Neutral Citation Number: [2011] IEHC 429

THE HIGH COURT

2009 3969 P

BETWEEN

EUGENE BATES AND BRENDAN MOORE

PLAINTIFFS

AND

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

DEFENDANTS

JUDGMENT of Miss Justice Laffoy delivered on the 15th day of November, 2011

1. The factual basis of the plaintiffs' case as pleaded and proven

1.1 At the hearing of these proceedings, the plaintiffs did not pursue one aspect of their case as pleaded. Notwithstanding that the defendants, in their defence, had pleaded that the aspect in question was "entirely misconceived", the plaintiffs persisted in pursuing it until, on the first day of the hearing, the plaintiffs' case was being opened by their counsel. Therefore, the following summary of the factual basis of the plaintiffs' case only relates to the case as pursued at the hearing.

1.2 At the material time, that is to say, from 1999 to 2005, the plaintiffs, who were business partners, were involved in fishing for scallops. The fishing operations which are in issue in these proceedings were conducted from two fishing vessels owned by them, namely: the MFV "William Joseph" (the "William Joseph"); and the MFV "Alicia" (the "Alicia").

1.3 The first licence for a sea-fishing boat which the plaintiffs obtained from the predecessor of the first defendant (the Minister) was dated 27th June, 2000. It licensed the use of the "William Joseph" for sea fishing during the period commencing on 21st May, 1999 and ending on 30th June, 2002. The schedule which contained the particulars of the vessel indicated that it was a "Specific" segment boat. What this meant was expressly conditioned into the licence, in that it was provided in the conditions that the vessel should "fish solely for Aquaculture purposes and for Bi-Valve Shellfish Species". On 19th June, 2002 a renewal licence issued to the plaintiffs in respect of the "William Joseph" for the period from 1st July, 2002 to 30th June, 2005. The process leading to the grant of those licences in respect of the "William Joseph" was similar to the process which I will outline later in relation to the grant of licences in respect of the "Alicia". Both licences granted by the Minister in respect of the "William Joseph" were expressed to be granted pursuant to s. 222B of the Fisheries (Consolidation) Act 1959 (the Act of 1959), as amended.

1.4 The evidence of the first plaintiff (Mr. Bates) was that the plaintiffs commenced fishing with the "William Joseph" in June 1999. That vessel was based in Newlyn, Cornwall and fished in the English Channel and the surrounding waters. As time went on, the skipper pushed further south and east in the direction of the Bay of Biscay. Scallop fishing is regulated under EU law on an area basis by reference to areas defined by the International Council for Exploration of the Sea (ICES) and the various areas are known by the relevant ICES designation. The portion of the Bay of Biscay which was the plaintiffs' goal is ICES Area VIIIa. That area is south of latitude 48ºN. Mr. Bates' evidence was that there was an abundance of scallops in Area VIIIa. In early 2000 he was assured by an officer in the Minister's Department (the Department), Michael O'Driscoll, that the plaintiffs were legally entitled to fish for scallops in Area VIIIa. Mr. Bates' evidence was that in late 2000 the plaintiffs saw the prospect of making a lot of money fishing in Area VIIIa and they decided to acquire another vessel, with the intention that the new vessel would, for safety purposes, fish in conjunction with the "William Joseph" in that area, in which weather and sea conditions can be extremely dangerous.

1.5 The application process for the licence for the "Alicia" took the following course:

> (a) An initial application to transfer a licence from another vessel owned by Mr. Bates to the "Alicia" having been refused, on 29th October, 2001 the plaintiffs informed the Department that they proposed applying for an aquaculture licence for the "Alicia". In that letter they informed the Department of the areas in which they intended to operate, being the areas in which the "William Joseph" was operating. It was indicated that in the months of May to November the area of operation would be the South English Channel and West Brittany, as highlighted on the map enclosed with the letter. The map indicated that Area VIIe/h would be fished from May to November. Area VIIIa was not depicted on it.
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> (b) The application for the licence was dated 29th November, 2001. It was accompanied by a statement of the same date, which was addressed to the relevant section of the Department and was signed by Mr. Bates. It stated that the "Alicia" would fish for scallops in the area highlighted on the map attached. The map showed various areas, including Area VIIa/b/e/f/g/h/j. The map did not include Area VIIIa, the southern most boundary being latitude 48°N. However, "VIII" was written on the map, obviously by Mr. Bates, below that line. I do not think that it would be reasonable to assume that an officer of the Department would have inferred from the letter in conjunction with the map that the plaintiffs intended for fishing for scallops in Area VIIIa.
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> (c) In December 2001 a licence offer issued from the Department to the plaintiffs and it was accepted. The plaintiffs then acquired the "Alicia".
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> (d) In April 2002 the plaintiffs submitted an Economic Link Questionnaire to the Department together with a Fishing Plan as required by the Department. As to the purpose of those two documents and their relevance to the issue with which the Court is concerned, the evidence established the following:
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> (i) The Economic Link Questionnaire became part of the licensing process in 1994 when the Act of 1959 was amended by s. 5 of the Fisheries (Amendment) Act 1994) (the Act of 1994) by substituting a new subs. (3) for s. 222B(3) thereof, which includes a provision to the effect that:

> "In deciding on the grant or refusal of a licence or the attachment of condition to a licence the Minister may take account of economic benefits which the operation of the boat will be likely to contribute to the coastal communities or regions … ".

The purpose of the Questionnaire was to elicit information which would inform the assessment of the economic benefits which would be likely to flow if the licence was granted. In my view, there was nothing in the Questionnaire completed by the plaintiffs which is of relevance to the issues in this case.

(ii) As explained to the Court, the Fishing Plan, a single page document, was a separate document from the Questionnaire. The defendants' evidence was that it was a document which applicants for licences in the "Specific and Aquaculture" segment were required to complete prior to 2003, because after 1999 there was a moratorium on entry into that segment other than through transfer of existing licence entitlements, with the objective of ensuring the conservation and rational exploitation of wild bivalve mollusc stocks. The Fishing Plan was used in connection with that policy to verify that an applicant did not propose to target species other than bivalve mollusc, for example, whitefish species. The Fishing Plan submitted by the plaintiffs to the Department in April 2002 indicated that the plaintiffs intended to fish in Area VIIIa and other areas in the months of May and June, June and July, and September and October for scallops.

1.6 On 2nd May, 2002 a licence for a sea-fishing boat in relation to the "Alicia" issued, under the statutory regime in force at the time, to the plaintiffs for the period commencing on 2nd May, 2002 and ending on 30th June, 2004. It was also expressed to be granted by the Minister pursuant to s. 222B of the Act of 1959, as amended. Its effect, as stated therein, was that the "Alicia" was thereby licensed for the purposes of s. 222B during the period specified. As with the licence in relation to the "William Joseph", it was a condition that the boat should fish solely in the specific segment – for aquaculture purposes and bivalve shellfish. By licence dated 30th September, 2003 the licence period was extended from 3rd September, 2003 to 30th September, 2004. By letter dated 22nd June, 2004 it was further extended until 30th June, 2005. However, in late 2004, the plaintiffs had ceased to be the owners of the "Alicia".

1.7 Mr. Bates testified that after the acquisition of the "Alicia" it was specifically converted for fishing in the Bay of Biscay. As I understand the evidence, the "William Joseph" and the "Alicia" fished in Area VIIIa in September 2002, May 2003, July 2003 and August 2003. Area VIIIa was fished by both boats for a combined total of twenty two days.

1.8 On 18th August, 2003, when both boats were fishing in Area VIIIa, they were informed by a French fisheries patrol aircraft that they were fishing illegally and they were ordered to proceed above latitude 48°N immediately, which they did. They made contact with Mr. Bates, who in turn made contact with Mr. O'Driscoll in the Department. Mr. Bates was reassured that the plaintiffs were entitled to fish legally in Area VIIIa. Mr. Bates conveyed that information, which had been confirmed by a fax message to him from a Sea Fishery Officer in the Department on 18th August, 2003, to the skippers of the two boats, but he told them to stay where they were positioned. Unfortunately, the information communicated verbally and by fax by the Department was incorrect. Later in the early hours of 19th August, 2003 both boats were arrested by the French Navy and directed to Brest.

1.9 When the vessels reached Brest on the afternoon of 19th August, 2003 the skippers were informed that they were being detained and their catch was being confiscated. On the morning of 20th August, 2003 the skippers attended a court hearing concerning the release of both vessels. They were released on lodgment of bonds aggregating €27,000. Mr. Bates representing the owners, and Mr. Colm Power, the skipper of the "Alicia", attended a Magistrate's Court hearing in Brest on 7th November, 2003. They both pleaded guilty to the charges of illegal fishing against them. Penal fines aggregating €18,000 were imposed on them. In addition, there were civil charges against them on foot of which they were ordered to pay damages aggregating €48,000 between them, together with €1,500 costs.

1.10 The evidence of both plaintiffs was that their scallop fishing business never recovered from the incident in August 2003. Apart from the direct financial loss arising from the arrest, fines and confiscation of the catch, their case was that the real damage to their business arose from the fact that, having invested heavily to be able to fish in Area VIIIa, they could not fish in that area. The "Alicia", which had been completely customised for Biscay, was no longer viable. It was sold for €350,000 in November 2004. The "William Joseph" continued to fish until it was decommissioned in 2005 as part of a State funded decommissioning scheme.

2. Misinformation and its source

2.1 In their statement of claim, which was delivered on 11th May, 2009, the plaintiffs pleaded that –

> (a) up to and including August 2003, the plaintiffs had been assured by the Department that they could fish in Area VIIIa/b/c,
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> (b) the Minister issued the licences in respect of the "William Joseph" and the "Alicia" to the plaintiffs without restriction for Area VIIIa/b/c and the Department officials confirmed to the plaintiffs that the licences issued entitled the plaintiffs to sea-fish for scallops in EU waters outside the State's territorial waters, and
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> (c) subsequent to the UK authorities specifically banning scallop fishing by UK registered vessels in Area VIIIa, the plaintiffs, having sought confirmation from the Department, were told by the Department's officials that their licences were valid to fish for scallops in Area VIIIa.

In response to a request for particulars dated 29th July, 2009 from the defendants, the plaintiffs, in replies dated 4th February, 2010, identified Mr. O'Driscoll, referred to as Chief Sea Fisheries Officer, as the official who made the foregoing representations. Further, the plaintiffs responded that Mr. O'Driscoll had told Mr. Bates that all the restrictions to scallop fishing were stated on the licence.

2.2 In the defence, which was delivered on 16th November, 2009, it was denied that the various representations alleged were made.

2.3 However, in a letter of 5th January, 2011 to the plaintiffs' solicitors from the Chief State Solicitor, the plaintiffs were informed that, in the light of the material then in the possession of the defendants, the defendants accepted that "the assurances" were given to the plaintiffs by Mr. O'Driscoll. I understand "the assurances" to mean all of the matters outlined in para. 2.1 above, which were summarised in the letter by reference to the statement of claim and the replies to the request for particulars. It was confirmed in the letter of 5th January, 2011 that –

> "… at all material times since 1995, a "0" fishing effort had been allocated to Ireland in respect of scallops in the relevant Areas and that nothing that was said or done by or on behalf of the Department … could alter or did alter that fact."

2.4 As I have recorded, on 18th August, 2003 an official of the Department sent a fax message to Mr. Bates stating that the Department had "found no valid reason to prevent [the plaintiffs] fishing for scallops" below latitude 48°N. However, by the following day, 19th August, 2003, the officials of the Department, as a result of contact by telephone with an official in the Direction des Peches Maritimes et de L'Aquaculture in Paris, had become aware that Irish registered fishing vessels were not permitted to fish for scallops in Area VIIIa. The source of the misinformation was explained in a letter of 19th August, 2003 from the Department to the French authorities and it was explained to the Court.

2.5 Council Regulation (EC) No. 2027/95 of 15th June, 1995 (the 1995 Regulation), establishing a system for the management of fishing effort relating to certain Community fishing areas and resources, provided in Article 2 that the maximum annual fishing effort for each Member State and for each fishery should be as indicated in the Annex. In the English language version, as published in the Official Journal of the European Communities on 24th August 1995, one page of the Annex dealt with scallop fishing, from which it was clear that Ireland had zero fishing effort in Area VIIIa/b/d. Unfortunately, the officials in the Department were working from an English translation of another version thereof, which was defective in that it omitted the line in the Annex relating to Area VIIIa/b/d. Accordingly, it was not obvious to the officials that Ireland had zero fishing effort in relation to those areas under the 1995 Regulation. On the basis of what is pleaded in the defence, it would appear that the officials in the Department were working from a translation of the consolidated version of the 1995 Regulation, which was published on 30th January, 1999.

3. Legal basis of plaintiffs' claim, as pleaded

3.1 These proceedings were initiated by a plenary summons which issued on 5th May, 2009. There had been correspondence from the plaintiffs' solicitors to the Department in the autumn of 2004, following the arrest of the "William Joseph" and the "Alicia". In that correspondence the Department was put on notice that, in the event that losses which had been incurred had arisen "out of an error caused by the Irish authorities", the plaintiffs would be looking to recoup the losses they had suffered and were continuing to suffer in the future arising out of that error. The legal basis on which the plaintiffs would pursue that redress was not indicated. The correspondence continued into the middle of 2005 without any reaction or response from the defendants.

3.2 The plaintiffs now claim that the defendants are liable to them for the losses they allege they incurred on two bases.

3.3 One basis is that what happened in August 2003 was caused by the misrepresentation, negligence and breach of duty of the Minister. The particulars of negligence alleged on the part of the Minister, as pleaded, which are relevant to the case as pursued at the hearing, are the following:

> (i) failing to ensure that the Minister and the plaintiffs had access to an accurate copy of the 1995 Regulation, including the annex thereto,
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> (ii) giving incorrect assurances to the plaintiffs about their entitlement to fish off the French coast,
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> (iii) giving incorrect assurances and incorrect representations which exposed the plaintiffs to economic loss as they built their business on this guidance and information, and
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> (iv) making inaccurate representations to the plaintiffs and in so doing exposing the plaintiffs to arrest and financial loss relating to capital losses, fines, levies, expenses incurred and loss of revenue.

The relief claimed by the plaintiffs arising out of that alleged wrongdoing is damages for negligence and breach of duty, including statutory duty.

3.4 The other basis on which the plaintiffs' claim is advanced is that there has been a breach of their legitimate expectation. In fact, breach of legitimate expectation is only referred to in the prayer for relief in the statement of claim. At the hearing it was submitted on behalf of the defendants that no case had been pleaded by the plaintiffs on the basis of legitimate expectation relevant to the facts which had been established at the hearing. It was submitted that the plaintiffs could not advance a case that they had not pleaded. Nonetheless, the basis on which the plaintiffs were pursuing a claim based on the doctrine of legitimate expectation had been set out in their outline legal submissions, which were filed on 8th November, 2010. Moreover the issue of the applicability of the doctrine was addressed in the defence, wherein it was pleaded that the principles of legitimate expectation did not arise in respect of the matters pleaded in the statement of claim and that the issue as to whether or not the plaintiffs were at any material time entitled to fish for scallops in Area VIIIa was a matter of law. Counsel for the defendants addressed the issue of legitimate expectation both in their written submissions and in their oral submissions at the hearing. Accordingly, I consider it appropriate to address whether the plaintiffs have established a case based on legitimate expectation.

3.5 Counsel for the plaintiffs also invoked the decision of the Supreme Court in *Duff v. Minister for Agriculture (No. 2)* [1997] 2 I.R. 22. Accordingly, it is necessary to consider to what extent that authority is relevant to the issues in this case.

4. Legitimate expectation

4.1 The plaintiffs contended that they had a legitimate expectation of having the right to fish for scallops in Area VIIIa for the duration of their licences and for a reasonable period of time after their repeated licensing and the categorisation of the two vessels as sea-fishing boats by the Minister. It was submitted that the licences issued by the Minister to them created rights protected by Article 43 of the Constitution, as property rights, and Article 1 of Protocol No. 1 to the European Convention on Human Rights. Counsel for the plaintiffs relied on the following authorities: the decision of the European Court of Human Rights in *Pine Valley v. Ireland* [1991] 14 EHRR 319; the decision of the High Court (McCracken J.) in *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403; and the more recent decision of the High Court (Clarke J.) in *Lett & Co. Ltd. v. Wexford Borough Corporation & Ors.* [2007] IEHC 195.

4.2 Counsel for the defendants also relied on the summary of the law on legitimate expectation set out by Clarke J. in *Lett & Co*. However, it was submitted that the decision of the Supreme Court in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160 is of particular significance in the context of these proceedings. In my view, that is correct.

4.3 In the *Wiley* case, the issue was whether an order of *certiorari* should be granted quashing a decision of the Revenue Commissioners that the applicant was not entitled to a repayment of excise duty under the provisions of article 12 of the Imposition of Duties (No. 236) (Excise Duties on Motor Vehicles, Televisions and Gramophone Records) Order, 1979 in respect of the purchase of a motor car purchased in August 1987 pursuant to the terms of a scheme for repayment of excise duty and value added tax on new motor vehicles for disabled drivers. The applicant had received a repayment of excise duty and value added tax under the scheme in

respect of two previous purchases of motorcars – in July 1983 and in July 1985. His case was that he had a legitimate expectation of a refund on the 1987 purchase. While he suffered from physical disabilities affecting his leg and back, the applicant's disability did not correspond to the criteria for allowing repayment. The explanation of the Revenue Commissioners as to why he had received the repayment on previous occasions was that at the time it had been the practice of the Revenue Commissioners to take road tax exemption certificates as indicating compliance with the relevant criteria. In upholding the decision at first instance to refuse the relief sought, Finlay C.J. stated (at p. 166):

> "The learned trial judge in the High Court decided the case on the basis that the applicant, who knew or ought to have known, that the extent of his physical handicap did not constitute him a person who was wholly, or almost wholly, without the use of each of his legs, could not have believed or expected that he was eligible for the repayment of excise duty under the scheme operated pursuant to art. 12 of the Order of 1979. The most he could expect was that he might be given such a repayment, an expectation arising from the fact that he was given it in previous years. In those circumstances the learned trial judge decided that the absence of a legitimate expectation, as distinct from an expectation, defeated the only claim which the applicant was making."

Having expressed concurrence in that decision, Finlay C.J. went on to outline an additional feature of the case in the following passage (also at p. 166):

> "An additional feature, however, in my view, also arises in this case which would independently defeat the applicant's claim. The Revenue Commissioners are a statutory body who can only act pursuant to statutory powers vested in them. As of 1987, they did not have any statutory power to grant repayments by way of concession of excise duties, otherwise than in accordance with the scheme which they had put in operation and which had received, one presumes, the consent of the Minister for Finance. For them to repay excise duty on a motor car to a person who was disabled but who did not come within the approved scheme, would be ultra vires and a breach of their statutory obligation to collect excise duties, except where they were validly exempted or avoided. There is in this case no question of a promise by the Revenue Commissioners to do any particular thing in 1987, and I am satisfied that quite independently of the more generally applicable principle of legitimate expectation and the limit it may impose on that doctrine, that this applicant could not pursue on the basis of expectation a remedy which would involve the carrying out by the statutory authority, the Revenue Commissioners, of activities which they were not empowered to carry out, and the payment or repayment of monies which they were not empowered to pay or repay."

4.4 As counsel for the defendants pointed out, McCarthy J. dismissed the appeal in more trenchant terms. He stated (at p. 168):

> "It is argued that he had a legitimate expectation that when he bought the new car he would get the rebates because he had got them in the past on that extra-statutory frame and that before he was to lose that right, he should be notified before he purchased the new car. Expressed somewhat differently, it may be said that having wrongly persuaded the licensing authority to exempt him … and consequently recouped from the general body of tax payers the excise duty and the VAT that he had paid on his new car in 1983 and in 1985, that when the Revenue Commissioners became alerted to possible abuses of the scheme, he should have been notified of their change of heart. Even if this extraordinary proposition were to be accepted, it would mean that the Revenue Commissioners would have to be ordered to pay out of the Central Fund a significant sum of money to someone not entitled to any such exemption. The concept that the courts should order the Revenue Commissioners or the Minister for Finance to pay money to someone plainly not entitled to it I find unusual. If expectation existed it was an illegitimate one."

4.5 The decision in the Wiley case was followed by the Supreme Court in *Daly v. Minister for the Marine* [2001] 3 I.R. 513, where Fennelly J. stated (at p. 523) that the very name of the doctrine of legitimate expectation demonstrates that it is founded on an expectation which is reasonable and legitimate.

4.6 In this case, the licences granted by the Minister in respect of the "William Joseph" and the "Alicia" were sea-fishing boat licences. While it was conditioned into the licences that the boats should be used only for fishing for aquaculture purposes and bivalve shellfish species, the licence did not, either expressly or impliedly, sanction or restrict fishing in any particular area. The licences could not have authorised fishing for scallops in Area VIIIa, because that was precluded under European Union law by the 1995 Regulation and, accordingly, in my view, the licences per se could not have given rise to a reasonable legitimate expectation on the part of the plaintiffs that they were entitled to fish for scallops in Area VIIIa.

4.7 It was undoubtedly mistakenly represented by an officer of the Minister to the plaintiffs that the "William Joseph" and the "Alicia" were entitled for the duration of the licences granted in respect of each to fish for scallops in Area VIIIa. The question which arises is whether that representation was of a type which is capable of grounding an actionable claim for failure on the part of a public authority to respect legitimate expectations. In *Glencar Explorations v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, Fennelly J. (at p. 162), in setting out the three matters necessary to establish a claim based on failure of a public authority to respect legitimate expectations, stated that, firstly, the public authority "must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity". As a matter of Irish law, on the authority of the decision of the Supreme Court in the *Wiley* case, the plaintiffs could not have had a legitimate expectation, as distinct from an expectation, on the basis of the representations made to them that they would be entitled to fish for scallops in Area VIIIa during the currency of the licences. Under the 1995 Regulation, Ireland had zero fishing effort for scallops in Area VIIIa and any representation to the contrary made by an officer of the Minister to the plaintiffs would be a representation that the plaintiffs could do an unlawful act. Such a representation could not give rise to a legitimate expectation.

4.8 Accordingly, in my view, the plaintiffs' claim, insofar as it is founded on the doctrine of legitimate expectation, cannot succeed.

5. Duff v. Minister for Agriculture

5.1 Counsel for the plaintiffs adopted the summary of the facts underlying the decision of the Supreme Court in *Duff (No. 2)* at the commencement of the majority judgment of Barrington J., in which he stated (at p. 75):

> "The facts of this case are not in dispute. The plaintiffs are a group of small farmers. The State, on its own behalf and as agent for the European Commission induced them to borrow money and to develop their farms on the basis that there would be an expanded outlet for the sale of their milk. Now, after they have incurred heavy expenditure they find that they will not get the outlet for the sale of their milk which they expected and were induced to believe they would receive."

Counsel for the plaintiffs also referred the Court to the following passage from the judgment of Barrington J. (at p. 89):

> "As previously stated, the plaintiffs could have had no legitimate expectation that the law would not be changed. Neither could they have any right that the Minister would exercise his discretion under art. 3 of Council Regulation EEC/857/84 in their favour. But once the Minister had decided to give them a reference quantity out of the national quota the Minister had a duty, and they had a right to expect, that the Minister would implement this decision in a lawful manner. The Minister, in breach of his duty and of their rights attempted to implement his decision in a manner which was unlawful. As a result the plaintiffs did not receive the special reference quantities to which they were entitled and have, in consequence, suffered damage and loss."

What the Supreme Court decided was that the plaintiffs were entitled to be compensated for the loss they suffered in consequence of the Minister having chosen a method to provide for them out of national milk quota in a manner which was unlawful. He could have made provision for them in a manner which was lawful, but due to a mistake of law, he did not do so. As O'Flaherty J. pointed out in his majority judgment (at p. 74), the Minister could not have honoured his commitment to farmers in the position of the plaintiffs in a manner that involved breaking any statutory or other duty or obligation, citing *Wiley v. The Revenue Commissioners*.

5.2 As is recorded at the end of the report of *Duff (No. 2),* the order of the Supreme Court, as perfected, remitted the matter to the High Court "for the assessment of damages suffered by the plaintiffs as a result of the mistake of law" of the Minister. It is difficult to see how that decision has any relevance to the facts established and the issues raised in these proceedings. In this case, the Minister, in exercise of his statutory function of which the plaintiffs availed, that is to say, the granting of sea-fishing boat licences in respect of both vessels, did not act under a mistake of law in granting them sea-fishing boat licences for the "William Joseph" and the "Alicia"; he acted in accordance with the statutory regime in force at the time and, in consequence, they got valid licences. The problem they encountered in August 2003 was not attributable to a mistake in the manner in which the Minister performed his statutory function nor, for the reasons which I will outline at paragraph 7 below, was it attributable to a mistake in the manner in which the Minister performed his function under Community law. It was attributable to the fact that an official in the Department gave the plaintiffs wrong information in relation to the provisions of Community law, the 1995 Regulation, which regulated the areas in which they were entitled to fish for scallops.

6. Breach of duty and negligence/breach of duty of care – general observations

6.1 In their submissions, counsel for the plaintiffs focused primarily on the concept of the Minister being liable to the plaintiffs for damages for breach of his duty to them under Community law. Counsel for the defendants, understandably, having regard to what is pleaded in the statement of claim, focused on whether the defendants owed the plaintiffs a duty of care at common law.

6.2 I propose considering the plaintiffs' arguments based on alleged breach of duty under Community law first. I will then consider the case based on the common law.

7. Breach of duty – Community law

7.1 It was submitted on behalf of the plaintiffs that negligence and breach of duty of care are causes of action in Ireland that are available to individuals who are affected by breaches of Community law by Member States. In support of that argument, counsel for the plaintiffs relied on the decision of the Supreme Court in *Emerald Meats Ltd. v. Minister for Agriculture (No. 2)* [1997] 1 I.R. 1. While I do not see the relevance of that decision in relation to the case advanced by the plaintiffs on the basis of negligence or breach of duty of care, I propose considering it because it does recognise a right of action in damages against a Member State at the suit of an individual for breach of a duty to him under Community law.

7.2 The *Emerald Meats* case arose out of a change in European Union law in relation to the distribution of what was referred to in the case as GATT meat quota in 1989. From 1986 to 1989 the first defendant (the Agriculture Minister) had been responsible for the distribution of Ireland's share of GATT meat quota. However, the basis of distribution was varied by a Council Regulation in 1989 and by Commission Regulation 4024/89/EEC. Thenceforth, it was provided that the Commission, rather than the Member States, would decide how quota would be distributed. However, Article 4 of the Commission Regulation provided that Member States should forward to the Commission a list of applicants for quota of GATT meat by 31st January, 1990 at the latest. The issues in the case centred around the manner in which the Agriculture Minister had dealt with the plaintiff's application to be included on the list of applicants for 1987, 1988 and 1989. The Agriculture Minister had forwarded the plaintiff's application in respect of 1989 but not its applications in respect of 1987 and 1988 to the Commission. The wrong which the plaintiff alleged against the Agriculture Minister was that, in not forwarding the plaintiff's application for 1987 and 1988 to the Commission, he was not complying with his obligations under Commission Regulation 4024/89.

7.3 In order to put the passage from the judgment of Blayney J., which was relied on by the plaintiff, into context, it is necessary to point out that the first issue which the Court had to address was a submission on behalf of the State that the plaintiff was not the "importer" of the GATT meat in 1987 and 1988 because it had purchased quota from a number of meat processors in those years and was merely their agent. That submission was rejected by Blayney J. That being the case, Blayney J. stated that it followed that the Agriculture Minister should have forwarded the plaintiff's application for 1987 and 1988 to the Commission. However, an issue was raised by the Agriculture Minister as to whether the High Court was correct in holding that the Department's adjudication of the applications of the plaintiff and the other food processors was defective. The detail of the defects, it seems to me, is not material for present purposes. Blayney J. stated (at p. 14):

> "What is clear on the evidence is that the Department had before it conflicting applications in respect of the imports of GATT meat in 1987 and 1988. Emerald claimed to be the importer and the meat processors, from whom it had purchased the quotas, also claimed to be the importer. The Department, without giving Emerald any opportunity to make its case, made the wrong decision."

The plaintiffs laid particular emphasis on the last sentence in the above quotation. Its perceived relevance may have related to the aspect of the plaintiffs' claim in these proceedings which was abandoned at the hearing, which was predicated on a notion that some change had been introduced in relation to the licensing of sea fishing vessels in August 2003 which had resulted in, or contributed to, the arrest of the "William Joseph" and the "Alicia". It seems to me that the giving to the plaintiffs of an opportunity to make their case has no relevance whatsoever to the claim which remains in the plaintiffs' case.

7.4 Turning to the *ratio decidendi* of the Supreme Court decision in the *Emerald Meats* case, Blayney J., having quoted a passage from the judgment of Costello J. at first instance, identified the wrong committed by the Agriculture Minister, stating (at p. 15):

> "In failing to forward Emerald's application as importer in the years 1987 and 1988, the Department was in my opinion in breach of its duty to Emerald. The duty arose under art. 1, sub-art. 1 which I cited earlier, and also article 4."

Blayney J. then went on to state (at p. 16) that the right to recover damages from a Member State for the breach of an obligation imposed on it by Community law seems to be clearly recognised in the passage which he then quoted from the decision of the European Court of Justice in *Francovich v. Italy* (Cases C-6/90 and C-9/90) [1991] E.C.R. 5357 – paras. 31 to 37. He then continued (at p. 17):

> "These principles must be applied by the courts of every Member State and it is clear from them that Emerald is entitled to claim compensation from the State for the Department of Agriculture's failure to carry out the obligation imposed on it by Regulation 4024/89. My conclusion on the third issue is accordingly, that Emerald has a good cause of action for damages."

In the context of an issue as to whether general damages should be awarded, the wrong on the part of the Minister was characterised by the Supreme Court as a breach of statutory duty.

7.5 I think it is pertinent to quote, in part, the paragraphs from the judgment in the *Francovich* case quoted by Blayney J. The Court of Justice stated:

> "31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions … .
>
> 32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals … .
>
> 33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.
>
> 34. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
>
> 35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.
>
> 36. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law … .
>
> 37. It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible."

7.6 On the facts of this case, no right of the plaintiffs under Community law was infringed by the Minister. It was acknowledged, belatedly, on behalf of the plaintiffs that not only did they have no right to fish in Area VIIIa by virtue of their sea-fishing boat licences; rather, Community law prohibited them fishing in Area VIIIa. Accordingly, there was no infringement by the Minister or any organ of the State of a right of the plaintiffs under Community law. The State has no liability under Community law in respect of losses for which the plaintiffs claim to have an entitlement to redress. Therefore, in my view, the principle applied in the Emerald Meat case has no application. Any claim the plaintiffs may have against the Minister for breach of duty can only arise at common law under the tort of negligence.

8. Negligence/breach of duty of care at common law: the defendants' submissions

8.1 As recorded at para. 2.3 above, it was admitted in the letter of 5th January, 2011 that the assurances which were given by an official of the Department to the plaintiffs had misrepresented on misstated to the plaintiffs the legal position in relation to the entitlement of Irish licensed vessels to fish for scallops in Area VIIIa prior to August 2003. However, it was expressly stated in that letter that the admission was without prejudice to the defendants' contention that no actionable duty of care arose in the context of the relationship between the parties.

8.2 In support of their contention that no actionable duty of care arose, counsel for the defendants relied on a number of Irish authorities, which it is necessary to consider to determine to what extent they are of relevance to the issue as to whether a duty of care existed on the facts of this case, namely: the decision of the Supreme Court in the *Glencar Exploration* case; the decision of the Supreme Court in *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191; and the decision of the High Court (Costello P.) in *W. v. Ireland (No. 2)* [1997] 2 I.R. 151. Before considering those authorities, I think it would be instructive to consider precisely what the role of the Minister and the Department and its officials was vis-à-vis the plaintiffs, as applicants for, and the holders of, sea-fishing boat licences in the period roughly from 2000 to August 2003. The Minister had dual functions.

8.3 First, the Minister performed a statutory function under Irish law in force at the time in granting sea-fishing boat licences to the plaintiffs in respect of the "William Joseph" and the "Alicia". As appears on the face of the licences, they were granted under s. 222B of the Act of 1959. Section 222B had been inserted by the Fisheries (Amendment) Act 1983 and, as I have recorded in para. 1.5 above, subs. (3) of s. 222B was substituted by the Act of 1994. Section 222B, as so amended, applied in relation to each of the licences, or the renewals thereof, granted to the plaintiffs before August 2003. Section 222B prohibited the use of a sea-fishing boat for sea-fishing, whether within the exclusive fishery limits of the State or otherwise, save under and in accordance with the licence granted by the Minister under the section. The manner in which the power to grant a licence was to be exercised was stipulated in s.

222B, as amended. As I have already recorded, subs. (3) provided that the Minister was entitled to take account of economic benefits. The same paragraph of subs. (3) provided that he was entitled to take account of the "requirements of the common fisheries policy of the European Union". On the plaintiffs' case as pursued, no issue arises in relation to the various licences granted by the Minister to the plaintiffs. The allegation of negligence and breach of duty of care relates to representations and statements made by an official of the Department to the plaintiffs as licence holders as to their entitlement to fish for scallops having regard to the requirements of the common fisheries policy. The representations made misstated Community law, in communicating to the plaintiffs that they were entitled to fish for scallops within Area VIIIa, which they were not, having regard to the provisions of the 1995 Regulation.

8.4 Secondly, while I have already referred to the provisions of the operative part of the 1995 Regulation insofar as they are of relevance to the issues before the Court, additionally, it is to be noted that it is recited in the 1995 Regulations that "the flag Member States are responsible for the management of fishing effort". Accordingly, while the misrepresentations at issue related to the effect of Community law, the context in which they were made was that the Minister and the Department were responsible for the implementation of the relevant provisions of Community law in relation to the Irish sea-fishing fleet.

8.5 Chronologically the earliest of the authorities relied on by counsel for the defendants was *W. v. Ireland (No. 2).* In that case, one of the issues which Costello P. had to consider was whether or not the Extradition Acts 1965 to 1987 had imposed on the Attorney General a common law duty to the plaintiff to consider an extradition request and to process it speedily, and whether, in the event of the breach of such duty, the plaintiff would be entitled to damages for any injury she thereby suffered as a result of the delay. The factual circumstances were that there had been a request from the Attorney General of England, Wales and Northern Ireland in April 1993 for the extradition of Father Brendan Smyth who, before any direction had been given by the Attorney General, voluntarily returned to Northern Ireland in December 1993 to stand trial on the charges referred to in the extradition warrants, where he was convicted of charges of sexual abuse, including charges in which the plaintiff was the victim. As is succinctly recorded in the head note of the report, Costello P. held that the test to be applied in considering whether, in the exercise of his statutory function, the Attorney General owed a duty of care at common law to the plaintiff was:

> (a) whether there was a relationship of proximity or neighbourhood between the Attorney General and the plaintiff; and
>
> (b) if so, whether the relationship was such that, in the reasonable contemplation of the Attorney General, carelessness on his part would be likely to cause damage to the plaintiff; and
>
> (c) if these questions were answered in the affirmative, were there any considerations which ought to negative, reduce or limit the scope of the common law duty of care.

In setting out those tests, the decision of the Supreme Court in *Ward v. McMaster* [1988] I.R. 337 was applied. Costello P. further held that, where the Court is required to consider whether a duty of care at common law arises in the exercise of statutory duties, powers, or functions, the issue is largely determined by the scope and nature of the relevant statutory provisions, again applying the decision of the Supreme Court in *Ward v. McMaster*. In applying those tests, Costello P. held that the legislation with which he was concerned did not impose a statutory duty on the Attorney General towards the victims of crimes referred to in the warrants which he was required to consider. His function was a professional one, which the Oireachtas required him to perform as part of the extradition process, and in performing that function the circumstances of the victim were in no way relevant. As there was no relationship between the Attorney General and the plaintiff, the Acts in issue imposed no duty of care on the Attorney General in relation to the plaintiff. Costello P. also held that, even if a sufficient relationship of proximity existed and the kind of injury of which the plaintiff complained was reasonably foreseeable, it would be contrary to public policy to impose a duty of care on the Attorney General. In considering whether the Attorney General should be immune from actions for negligence, the Court was balancing the hardship to individuals which such immunity could produce against the disadvantage to the public interest if no such immunity existed.

8.5 In considering the circumstances in which one person may owe a duty of care to another person, so as to give rise to an action in tort if the duty of care is breached and loss ensues, in his judgment in the *Glencar Exploration* case, Keane C.J. analysed the authorities from the seminal decision of the House of Lords in *Donoghue v. Stevenson* [1932] A.C. 562 onwards. In doing so, he addressed the controversy in relation to the two stage approach laid down by the House of Lords in *Anns v. Merton London Borough* [1978] A.C. 728 and whether it had been endorsed by the Supreme Court in *Ward v. McMaster*. He did not allude to the decision in W. (No. 2) v. Ireland. In considering the approach the Court should adopt generally in relation to determining whether a duty of care, in the context of an action in negligence generally, existed, Keane C.J. made it clear that he did not approve of the approach adopted in *Anns v. Merton London Borough,* stating (at p. 139):

> "There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff ….. ."

8.6 In the *Glencar Exploration* case, the Court was concerned with a claim for negligence against a public authority in the performance of a statutory function. Keane C.J. made the following general observations about the position of a public authority (at p. 139):

> "The circumstances in which a duty of care can be said to arise in the case of such authorities when exercising statutory functions has also given rise to an enormous volume of decided cases in the common law world, to many of which we were referred. There are, of course, many instances in which a public authority will be liable in negligence because the duty of care imposed by the law on them is no different from that arising in private law generally. Obvious examples are the duties owed by local and other public authorities arising out of their occupation of premises or their role as employers. In such cases, the plaintiff does not have to call in aid the fact that the defendants may have been exercising a statutory function: their duty of care as occupiers, employers, etc., is no greater, but also no less, than that of their counterparts in the private sector."

Keane C. J. remarked that difficulties have arisen, however, in determining whether, and to what extent a statutory authority can be made amenable in damages for the negligent exercise of a power which they were entitled, but not obliged, to invoke. Having considered some of the authorities, he stated (at p. 140) that, for the purposes of the case before the Supreme Court, it was sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise to a duty of care at common law.

8.7 The facts in the *Glencar Exploration* case were that the applicant had held mining licences from the State in respect of lands in County Mayo since 1986, which had been renewed and were not due to expire until 1993, on foot of which it had carried out extensive prospecting and had achieved encouraging results. Mayo County Council, as planning authority, had ratified its draft development plan which incorporated a mining ban in respect of extensive tracts of land, including the land affected by the plaintiff's licences. In judicial review proceedings in the High Court in 1992, it was held that the inclusion of the mining ban in the development plan was ultra vires the powers of Mayo County Council and was null and void. The plaintiff then brought a claim for damages for, *inter alia*, negligence and breach of duty, seeking recovery of all monies they had expended prior to the imposition of the ban. Apropos of the case before him, Keane C.J. stated (at p. 141):

> "In the present case, the decision by the respondent that it would not grant planning permission for any mining development within the area covered by the ban was, on the assumption that it was *intra vires*, the exercise by it of a statutory power which would result in the withholding of a benefit from the applicants which would foreseeably result in their suffering financial loss. But, although such a loss was undoubtedly reasonably foreseeable, when one bears in mind that the powers in question were exercisable by the respondent for the benefit of the community as a whole and not for the benefit of a defined category of persons to which the applicant belonged (as in *Siney v. Corporation of Dublin* [1980] I.R. 400 and Ward v. McMaster …), I am satisfied that there was no relationship of 'proximity' between the applicants and the respondent which would render it just and reasonable to impose liability on the respondent."

Keane C.J. also stated that, in considering whether a relationship of "proximity" existed and whether it would be just and reasonable to impose a duty of care on Mayo County Council, it had to be borne in mind that the case was not one in which it could reasonably be said that the applicants, in incurring the expense of their prospecting activities, had been relying on the non-negligent exercise by the respondent of its statutory powers, in contrast to the situation in *Siney v. Corporation of Dublin* and *Ward v. McMaster*.

8.8 In addressing the issue of negligence in the *Glencar Exploration* case, Fennelly J. considered the question whether the making of an admittedly *ultra vires* decision could form the basis for a finding of negligence against the respondent and, in that context, he considered the decision of the Supreme Court in *Pine Valley Development Ltd. v. The Minister for Environment* [1987] I.R. 23, in which the Supreme Court held that the public authority, in that case a Minister adjudicating on a planning appeal who purported to grant outline planning permission, had not been guilty of negligence or negligent misrepresentation. Fennelly J. concluded that the respondent, Mayo County Council, did not owe a duty of care to the applicant, Glencar Exploration, either to take legal advice or to take further steps to follow it up (p. 160). However, before expressing that conclusion, Fennelly J. made the following observations (at p. 159):

> "As a matter of principle, it would not be wise to rule out the possibility that a case may in the future present itself where the relationship between a person liable to be affected by a ministerial or other public law decision is entitled to expect that care will be exercised in and about the decision to take legal advice and the manner of its taking. At the least, I think it would have to be shown that the statutory power in question was of the type which is designed to protect particular interests and that the plaintiff comes within its scope. In addition, it would probably be necessary for the claim to arise from the context of the type of individual transaction which was the subject-matter of *Ward v. McMaster* … or perhaps from the sort of reliance on the expertise of another which formed the background to *Hedley Byrne v. Heller and Panners* (sic) Ltd [1964] A.C. 465."

The reference to the *Hedley Byrne* case there, albeit in the context of consideration of the exercise of a statutory power, prompts two rhetorical questions. The first is whether the type of situation which would give rise to a claim for negligent misstatement on the basis of a private law duty of care should be treated differently from the norm in tort, if the person who made misrepresentation or misstatement is a person for whom a public authority is vicariously liable. The second is, if it should, what distinguishes liability for negligent misstatement from, say, employers' liability or occupiers' liability at common law referred to by Keane C.J. in the passage from his judgment referred to at para. 8.6 above. I will return to those questions later.

8.9 The decision in the *Glencar c*ase was re-visited, but only peripherally, in *Beatty v. Rent Tribunal*. In that case the issue was whether the Rent Tribunal, a statutory body established by the Housing (Private Rented Dwellings) Act 1982, could be liable in negligence to the applicant landlords in relation to the manner in which the review of the rent payable to them by the notice party tenant was conducted, which was a statutory function. The majority in the Supreme Court (Denham, Hardiman and Geoghegan JJ.) decided that it could not, but did so on a very narrow basis. Geoghegan J. stated (at p. 195):

> "There is a single and simple reason why I believe that the appeal should be allowed and the claim for damages dismissed. Even though the respondent is a tribunal which essentially determines rent disputes as between private parties, it is a statutory body exercising statutory duties in the public interest. In these circumstances, I am quite satisfied that, provided it is purporting to act *bona fide* within its jurisdiction, it enjoys an immunity from an action in ordinary negligence."

8.10 In citing the decision of the Supreme Court in *Beatty v. Rent Tribunal*, counsel for the defendants referred the Court to the following passage from the judgment of McCracken J. (at p. 219):

> "What can be gleaned from the various decisions is that there are circumstances in which, for reasons of public policy, it would not be just and reasonable to impose a duty of care. What is to be considered as just and reasonable is not merely what would be just and reasonable as between the parties, but also what would be just and reasonable in the public interest. Where a public body, such as the respondent, performs a function which is in the public interest, then in many cases and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without the fear or threat of action by individuals. The fact that it is performing a function which is in the public interest may outweigh any duty of care to private individuals. Whether it does or not, of course, is a matter for decision based on consideration of the position of any particular public body."

The requirement that it is just and reasonable to impose a duty of care is consistent with the approach adumbrated by Keane C.J. in the *Glencar Exploration* case in the passage from his judgment quoted at para. 8.5 above. However, it is important to note the *caveat* entered by Geoghegan J. at the end of his judgment (with which Denham and Hardiman JJ concurred) in *Beatty v. Rent Tribunal* that he was not expressing any views on the principles of Irish law "relating to recovery of damages for economic loss in a negligence action", stating that the law had not been finally determined in Ireland notwithstanding some relevant *obiter dicta* of Keane C.J. in the *Glencar Exploration* case.

8.11 The three authorities which have been considered above concerned the exercise of a statutory power by a public body. Counsel

for the defendants referred the Court to two decisions of the House of Lords on the issue whether the police owed a duty of care to victims of crime. I do not propose considering those cases, because I think they are too far removed from the factual basis of this case. Similarly, the most recent decision of an Irish Court cited on behalf of the defendants, the decision of the High Court (Hedigan J.) in *M (L) v. Commissioner of An Garda Síochána & Ors*. [2011] IEHC 14, which concerned the prosecution of a criminal offence, is also far removed from the facts of this case. In that case, the plaintiff, who was twelve years of age at the time, made a formal complaint of rape to the Gardaí in May 1990, but the accused was not returned for trial until October 1998, when he was convicted. In 2001 his conviction was quashed by the Court of Criminal Appeal and a retrial directed. However, the retrial never took place because the accused was successful in obtaining an order of prohibition in judicial review proceedings on the ground of prosecutorial delay. Hedigan J., in concluding that the Gardaí did not owe a duty of care to the victim, adopted the following passage from the judgment of Kearns P. in *B.L. v. Ireland* (the High Court, Unreported, 10th December, 2010).

> "I am satisfied to conclude that no duty of care arises in respect of bona fide actions and decisions carried out by An Garda Síochána in the course of a criminal investigation and/or prosecution. Any other view would have quite alarming consequences. One might begin by enquiring where the duty of care would begin or end. Would the victim of a crime, such as that perpetrated on the plaintiff in the present case, be the only person with an entitlement to sue, or would any such entitlement extend to immediate members of her family or perhaps to some person who might have been a witness in the trial or a witness to the event itself? By the same token, the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Síochána, or any other police force for that matter, to carry out its duties effectively and with expedition. It would be unacceptable that those charged with responsibility for the investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step in the criminal process. Any such approach would simply render the present system, struggling as it is with the multiple obligations imposed on the Garda Síochána in respect of those suspected of crime, to constraints of unimaginable proportions."

8.12 Counsel for the defendants cited a decision of the House of Lords the factual foundation of which, at least superficially, is closer to this case than the cases involving the investigation or prosecution of criminal offences by An Garda Síochána or the police force in the United Kingdom – *X (Minors) v. Bedfordshire* CC [1995] 3 All ER 353. In that case, the House of Lords was dealing with two separate sets of appeals in which the issue was whether the careless performance of a local authority of statutory duties relating to the education and welfare of children could found an action for negligence by children adversely affected by the local authority's actions. Having considered the speech of Lord Browne-Wilkinson, with whom the other Law Lords agreed, I do not find that it assists in the resolution of the issue which is before the Court in this case.

8.13 In support of their argument that the Minister did not owe a duty of care to the plaintiffs, counsel for the defendants submitted that the prime function of the Minister at the material time relevant to these proceedings was to manage the fisheries regime as established by the common fisheries policy of the European Union. In that context, it would be contrary to public policy to hold that the Minister or the Department owed a common law duty of care to ensure that all responses given by officials of the Department to inquiries accurately reflected the up to date position in Irish and European law. To so hold, it was submitted, would have wide implications across the public service, to the extent, in all likelihood, that a department would have to desist from answering queries for fear of being sued. The representations made and the assurances given in this case did not relate to a fact within the peculiar knowledge of the Department; the inquiries related to the correct interpretation of the applicable law. That is something on which the plaintiffs should have taken legal advice themselves. Counsel for the defendants made the point that, even with the benefit of legal advice, up to the hearing of the action, the plaintiffs did not appear to accept that, by virtue of the 1995 Regulation, they were not entitled to fish for scallops in Area VIIIa from 1995 onwards. I venture to suggest that the reason for that is that they may have been influenced by incorrect advice by an expert who did not testify.

8.14 In summary, the position of the defendants is that any statement or representation by an officer of the Department to the effect that the plaintiffs could legally fish for scallops in Area VIIIa did not occur in the context of a proximate relationship between the relevant official and the plaintiffs. In any event, insofar as the statements made related to the legal position as understood by the relevant official, the official was not offering legal advice to the plaintiffs. Finally, even if a proximate relationship did exist, it would be contrary to public policy to hold that a duty of care arose.

9. Negligence/breach of duty of care: conclusions on liability

9.1 While I have considered them in some detail, I do not think that the authorities relied on by counsel for the defendants, starting with *W. v. Ireland (No. 2)* are, in reality, relevant to the plaintiffs' claim in negligence. The plaintiffs' claim in negligence is not, and could not be, based on an assertion to be entitled to damages for negligent exercise by the Minister, as a statutory authority, of his powers or functions. While, at the relevant time, the Minister did have a statutory power to grant a sea-fishing boat licence, and did grant sea-fishing boat licences in relation to the "William Joseph" and the "Alicia" to the plaintiffs, there is no complaint that, in so doing, the Minister exercised his power improperly or negligently. The Minister, as an organ of the State, also had a function under Community law. He was responsible for the management of State's fishing effort in accordance with Community law. There is no claim, nor could there be, by the plaintiffs that the Minister improperly exercised that function or negligently mismanaged the fishing effort in a manner which infringed the plaintiffs' rights under Community law. The sole basis of the plaintiffs' claim in negligence is that an official of the Department gave assurances to the plaintiffs which misstated the correct legal position in relation to the entitlement of the owner of a vessel with the benefit of a sea-fishing boat licence issued in this jurisdiction to fish for scallops in Area VIIIa, that he did so negligently, and that in consequence the plaintiffs acted to their detriment and incurred economic loss. The issue, in my view, is whether the Minister or the State owed to the plaintiffs, and is vicariously liable for a breach of, a private law duty of care in accordance with the principles recognised in the *Hedley Byrne* case and as applied in this jurisdiction.

9.2 Obviously, the fact that the defendants are public authorities and that the factual context in which the representations were made by the official of the Department was a request by the plaintiffs for information against the background of the plaintiffs' application that the Minister exercise his statutory power to grant a sea-fishing boat licence points to some similarity with cases which were considered in the authorities relied on by the defendants and considered at para. 8 above. In Ward v. McMaster, which was followed in *W. v. Ireland (No. 2)*, the plaintiffs succeeded in their claim for damages against the second defendant, Louth County Council, on the basis that a private law duty of care arose out of the relation of the plaintiffs and Louth County Council, rather than on foot of the Housing Act 1966, in circumstances where the plaintiffs had applied to Louth County Council under that Act for a loan to enable them to purchase a house. The public duty which was imposed by regulations made under that Act on Louth County Council, of which it was in breach, was to ensure by a proper survey that the house was an adequate security for the loan which it made. The breach of duty to the plaintiffs which the Supreme Court found was that the examination of the house by a valuer appointed by Louth County Council, on which the plaintiffs, as was reasonably foreseeable, relied, was not adequate because of the lack of expertise on the part of the person who carried it out, who did not discover the defects in the house. It is observed in McMahon and Binchy on *Law of Torts* (3rd Ed., 2000) at para. 10.141 that it is interesting to note that *Ward v. McMaster* could well have been based on Hedley Byrne principles rather than proximity of relationship, having regard to the assumption of responsibility for

obtaining an effective survey which Louth County Council was found to have undertaken.

9.3 The rhetorical questions posed at paragraph 8.8 above must be confronted in addressing the issue to be determined, as formulated at the end of para. 9.1 above, on the narrow basis of whether the plaintiffs' claim, based on a duty owed to them and breach of that duty, comes within the principles recognised in the *Hedley Byrne* case. If a plaintiff can establish negligence against a public authority or the State, in reliance on the *Hedley Byrne* principles, which were first recognised in this jurisdiction almost a half a century ago, without having to call in aid the fact that the defendant public body may have been exercising a statutory power or function when the alleged civil wrong was perpetrated, in my view, the position of the plaintiff is no different to that of a plaintiff who invokes private law duties in relation to occupiers' liability or employers' liability against a public body defendant. I can see no reason why a public authority or the State should be afforded immunity in an action for negligent misstatement by a person for whom it is vicariously liable, in the type of situation where a defendant, which does not have public authority status, such as the bank in the *Hedley Byrne* case which gave a reference as to the creditworthiness of its customer to another bank, would be held liable in tort. To adopt the words of Keane C.J. quoted at para. 8.6 above, the duty of care of the public authority should be "no greater, but also no less" than its counterpart in the private sector. Accordingly, provided the plaintiffs can establish compliance with the criteria which in the tort of negligence entitles a plaintiff to damages for economic loss arising from negligent misstatement, the plaintiffs must succeed, notwithstanding that the defendants are public bodies.

9.4 Unfortunately, neither the plaintiffs nor the defendants, in their submissions, addressed the criteria which must be met to establish liability on the part of a defendant for negligent misstatement. It was held by the Supreme Court in *Wildgust v. Bank of Ireland* [2006] 1 I.R. 570 that the proximity test in respect of a negligent misstatement included persons in a limited and identifiable class, when the maker of the statement could reasonably expect, in the context of a particular inquiry, that reliance would be placed thereon by such persons to act or not to act in a particular manner, potentially to their detriment, in relation to the transaction. Given the context in which the plaintiffs sought information from the officials of the Department in relation to their entitlement to fish for scallops in Area VIIIa, in my view, the proximity test is met and a duty of care was owed to the plaintiffs, as persons who were applicants for, and the holders of, sea-fishing boat licences to enable them to fish for scallops, and who were relying on special knowledge and expertise of the officials of the Department in connection with the complexities of Community law on fishing. The duty of care required the officials, when furnishing the information sought by the plaintiffs to them, to conform to a standard which would not expose the plaintiffs to unreasonable risks. The official who gave the admitted assurances to the plaintiffs prior to August 2003, Mr. O'Driscoll, did not testify. However, in my view, that does not hamper the Court in coming to a conclusion as to what gave rise to that official giving wrong information to the plaintiffs. The official who was in contact with Direction des Peches Maritimes et de L'Aquaculture on 19th August, 2003, Mr. Andrew Kinneen, Sea Fisheries Control Manager, did testify. His explanation for his misunderstanding of the legal position was, as I have outlined earlier, that the file copy of the English translation of the 1995 Regulation, which was available to him, which was in the normal format of the Official Journal, differed from the French language version. In my view, it is reasonable to infer that that was also the source of confusion which led to Mr. O'Driscoll giving the plaintiffs the wrong information.

9.5 That leads to the question whether, by reason of Mr. O'Driscoll's reliance on the file copy of the 1995 Regulation which did not state the legal position correctly, the defendants were vicariously in breach of their duty of care to the plaintiffs. While it would be unfair to ascribe negligence to either of the two officials who communicated with the plaintiffs, I have come to the conclusion that some official of the Department for whom the defendants are vicariously liable must have been negligent in failing to ensure that the version of the translation of the 1995 Regulation which was available to be consulted by officials who had to deal with queries in relation to the fishing effort available to Ireland, in the context of applications for sea-fishing boat licences, correctly reflected the regulation as implemented. Therefore, I am satisfied that the plaintiffs have established an entitlement to damages to compensate them for the economic loss which they incurred as a result of acting on the incorrect information given by officials of the Department as regards the entitlement of a sea-fishing boat licensed in this jurisdiction to fish for scallops in Area VIIIa.

10. Assessment of damages for negligence/breach of duty

10.1 The plaintiffs have claimed that they have suffered loss in the following respects:

> (a) They incurred expenditure and loss as a result of the arrest of the two vessels, the confiscation of the catch, and the criminal and civil proceedings in France. It has been agreed between the parties that the gross outlay incurred by the plaintiffs was €40,000.
>
> (b) They contend that they have suffered loss of earnings on account of being unable to fish in Area VIIIa after 19th August, 2003. The loss of earnings per boat has been agreed at €1,200 per diem.
>
> (c) It is claimed that the plaintiffs incurred a capital loss in relation to the "Alicia", in that the plaintiffs sold the "Alicia" for €350,000 prior to the announcement of the de-commissioning scheme, but would have obtained what the purchaser got under the de-commissioning scheme, €595,707, had they been in a position to retain ownership of the "Alicia" until the de-commissioning scheme came into effect. Therefore, the capital loss claimed is €245,707.

10.2 It could not be disputed that the expenditure and loss incurred by the plaintiffs in consequence of the arrest of the vessels in France in August 2003 is a direct consequence of the misstatement by an official of the Department of the entitlement of the plaintiffs to fish for scallops in Area VIIIa. It was as a result of having received the admitted assurances that they fished in Area VIIIa in contravention of the 1995 Regulation. An issue was raised on behalf of the defendants that the expenditure and loss in the agreed sum of €40,000 represented the gross amount for which the plaintiffs were liable in the conduct of their business and that that figure should be netted down to take account of whatever tax benefit would ensue from receipt of the gross amount by them. It is not clear to me on the evidence what the build up of the agreed sum of €40,000 is, or to what extent the components of it would be deductible or not deductible (for example, fines) for tax purposes. In the circumstances, I propose to award the agreed sum of €40,000 as damages.

10.3 In relation to the claim for loss of earnings on account of the two vessels not having been able to fish in Area VIIIa, in my view, counsel for the defendants was correct in submitting that there is a causation issue in relation to it. Apart from their inability to fish at all in the immediate aftermath of the arrest of the vessels, the fact that the plaintiffs were not in a position to make a profit from using the two vessels to fish in Area VIIIa for scallops after 19th August, 2003 was a consequence of the effect of the 1995 Regulation, which prohibited them from fishing in Area VIIIa. It was not a consequence of the misstatement by an official of the Department of the effect of the 1995 Regulation. Therefore, in my view, the plaintiffs are not entitled to recover for loss of earnings by reason of not being able to fish in Area VIIIa after August 2003. However, it must be recognised that the arrest of the two vessels prevented them from fishing at all in any area for a number of days and they are entitled to damages to compensate them for that loss. I propose awarding €9,600 in respect of the loss in question , which represents loss of earnings from both vessels for four days

at €1,200 per vessel per day. I do so acutely conscious of the fact that the agreed figure of €1,200 per vessel *per diem* represents the average daily differential between possible returns from fishing in Area VIIIa and fishing in other areas. However, I consider that the approach adopted represents a fair assessment of the loss of earnings to the plaintiffs in consequence of the events of 18th August, 2003 and subsequently, having regard to the evidence.

10.4 Aside from the causation issue, on the basis of the evidence of the accountant called by the defendants, Mr. Sean Bagnall, even if they had been in a position to fish for scallops in Area VIIIa for the remainder of the 2003 season, it is probable that they would have earned no more than the amount which Mr. Bagnall assessed which was under €25,000, based on 11 days fishing in late August and September 2003. The reality is that, after 2003, as subsequent events illustrated, the probability of the plaintiffs making a profit from scallop fishing became remote. A new regime for fishing for, *inter alia*, scallops in the Western waters was adopted in Council Regulation (EC) No. 1954/2003 and Council Regulation (EC) No. 1415/2004, which ultimately led to the de-commissioning scheme in this jurisdiction. In my view, the plaintiffs' claim for loss of earnings is not sustainable except to the extent allowed, which is probably generous.

10.5 Similarly, in my view, the plaintiffs' claim for capital loss in relation to the "Alicia" is not sustainable. In fact, it is clear on the evidence that the plaintiffs made a profit on the sale of the "Alicia". I am not satisfied that it has been established that there was a causal link between the misstatement of the law contained in the assurances given by the official of the Department and what the plaintiffs considered was the necessity for the sale of the "Alicia" prior to the de-commissioning scheme coming into force. It is quite clear on the evidence that there was a range of problems which affected the Irish scallop fishing fleet, which ultimately gave rise to the decommissioning scheme established in 2005 at the urging of the fishermen, such as the depletion of scallop beds near the Irish coast. Moreover, it is impossible to find that the loss which the plaintiffs claim by reason of having sold the "Alicia" before the decommissioning scheme came into force was reasonably foreseeable when the official of the Department gave the assurances to the plaintiffs.

11. Order

11.1 There will be judgment in favour of the plaintiffs against the defendants in the sum of €49,600.