. The Medical Council* [2010] 3 I.R. 615, *Nurendale Ltd trading as Panda Waste Services v. Dublin City Council* [2009] IEHC 588, *Carrigaline Company Ltd v. Minister for Transport* [1997] 1 ILRM 241, and Case C-364/92 SAT *Fluggesellschaft v. Eurocontrol* [1994] ECR 1-43, Case 343/95, *Cali e Figli v. Servizi Ecologici Porto di Genova SpA* [1997] ECR 1-1547, Case C-82/01 *Aeroports de Paris v. Commission* [2002] ECR 1-09297, Case C-49/07 MOTOE [2008] ECR 1-4816, Lifeline Ambulance Services *Limited v. Health Service Executive*, unreported, High Court, 23 October 2012, *Medicall Ambulance Limited v. Health Service Executive,* [2011] 1 I.R. 402.

245. That list is not exhaustive but it gives some idea of the substance of the submissions that have been made on this issue. There is a degree of repetition in the cases. The established principles are discussed and referred to in many of them. Each case clearly is fact specific, and the principles must be applied in the light of particular facts in particular cases. I find it useful to refer to the judgment of Cooke J. in *Lifeline Ambulance Services* for an authoritative distillation of the important principles emerging from the case law referred to, particularly perhaps SAT *Fluggesellschaft v. Eurocontrol.*

246. At paragraph 32 of his judgment in Lifeline Ambulance Services, Cooke J. stated the following in relation to Eurocontrol:

> *"[Eurocontrol] illustrates on the one hand that a public authority irrespective of how it is established or financed or of its legal status can in principle be 'an undertaking' if it is engaged in an economic activity … … …. On the other hand, it also illustrates the fact that such a public undertaking will nevertheless be excluded from the competition rules even where it is engaged in the provision of a service which could conceivably be carried out by private undertakings and even where it makes a charge for those services, provided it is performing those services exclusively in exercise of its powers as a public authority with the objective of securing a benefit in the public interest."*

247. As I stated in paragraph 245, Cooke J. in *Lifeline Ambulance Services* stated a number of general principles which he identified from the cases which he considered in relation to whether and when a public authority is to be considered to be an 'undertaking' and therefore subject to competition rules. He stated the following:

> *"(a) A public body funded from public monies and exclusively engaged in the exercise of entrusted functions which have the object of securing some public interest benefit will not come within the scope of the prohibition as an economic activity even where it makes a charge for the services it provides and notwithstanding the possibility that those services could be provided by private undertakings: (Eurocontrol).*
>
> *(b) A non-profit organisation entrusted by law with responsibility for both emergency and non-emergency ambulance services may be considered to engage in an economic activity in respect of its non-emergency services when provided for remuneration where similar services are also provided by private operators: (Ambulanz Glockner).*
>
> *(c) A public authority which occupies a dominant position in a service market by virtue of being entrusted with special rights in the public interest does not by virtue of that fact alone infringe Article 102, unless the very exercise of those rights lead it to commit an abuse;*
>
> *(d) Such an abuse may arise if the exercise of the right enables the undertaking to reserve to itself the provision of an ancillary service on a related but distinct market where private operators are present; (Ambulanz Glockner).*
>
> *(e) Where the functions of a public authority involve it in activities some of which are economic and others are non-economic, it will come within the scope of the prohibition in respect of the economic activities only, and will not be excluded from it by the fact that its public functions are partly non-economic."*

248. I refer also to some comments of Keane J. in *Carrigaline Company Limited v. Minister for Transport* [1997] 1 ILRM 241 in which one of the issues for determination was whether the Minister was an undertaking in relation to his function of issuing wireless telegraphy licences under the Wireless Telegraphy Act, 1972 and for which a charge was levied on the licence holder. In that regard he stated that it was clear that *"if the Minister in granting licences for transmission is engaged in no more than a regulatory or administrative function, then the fact that he imposes a charge for the granting of the licence does not of itself mean that he is engaged 'for gain' "*. He went on to describe it as a misuse of language to describe the charge as the provision of a service in return for payment and the licensing authority as being in any meaningful sense 'engaged for gain'. He went on to state further at page 290 in relation to such a charge that *"whether it equates to those costs [i.e. the costs of administering and policing the regime] or leaves him with a surplus or a deficiency cannot affect the legal capacity in which he receives the annual levy which is solely that of a regulator and administrator.".* He added that Eurocontrol supported such conclusions.

249. As I have said, there really is no issue on the relevant principles and the law in that regard. It is the application of same to the facts where there is dispute. The plaintiffs essentially maintain that the local authority in question is engaged for gain in an economic activity (issuing licences) which could in principle be performed by other actors, and therefore the fact that each is a public authority performing a function in the public interest is not of itself determinative.

250. The councils on the other hand take a very different view of the activity carried out by the council when determining the number of, and issuing, taxi licences. Counsel submits that while a fee is undoubtedly charged for a taxi licence, and while it may on the evidence be seen as one not reflecting merely the economic cost of issuing the licence and/or policing the taxi sector, that matter has been judicially determined not to be material – see e.g. Keane J. in Carrigaline *Company Limited* above. They emphasis the nature of what the council does when it determines the number of licences which should be issued in any particular year, and issues same, if any, and that this power was one granted to them exclusively by an Act of the Oireachtas for the purpose of control and operation of the taxi industry in the public interest, and they submit that by any definition this must be seen as an activity which is purely regulatory and administrative, and therefore beyond any sensible definition or meaning of an economic activity for gain to which rules of competition are applicable.

251. Much of the same case law to which the plaintiffs referred is relied upon by the Councils, but they submit that the facts of this case are not such that the council can be considered to be carrying out an economic activity, even though it may carry out other activities in respect of which the competition rules could apply, and even though a licence fee is paid to the council.

252. I am entirely in agreement with the submissions made by the Councils, and indeed by the State defendants during their

submissions on the same issue as regards the Minister/State. As is made clear by the authorities to which the Court has been helpfully referred, the Court must look at the nature of the activity being performed, and not the nature of the body performing that activity. That is the functional approach consistently advocated by the Court of Justice. The activity performed by the Council is one that it could only perform if it was specifically empowered to do so by the Minister under Regulations made under section 82 of the 1961 Act. It is not an activity that any other private actor may perform unless it is similarly authorised by Regulation. It is quintessentially a regulatory function in relation to a service controlled and operated initially by the Minister under the 1978 Regulations albeit that the local authorities were the decision-makers as to the number of licences that should be granted and the Garda Commissioner actually issued the licences, and later by the local authorities under the 1995 Regulations both as to the numbers of licences to be granted and the issue thereof. In either case the activity carried out by local authorities under the Regulations was regulatory in nature only.

253. The market in respect of which the Council is said by the plaintiffs to be an undertaking is in relation to the issue of licences since the councils are not themselves the providers of the taxi services. They are not a competitor in the taxi service market. They do not own taxis. If they were trading in that same market, then of course under the accepted principles of competition law referred to, they would be carrying on an economic activity for gain, as competitors in that market, and competition rules would prevent a council from operating in that market in a way that was abusive of any dominant position it might hold. But that is not the position on the facts of the present case. In deciding on the number of licences, and issuing same, and charging a licence fee, the councils are performing only a regulatory function or an administrative function in the public interest. The provision of a taxi service in the capital city, or indeed in any other city or town, is something that is done to meet a public need. The taxi industry is regulated in the public interest under powers given to the Minister in section 82 of the Act of 1961. Those powers to operate and control the small public service vehicle industry are powers to be exercised in the public interest, and not in the interests of the taxi licence owners. The fact, as already adverted to in another section of this judgment, that a wise Minister might consult widely, including with representatives of the taxi industry, before deciding on the manner in which his powers should properly be exercised in the public interest does not alter the public interest nature of the function he is performing when making Regulations for that public service.

254. As part of their submissions, the plaintiffs have referred to what has become known as the 'comparative criterion test'. In other words, the Court is urged that an important question in determining if an activity being carried on by a public authority is or is not an undertaking is to consider whether it is an activity which, at least in principle, is capable of being carried out by a private or other actor besides the public authority. Some of the evidence to which I have referred has sought to give this Court an evidential basis to conclude that the determination of how many licences should be issued, and to issue same, is something that in principle could be carried out by another private entity or actor. But I have to say I find that submission, and the evidence led in that regard, to be somewhat contrived. It bears no real relationship to a taxi industry regulated in the public interest. It is suggested that it would be possible that a number of different entities or persons could be authorised to issue licences, and furthermore that each could compete with the other, even on price, just as they might in relation to other goods and services. I must again say that I find that submission to be specious and syllogistic, and really an exercise in deductive reasoning in an attempt to disguise the reality of what is a purely regulatory nature of the activity. It is an approach which focuses too much on the comparative criterion test to the exclusion of the market participation test, the former confining its purview to the sole question whether the activity is one that could in principle be carried on by a private party.

255, In that regard it is worth referring to what Advocate General Maduro in his Opinion in Case C-205/03 *FENIN v. Commission* [2006] ECR 1-6295 said regarding the limitations of the comparative criterion test:

> *"However, that comparative criterion test would, literally applied, enable any activity to be included within the scope of competition law. Almost all activities are capable of being carried on by private operators. Thus, there is nothing in theory to prevent the defence of a State being contracted out, and there have been examples of this in the past. Accordingly, in its subsequent judgments, the Court elaborated on that concept by linking it to participation in the market …. Under the participation in the market test, it is not the mere fact that, in theory, private operators may carry out economic activities on a given market that is decisive. Rather, it is the fact that those activities are actually carried out in a member state under market conditions, which determines the application of article 82. Such market conditions are distinguished by conduct which is undertaken with the objective of capitalisation, as opposed to activities pursued solely pursuant to the principle of solidarity."*

256. In my view the position is clear. While the plaintiffs have through the evidence led in this respect sought to establish the ingredients of an economic activity in a literal way in order to satisfy the Court that the taxi licensing activity carried on by the councils under the 1978 and 1995 Regulations meets the criteria for an economic activity, at least at the level of principle, they are overlooking or ignoring, as they must for their argument, the non-commercial reality of that activity. There was no market participation when the councils performed their purely regulatory function under powers expressly given to them, and only them, by the powers vested in the Minister under section 82 of the Act of 1961. This is classically a regulatory activity – a public interest activity. Another important factor which militates against any idea that this is an economic activity is that it is the democratically elected members of the council who determine the number of licences, and not the executive of the councils. I cannot accept the view that the activity of determining the number of licences for, say, Dublin is something which in any sensible way could even in principle be seen as something which could be done by a private operator or a number of private operators. I also bear in mind the evidence of Owen Keegan, that in fact while Dublin City Council performed the role of deciding on numbers of licences for the whole of Dublin, there were three other councils within that area whose agreement had to be obtained in relation to the decision. That only serves to emphasise the impossibility of considering that some private operator could be given the task. There is no reality to this proposition.

257. The fact that a secondary market in licences evolved as an incidental consequence of the Regulations is in my view irrelevant to the Court's consideration. The council never competed in the market for the provision of taxi services. The non-economic activity engaged in by the councils means that when performing this regulatory function they are not undertakings for the purpose of competition law, and therefore this activity fell at all times outside the competition rules.

257. For all the reasons appearing in this judgment, the claims made in these three sets of proceedings commenced by Mr Muldoon, Mr Kelly and Mr Malone must all be dismissed.