

BETWEEN

PAUL BARLOW, WOODSTOWN BAY

SHELLFISH LIMITED, MICHAEL CROWLEY,

RIVERBANK MUSSELS LIMITED, GERARD KELLY, FRESCO

SEAFOODS LIMITED, TARDRUM FISHERIES LIMITED,

ALEX MCCARTHY AND HALCOME MERCHANTS (IRELAND)

LIMITED TRADING AS ALEX MCCARTHY SHELLFISH

PLAINTIFFS

AND

THE MINISTER FOR COMMUNICATIONS, MARINE

AND NATURAL RESOURCES, THE REGISTRAR GENERAL

OF FISHING BOATS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 31st day of May, 2019

Background

1. On 22 March 2019 I delivered judgment in this action wherein I dismissed the plaintiffs' action against the defendants and this judgment should be read in conjunction with that earlier judgment. At the conclusion of the judgment, I stated: -

"75. As is clear from the foregoing, I have rejected the various claims made by the plaintiffs so the Court must dismiss the action. In reaching this conclusion, however, it would be wrong for the Court not to recognise the energy, application and dedication which the plaintiffs have brought to their respective businesses. Though, in my view, the law prevents any remedy for the plaintiffs, the fact remains that for many years the State permitted vessels registered in Northern Ireland unlawfully to fish for mussel seed to the detriment of the mussel industry. thus it cannot be said that the plaintiffs were well served by the State."

2. The remaining issue before the Court is costs.

Submissions by the defendants

3. The defendants have, correctly, referred to the fact that the Court has found against the plaintiffs on all five issues on foot of which the plaintiffs made their claim. They submit, therefore, that the Court should apply the standard rule in relation to costs, namely that "costs follow the event", as per O. 99, r. 1(3) of the Rules of the Superior Courts. The defendants further submit that there are no circumstances in this case to justify the Court departing from this rule.

Submissions of the plaintiffs

4. The plaintiffs submit to the Court that it ought to either award the plaintiffs their costs, full or partial, or make no order as to costs. In the alternative, the plaintiffs seek that the Court only award the defendants a portion of their costs. The grounds for this application are:

- (i) The proceedings are proceedings of public importance;
- (ii) The defendants' conduct of the proceedings added to the costs;
- (iii) A costs order against the plaintiffs would cause hardship.

Consideration of issues

5. As to grounds (ii) and (iii) above, I cannot see that either would be a basis upon which to make a costs order as submitted by the plaintiffs. These proceedings commenced in 2006 and were subject to multiple amendments and alterations over the years. In particular, these proceedings gave rise to the "*Barlow II proceedings*" which resulted in the decision of the Supreme Court on 27 September 2016. Though a period of some twelve years has elapsed between the initiation of the proceedings and the trial of the action, I am not going to, at this stage, apportion blame.

6. On the issue of hardship, though I do accept that an order for costs against the plaintiffs could result in hardship, there is insufficient evidence of such as to displace the standard rule of costs following the event.

7. The Court was referred to a number of authorities which set out the principles that should be applied in circumstances where, though unsuccessful, parties are awarded their costs (see *Collins v. the Minister for Finance* [2014] IEHC 79 and *Dunne v Minister for the Environment, Heritage and Local Government & Ors* [2008] 2 IR 775).

8. There are a category of cases involving constitutional challenges which raise issues of special and general public importance which are not brought for personal advantage. The instant case does not fall into this category in that it concerned a claim for commercial loss and, in reaching its decision, the Court applied well-established principles of law. There are, however, other categories of cases in which special circumstances can arise. I refer, in particular, to *Kerins v. McGuinness & Ors* [2017] IEHC 217 wherein an action was

taken arising from the plaintiff's appearance before the Public Accounts Committee ("PAC"). The applicant's claim was dismissed but the High Court (Divisional Court, Kelly P, Noonan & Kennedy JJ.) was very critical of the procedures followed by the PAC. The applicant was awarded two-thirds of her taxed costs, the Divisional Court having being satisfied, firstly, that the applicant raised issues of special and general public importance and of some novelty and

"28. The court is satisfied that the institution of these proceedings was a proportionate reaction on the part of the applicant to the situation arising from what took place before the PAC."

9. In the instant case, the Supreme Court found that the defendants had permitted unlawful fishing for mussel seed in the territorial waters of the State for many years. In those years, the State and its agencies correctly identified the economic potential of mussel fishing but simultaneously permitted mussel seed to be unlawfully fished by vessels registered in Northern Ireland. The plaintiffs gave evidence as to aggressive fishing practices that were adopted by these Northern Irish registered vessels and the various protests in which they engaged in an attempt to bring about an end to this situation.

10. This illegal fishing, permitted by the State, did have adverse commercial consequences for the plaintiffs. Notwithstanding this, I have held that such losses are not recoverable in law. These proceedings were, in my view, a "proportionate reaction" to the unlawful situation created by the State. Unlike *Kerins*, however, the within action did not involve constitutional issues or issues of special and general public importance and further were taken for commercial gain.

11. In light of the foregoing, therefore, I will award the unsuccessful plaintiffs 25% of their taxed costs (or agreed costs) against the defendants and 100% of the costs of the transcripts of the hearing before this Court. As for the reserved costs, I will make no order for costs concerning application(s) brought by the plaintiffs to amend the statement of claim, first issued on 10 July 2006. As for the costs of the motion for discovery, issued in 2010 and reserved by the High Court (Fenney J.) on 23 July 2011, I will award the plaintiffs 25% of those costs when taxed, if not agreed.