Neutral Citation Number: [2010] IEHC 104

THE HIGH COURT

2008 6982 P

BETWEEN

ATLANTIC MARINE SUPPLIES LIMITED

AND

SEAN ROGERS

PLAINTIFFS

AND

MINISTER FOR TRANSPORT, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered on the 26th March, 2010

1. Introduction

1.1 The second named plaintiff ("Mr. Rogers") is the principal behind the first named plaintiff company ("Atlantic"). Mr. Rogers and Atlantic have been in the business of providing safety equipment for fishing boats for some considerable period of time. It is fully accepted by all involved in these proceedings that Mr. Rogers and Atlantic carry out their duties in that regard to the highest standards.

1.2 At the core of the complaint made by Atlantic in these proceedings is a contention that the first named defendant ("the Minister") has failed to enforce legally binding measures in respect of the equipment which fishing boats are required to carry for safety purposes (specifically life rafts). As a consequence it is said that a great number of fishing boats have life rafts which are not appropriate. As a consequence, in turn, it is argued that significant financial loss has been caused to Atlantic by reason of the alleged lack of enforcement to which I have referred.

1.3 It should also be noted that Atlantic is, by virtue of the services which it provides, itself the subject of a requirement to be certified to provide such services. It should immediately be noted that there has never been any suggestion that Atlantic has failed to carry out its role in full compliance with its obligations. It is, however, said that Atlantic is constrained, by virtue of the consequences of that certification, to provide and service particular types of equipment only. In circumstances where it is said that the alleged lack of enforcement, to which I have referred, permits many fishing boats to operate with a lower standard of equipment, Atlantic claims that it is deprived of the opportunity to seek to exploit the market in the supply and service of the higher standard equipment which, on Atlantic's case, many fishing boats should carry.

1.4 In any event, it is also important, at this early stage, to note that there are a series of separate legal bases on which Atlantic claims to be entitled to damages arising out of the alleged failure of regulation on the part of the Minister. Each of the relevant headings brings with it its own difficult legal questions. However, for present purposes, I should simply note that the four bases on which Atlantic claims to be entitled to damages are as follows:-

A. Breach of duty;

B. Breach of statutory duty;

C. Breach of constitutional rights; and

D. Legitimate expectation.

1.5 As there was no significant dispute as to primary facts, only a limited dispute as to inferences that might properly be drawn from those facts with, perhaps, a more significant dispute as to the proper characterisation of the situation which might be said to flow from that undisputed evidence, it is perhaps most convenient to start by setting out those facts which are not in dispute and the allegations that underlie Atlantic's case.

2. The Undisputed Facts and the Allegations

2.1 Mr. Rogers started fishing out of Killybegs in County Donegal in 1971. In 1982 he decided to start his own business in relation to life saving equipment. It would appear that, at the relevant time, there was no service station on the West Coast dealing with the sale and service of marine life saving equipment. In that context, Mr. Rogers spoke to the then Chief Surveyor of the Minister together with a number of manufacturers of life rafts.

2.2 It is clear from the evidence that the suppliers of relevant equipment maintain a rigorous certification process whereby those operating service stations in this field are required, in order to obtain an initial certification, to attend for significant training, and, as the price of maintaining certification, have further regular training requirements imposed on them, and are subjected to regular inspections. The evidence makes clear that Mr. Rogers and Atlantic have, at all material times, been in good standing with the suppliers for whom they hold certification.

2.3 In order to establish the relevant service station, Atlantic initially obtained a site from the then Department of the Marine and built an appropriate structure designed to allow for the servicing of the type of life rafts then in use.

2.4 Subsequently, larger life rafts (as required for larger vessels) came on stream which required an expanded premises capable of

servicing those larger life rafts. On that basis, Atlantic bought different lands on which a larger service station was built.

2.5 In the early days it would appear that the relevant form of certification from the relevant department (the department has gone through a variety of names over the years) was in the form of a letter from the Chief Surveyor. However, from in or around 1990, it would appear that a formal certificate was issued. Atlantic has, at all relevant times, held the appropriate certification.

2.6 It, therefore, follows that Atlantic has at all times satisfied both the suppliers of its equipment and the relevant department that it is up to standard for the provision of the important services with which it is charged.

2.7 It will be necessary in due course to refer in some more detail to the relevant regulatory regimes applicable to the use by fishing boats of life rafts. However, for the purposes of this narrative it should be noted that there is a clear and unambiguous statutory obligation on all fishing vessels in excess of 12 metres to carry a specified type of life raft and other safety equipment (in fact the regime differs somewhat depending on whether the boat concerned is over or under 15 metres but nothing turns on that fact for the purposes of this case). The position in respect of fishing vessels of less than 12 metres is less clear. The statutory regime applying to larger vessels, to which I have referred, does not apply to vessels under 12 metres. However, such vessels (along with all vessels which are involved in fishing) require a licence. For reasons which it will be necessary to explore in more detail, there is a statutory pre-condition to the award of such a sea-fishing boat licence which is to the effect that the vessel is appropriately certified as complying with a Code of Practice published by the Minister. The interpretation of that Code of Practice is itself a matter of some debate to which it will be necessary to turn in due course. However, on the case made by Atlantic and Mr. Rogers, it is suggested that the true construction of the Code of Practice requires that any fishing vessel (including those under 12 metres) which carries a life raft is required to ensure that the relevant life raft conforms with certain international specifications.

2.8 It is the assertion by Atlantic to the effect that there is widespread non-observance of that requirement which is at the heart of these proceedings. It will be necessary to refer in more detail to SOLAS standards for life rafts which is the recognised maritime international safety standard. On Atlantic's case all fishing vessels are required, if they carry a life raft at all, to carry a SOLAS standard life raft or a life raft which meets analogous standards. It is clear that Atlantic became concerned about what it felt was a failure on the part of the Minister to enforce what Atlantic believed to be the appropriate statutory regime. Atlantic came to the view that many fishing boats were carrying life rafts which did not meet the relevant standard. There was significant correspondence and meetings between Atlantic and representatives of the relevant department (including meetings with senior officials and the then Minister for Marine and Natural Resources, Frank Fahey), in the early years of the 2000s.

2.9 Atlantic maintains that there are a very significant number indeed of fishing vessels which carry life rafts which do not meet the necessary standard. It is said that, in all or, at a minimum, a significant number of such cases, the failure to carry an approved life raft is in breach of the code of conduct to which I have referred. It is further said that this situation is, at least in significant part, due to a lack of adequate enforcement on the part of the Minister.

2.10 It is also alleged that one of the consequences of that state of affairs is that the number of relevant higher standard life rafts in the market place is significantly reduced with a consequent and significant loss of profit to Atlantic by reason of not having the opportunity to make the relevant sales and, it would appear, more significantly, not having the opportunity to earn further revenues by servicing the life rafts in question on a regular basis (it being typically a term of compliance with relevant standards that life rafts are regularly serviced in accordance with appropriate recommendations). It should be noted that any question of the quantification of damages to which Atlantic might be entitled has, by agreement between the parties and the court, been left over for further consideration so that this judgment is concerned solely with the question of the entitlement, if any, at the level of principle, of Atlantic to damages.

2.11 In the course of evidence it was established that, during a number of spot checks carried out by Joseph O'Sullivan (an engineer called to give evidence on behalf of Atlantic), a significant majority of fishing vessels of less than 12 metres which were found in the ports visited by the engineer concerned on a random basis, had life rafts which did not appear to be of the standard which Atlantic asserts are required by the Code of Practice. The expert evidence tendered on behalf of Atlantic established that a significant difference exists between life rafts primarily designed for use on sporting yachts on the one hand and life rafts designed for fishing vessels and other commercial boats on the other hand. Amongst the distinctions which can properly be drawn between the two is the fact that servicing of such life rafts is required on a more regular basis in the context of fishing and commercial ships. The reason for this appears to stem from the fact that fishing and commercial boats are in almost continuous use, while pleasure or yachting vessels are less regularly at sea. Mr. O'Sullivan's evidence established that a very high number indeed of smaller Irish fishing vessels appear to carry life rafts designed for the yachting sector. The inferences to be drawn from that evidence and, perhaps more importantly, the way in which any such inferences should be characterised, was the subject of some dispute between the parties. However, the primary evidence given on behalf of Atlantic was not disputed. I should in passing note that while there was very limited evidence from which it might, on one view, be suggested that there were breaches of the undoubted formal statutory regime which exists in respect of vessels of 12 metres or more, it did not seem to me that any such evidence could give rise to an inference of lack of enforcement in respect of such boats.

2.12 In the context of the fact that there is a difference in the regulatory regime in respect of fishing vessels dependent on the size of those vessels, it is relevant to note that it was established that the number of vessels in relevant categories currently on the register of licensed fishing vessels is as follows:-

Vessels of less than 12 metres 1,777 84.821%

Vessels of less than 15 metres 1,854 88.496%

Vessels between 15 and 24 metres 132 6.301%

Vessels of 24 metres and above 109 5.203%

It will be seen that by far the preponderance of vessels in the Irish fishing fleet are those of less than 12 metres. It follows that, as a matter of fact, it is the regulatory regime in respect of such vessels which has the greatest potential, in practice, to influence the commercial business of safety equipment suppliers and servicers such as Atlantic.

2.13 Against that brief factual background it is appropriate to turn next to the regulatory regime.

3. The Regulatory Regime

3.1 As indicated earlier there was, in the end, no real dispute between counsel as to the applicable statutory regime in respect of

fishing vessels of greater than 12 metres length. It was accepted that the regime technically differed as and between vessels of, on the one hand, more than 15 metres in length and, on the other hand, vessels between 12 and 15 metres in length. However, the net and combined effect of various measures including the Merchant Shipping (Life Saving Appliances) Rules 1967 and the Merchant Shipping (Life Saving Appliances) Rules 1993, is accepted as being that such that all such vessels are required to carry a SOLAS standard life raft including a so called SOLAS "B" pack. SOLAS stands for the International Convention for the Safety of Life at Sea. That Convention was adopted on the 1st November, 1974, by the International Conference of Safety of Life at Sea which was convened by the International Maritime Organisation. SOLAS entered into force on the 25th May, 1980, but has been amended subsequently by means of protocols. It would appear that many of the measures adopted in this jurisdiction are designed to ensure that Ireland complies with its obligations under that Convention, to which Ireland is a party. Of particular relevance to the issues which I have to decide is that SOLAS contains, amongst many other things, provisions in respect of life rafts. SOLAS life rafts are an approved type of life raft for six persons or more which comply with the relevant requirements. The life raft comes packed in a glass reinforced plastic container and should contain an emergency pack which is either an "A" pack or, in respect of smaller vessels, a "B" pack. A "B" pack is essentially a scaled down version of an "A" pack. In either case, SOLAS provides for a significant list of items which are required to be in the pack concerned providing for such matters as a hand pump, paddles, a sea anchor, a first-aid kit, various devices designed to attract attention and thermal protective aids.

3.2 It should also be noted that the certification of Atlantic as a relevant service provider is in accordance with the provisions of SOLAS. There was no dispute between the parties but that the proper interpretation of the use of SOLAS related terms such as, for example, a SOLAS "B" pack, in Irish regulations and in Marine Notices incorporated into the Code of Practice to which I will refer in due course, should be interpreted by reference to SOLAS itself. It was not suggested (nor could it have been) that SOLAS is directly applicable in this jurisdiction. The way in which Ireland has chosen to give effect to its obligations under SOLAS is by means of the various regulatory measures in the maritime field, some of which are referred to in the course of this judgment. It follows, of course, that an Irish Court in construing those Irish measures should attempt to do so in a manner that ensures that Ireland complies with its obligations under SOLAS. Thus, it is appropriate to refer to SOLAS for the purposes of determining the meaning of SOLAS related terminology. No greater application of SOLAS as a matter of domestic law was urged on behalf of Atlantic. I did not understand counsel for the Minister to contest but that SOLAS references in the relevant Irish regulatory documentation must be taken to mean references to relevant items in the way in which those items are defined or explained in SOLAS.

3.3 However, the real issue of contention between the parties, so far as the statutory regime is concerned, centres on the Code of Practice promulgated by the Minister. The Code of Practice was introduced by the Minister in 2004. I will refer, in due course, to certain material terms of the Code. However, it is important to note that, when first introduced, the Code had no statutory basis. It is clear that, in parts, the Code specifies requirements which arise under specific statutory regimes and, thus, draws attention to what are undoubtedly statutory obligations arising from relevant statutory instruments. In 2006, s. 97 of the Sea Fisheries and Maritime Jurisdiction Act 2006, inserted a new s. 4 into the Fisheries (Amendment) Act 2003 ("the 2003 Act"). Section 4(2) of the 2003 Act specifies that a sea-fishing boat is not to be used for sea-fishing, nor are persons on board such boats to fish for sea fish, except in accordance with a sea-fishing boat licence. A breach of that requirement constitutes an offence.

3.4 Subsections (a) and (b) of s. 4(9) of the 2003 Act apply to larger boats. It is s. 4(9)(c) which applies to smaller boats and is in the following terms:-

> "Where a code of practice published by the Minister for Transport relating to the safety and sea-worthiness of sea-fishing boats of a class to which paragraph (b) does not apply requires a survey to be carried out of a sea-fishing boat of such class for the purpose of establishing whether or not such boat complies with the requirements specified in the code of practice, the licensing authority shall not grant or renew a sea-fishing boat licence in respect of the boat unless a declaration of compliance with the code of practice has been provided to the licensing authority."

3.5 It is clear, therefore, that there is a statutory pre-condition to the grant of a sea-fishing boat licence to the effect that a declaration of compliance with the Code of Practice must be supplied.

3.6 As pointed out earlier, the Code of Practice itself was, in fact, in existence since 2004. However, the Code received a statutory status, in the form of s. 4(9)(c) of the 2003 Act in 2006. From that time on there was a statutory prohibition on the giving of a sea-fishing boat licence, save where a Certificate of Compliance with the Code was made available.

3.7 There was a significant debate between the parties as to how it was appropriate to characterise s. 4(9)(c) of the 2003 Act. It seems to me clear that the section does not impose, as such, an obligation on anyone to comply with the Code of Conduct. It should, of course, be noted, as pointed out, that the Code of Conduct itself often draws attention to the fact that certain legal requirements lie on the owners and operators of sea-fishing boats under a variety of legislative provisions. Obviously those legislative provisions have direct statutory effect on and bind parties governed by them. However, to the extent that the Code of Conduct goes further and specifies either mandatory requirements or recommendations, which are not of themselves obligations contained within enforceable statutory instruments, then the Code does not, of itself, give rise to any statutory obligation. A person who is in breach of the Code does not commit an offence. Neither is such a person guilty of a civil wrong, save to the extent that the relevant obligation recorded in the Code is otherwise of statutory effect from a source outside of the Code.

3.8 On the other hand, it seems equally clear to me that the Code has, from 2006, a statutory status. There is a clear requirement that an applicant for a sea-fishing boat licence is required to produce a Certificate of Compliance with the Code. That requirement is a direct statutory requirement. It would be unlawful for the licensing authority to grant a sea-fishing boat licence in circumstances where a Certificate of Compliance with the Code was not available for s. 4(9)(c) of the 2003 Act expressly prohibits the grant of a licence in such circumstances. The Certificate of Compliance is a Certificate of Compliance with the Code for the time being. It follows that the Code has a quasi statutory status in that it is a document by reference to which statutory rights and obligations arise.

3.9 The entitlement of an applicant to obtain a sea-fishing boat licence for which the relevant applicant might otherwise qualify, may be lost because the relevant fishing boat does not comply with the Code of Practice and thus, cannot be the subject of a valid Certificate of Compliance. It follows that compliance or otherwise with the Code of Practice can legitimately lead to the grant or refusal of a licence and, thus, the entitlement of the person concerned to engage in sea-fishing.

3.10 It seems to me that codes of practice, in general terms, can have a range of standing so far as statute is concerned. At one extreme is a code of practice which is issued merely for the purposes of guidance to persons in a particular industry or sector. As such it may provide a useful benchmark by which to consider appropriate standards but would have no added legal status. Even in an action for negligence, such a code of practice would have no formal status although reference could, undoubtedly, be made to such a code as supporting a contention that a particular practice (or the lack of it) was in accordance with appropriate standards of care.

3.11 At the other extreme might lie a code of practice which was expressly authorised by statute, where failure to comply with the provisions of the code concerned amounted to an offence or was otherwise rendered unlawful. In such circumstances breach of the code*, per se*, would be unlawful.

3.12 It seems to me that the Code of Practice in this case lies somewhere between those two extremes. It is not enforceable *per se*. It goes, however, beyond mere guidance for it has an indirect statutory effect such as can preclude persons from obtaining a sea-fishing boat licence if they fail to comply with its terms. It will be necessary to turn to how such status should properly be characterised in due course.

3.13 However, before going on to consider the legal issues which arise concerning the potential liability of the Minister and the other defendants in these proceedings, it is next appropriate to turn to the provisions of the Code insofar as they are relevant to the case made by Atlantic.

4. The Code of Practice

4.1 Any review of the Code of Practice must note that the Code, in its terms, distinguishes between provisions which contain mandatory language such as "shall", on the one hand, and language which connotes a recommendation by the use of words such as "may", on the other hand. The Code is, therefore, clear and states in terms that some of its provisions are mandatory while some of its provisions amount to recommendations alone. So far as mandatory recommendations are concerned, some of same involve a repetition of matters which are independently governed by express statutory provisions and, thus, would be mandatory even if they were not referred to in the Code. Others may well amount to matters which, so far as the Code itself is concerned, are mandatory even though they may not be directly enforceable as being in breach of an express statutory provision. These latter matters are mandatory in the sense that they must be complied with in order for a boat to be properly said to comply with the Code of Practice and thus be validly the subject of a Certificate of Compliance and thus, in turn, suitable for the grant of sea-fishing boat licence.

4.2 The relevant provisions of the Code of Practice concerning inflatable life rafts are to be found in s. 7.4 which provides as follows:-

> "7.4 Inflatable Life rafts
>
> Where carried, inflatable life rafts must be of a capacity to accommodate all persons on board. The life raft must be stowed in a GRP container and be fitted in a position to enable it to float free if the vessel sinks, and be fitted with an approved HRU. If this is not practicable, for example, in an open vessel, it is recommended that the life raft should be stowed in an accessible place; it may be contained within a valise. While it may not be capable of floating free it must be readily accessible to throw overboard. If it goes down with the vessel it will not operate. Life rafts must be equipped with "SOLAS 'B' Pack".
>
> 7.4.1 The requirements for the carriage of life rafts are as follows:-
>
> i) All vessels with 4 or more persons on board must carry one or more life rafts, regardless of their area of operation.
>
> ii) All vessels operating beyond 5 miles from a safe haven must carry a life raft.
>
> iii) All vessels operating less than 5 miles from a safe haven with fewer than 4 persons on board are recommended to carry a life raft.
>
> 7.4.2 Vessels of Loa greater than 12 metres and vessels carrying more than 4 persons must carry an approved MED/SOLAS life raft.
>
> Vessels of Loa 12 metres or less or carrying 4 persons or less may carry non-SOLAS/non-MED life rafts. Guidance on the carriage of non-SOLAS type inflatable life rafts is given in Marine Notice No. 2 of 2003."

4.3 A number of comments need to made about the text which I have cited. First, it seems clear that s. 7.4 does not require any life raft to be carried in at least some circumstances. The section commences with the words "where carried". The text also makes clear in s. 7.4.1(iii) that vessels operating less than five miles from a safe haven with fewer than four persons on board are <u>recommended</u> to carry a life raft.

4.4 Furthermore, it is clear from s. 7.4.2 that vessels of greater than 12 metres must carry an approved MED/SOLAS life raft while vessels of 12 metres of less or carrying four persons or less may carry non-SOLAS/non-MED life rafts but that guidance on the carriage of such non-SOLAS type life rafts is to be found in what is described as Maritime Notice No. 2 of 2003.

4.5 It would appear that Maritime Notices are issued from time to time for the purposes of bringing important information to the attention of those with an involvement in maritime affairs. Some such notices involve bringing regulatory or quasi regulatory matters to the attention of interested parties. One such notice was Marine Notice No. 2 of 2003. The relevant portion of the text of that notice reads as follows:-

> "The Department of Communications, Marine and Natural Resources wishes to remind skippers and those working onboard registered fishing vessels that inflatable life rafts should be approved and comply with the Marine Equipment Directive and SOLAS Convention. However, the Department recognises that for small fishing vessels, less than 40 feet, that such vessels are not required by statute to carry inflatable life rafts. The Department also recognises that the smallest approved MED/SOLAS inflatable life rafts are for six persons, this may discourage the voluntary carriage of inflatable life rafts on such small fishing vessels. In this regard the Department wishes to encourage the voluntary carriage of inflatable life rafts on small fishing vessels and it has accepted the following non-Solas/non-MED inflatable life rafts for such vessels.
>
> • DSB 4 Person Inflatable Life raft, SOLAS type, B Pack
>
> • RFD 4 Person Inflatable Life raft, SOLAS type, B Pack
>
> • Viking 4 Person Inflatable Life raft, SOLAS type, B Pack

- Zodiac 4 Person Inflatable Life raft, SOLAS type, B Pack"

4.6 It will be recalled that the minimum size of a SOLAS approved life raft is one suitable for six persons. It was pointed out in the relevant Marine Notice that, for smaller boats *i.e.* those less than 12 metres (or 40 feet), and which are not, as such, required by statute to carry inflatable life rafts, it was acknowledged that smaller life rafts would be appropriate. It will, however, be noted that in each of the four approved cases, a SOLAS "B" pack is specified.

4.7 In addition, it is necessary to make reference to Marine Notice No. 8 of 2005 which is stated to supersede Marine Notice No. 2 of 2003. The relevant provisions of that Notice read as follows:-

> "The Department recognises that small fishing vessels of length overall less than 40 feet are not required by statute to carry inflatable life rafts and that the smallest approved MED/SOLAS inflatable life rafts are for six persons. To facilitate compliance with the Code of Practice and to encourage the voluntary carriage of inflatable life rafts the Department has accepted the following non-SOLAS / non-MED inflatable life rafts. Only these life rafts listed will be accepted on fishing vessels, which are either:
>
> (a) not required to carry a SOLAS / MED approved life raft or
>
> (b) recommended to carry a life raft.
>
> The life raft is to be fitted with a Hydrostatic Release Unit and stowed, if practicable, in such a position that it can be easily and quickly launched on either side of the vessel. The life raft is to be serviced at an approved life raft servicing station at intervals not exceeding 12 months.
>
> Accepted non-SOLAS / non-MED inflatable life rafts
>
> - DSB 4 Person Inflatable Life raft with SOLAS B Pack
> - RFD Surviva 4 Person Inflatable Life raft with SOLAS B Pack
> - RFD SEASAVA PRO ISO 9650 4 Person Inflatable Life raft with SOLAS B Pack
> - Viking DK 4 Person Inflatable Life raft with SOLAS B Pack
> - Zodiac 4 Person Inflatable Life raft with SOLAS B Pack
> - EUROVINIL ISO/DIS 9650 4 Person Inflatable Life raft with SOLAS B Pack"

4.8 It seems to me to follow that the Code of Practice must now be construed as making reference to Marine Notice No. 8 of 2005, given that that Notice is specified as replacing Marine Notice No. 2 of 2003. It will be noted that, as with the 2003 Notice, each of the so called non-SOLAS/non-MED life rafts approved are specified as requiring a SOLAS "B" pack. It is also important to note that it is made clear that only such life rafts are to be accepted on fishing vessels which are either "not required to carry a SOLAS/MED approved life raft" or are "recommended to carry a life raft".

4.9 The net affect of each of those measures seems to me to create a situation where it is possible to take two views concerning the proper intent of the Code of Practice incorporating the relevant Marine Notices.

4.10 First, so far as the Code of Practice is concerned, any boat operating with four or more persons or five miles beyond a safe haven is required to carry a life raft. In the case of vessels of more than 12 metres the requirement is that the life raft be an approved MED/SOLAS life raft. In the case of vessels less than 12 metres, the life raft must, by virtue of the Marine Notices, be of one of the types authorised by those Notices. The fact that the Code of Practice makes reference to the 2003 Notice (and by necessary implication any amendment of it), incorporates at least the relevant portions of those Notices in to the Code of Practice. Each of the life rafts mentioned in either of the Notices requires a SOLAS "B" pack. It follows that all vessels (even those of 12 metres or less), which operate outside the four persons/five miles parameter, are required to carry a life raft which is one of those specified in the Marine Notices (currently Marine Notice No. 8 of 2005). The status of vessels which are less than 12 metres and which operate within the five mile and four person limit is less clear. The Code of Practice speaks of a recommendation while Marine Notice No. 8 speaks of only those life rafts specified in that Notice as being permitted. The Code itself, as opposed to the Marine Notices, is not clear on whether there is or is not an obligation on a boat of less than 12 metres operating within the four person/five mile limits to carry an approved life raft.

4.11 That analysis seems to me to stem from the natural wording of the Code of Practice. It does, perhaps on one view, produce a somewhat paradoxical result. There can be little doubt that a vessel of 12 metres of less operating within the five miles/four person limit is not required, under the Code of Practice, to carry any life raft. It also appears that such a vessel, operating within those limits, if it chooses to carry a life raft must, if it is to comply with the Marine Notices and, perhaps, the Code of Practice, carry a life raft of the type specified in the relevant Marine Notices. The question arises as to the sense of such a provision. On one view it might be said that carrying some life raft is at least better than carrying no life raft. On the other hand, it might be argued that it is better that vessels not put to sea with a form of life raft which is considered to be underspecified thus, perhaps, leading those on board into a false sense of security.

4.12 I fully understand that, as is apparent from the terms of the Marine Notices, the intention of the Minister was at all times to seek to encourage an upgrading in the quality of lifesaving equipment on fishing vessels. It is clear that by far the preponderant number of fishing vessels in the Irish fleet are of less than 12 metres. Those vessels are not, therefore, caught by the mandatory statutory requirements to which I have referred. A decision was clearly taken not to extend those mandatory statutory requirements to such smaller vessels. However, it is apparent from the Marine Notices that the intention was to seek to encourage the use of life rafts in all cases. In such circumstances, it may well be that there was a case for some degree of what might be called "constructive fudge" concerning the precise parameters of the obligations in relation to smaller fishing vessels in respect of life rafts. If the Code of Practice had continued to operate with its original status as being simply a recommendation with no statutory consequence at all, then there might well have been a justification for retaining some degree of constructive fudge as a means of encouraging compliance in circumstances where the mandatory imposition of compliance was not regarded as beneficial. However, it seems to me that that situation changed when the Oireachtas chose to confer a statutory status on the Code of Practice. Given that the Code of Practice creates a mandatory obligation on those seeking licences, it seems to me that it needs to be clear in its terms. It is, to say the least,

unfortunate that the provisions of the Code of Practice concerning the obligations of those with smaller vessels operating within the five mile/four person limit lack clarity. If nothing else came out of this case, then it seems to me to be of vital importance that the Minister takes an early opportunity to make absolutely clear in unambiguous terms as to the requirements of the Code of Practice. If it is the Minister's intention that the Code of Practice requires (as Marine Notice No. 8 seems to suggest) that it is preferred that a vessel have no life raft rather than have a non-complying life raft, then that should be said in clear terms. If that is not the intention, then equally the Code of Practice needs to make clear what precisely are its requirements concerning life rafts in respect of the smaller vessels within the five miles/four persons limitation.

4.13 In the absence of any such amendment to the Code of Practice to date, then I must do the best I can with the existing text. For the reasons which I have sought to analyse, I am satisfied that, on a proper construction of the current Code of Practice by reference to Marine Notice No. 2 of 2003, which is expressly incorporated into it, and Marine Notice No. 8 of 2005, which is expressed to be an amendment of Marine Notice No. 2 of 2003, the Code of Practice is currently not complied with by any vessel carrying an unapproved life raft. It will be recalled that the evidence established that a significant number of fishing vessels observed by Mr. O'Sullivan, the engineer, had life rafts which were designed for the yachting sector. It is clear on the evidence that none of the relevant life rafts so described by Mr. O'Sullivan were of the type specified in either Marine Notice No. 2 of 2003 or Marine Notice No. 8 of 2005. It follows that there are a significant number of Irish fishing vessels which carry unapproved life rafts contrary to the Code of Practice as I have interpreted it.

4.14 Against that background it seems next appropriate to turn to the legal issues which arise in relation to the potential liability argued as applying to the Minister under the various headings which I have previously identified.

5. The Legal Bases for Atlantic's Claim

5.1 As indicated earlier, four legal bases were, in the alternative, put forward for Atlantic's claim. In fairness it should be noted that counsel for Atlantic accepted, in the course of argument, that the contention that Atlantic's claim could be based on breach of constitutional rights could not be said to put Atlantic's claim any further than might arise under the other headings. While Atlantic does enjoy property rights and Mr. Rogers does enjoy a right to earn a living, any claim for breach of those rights could only arise in circumstances where it could be said that a relevant defendant was guilty of some wrongdoing which interfered with the right in question. The right to damages for breach of a constitutional entitlement is, at the level of principle, clear (see for example *Meskell v. CIE* [1971] I.R. 121). However, it is also clear that, where an entitlement to pursue damages in respect of the same set of circumstances arises under a traditional head of claim, such as damages for tort or damages for breach of contract, the courts will only permit the invocation of a claim for damages for breach of constitutional rights in circumstances where the existing law (in the instances cited, the Law of Tort or the Law of Contract) can be said to fail to adequately protect any constitutional rights involved.

5.2 In those circumstances, it was accepted by counsel for Atlantic that, in the event that I was not persuaded that the Law of Tort (including where appropriate claims for breach of statutory duties), or the Law of Legitimate Expectation, provided Atlantic with a remedy, then the Constitution would not avail Atlantic.

5.3 In substance, therefore, two areas arose for consideration. The first was as to whether Atlantic might be able, at least in principle, to pursue a claim for damages for negligence or breach of statutory duty. For reasons which I will explore these areas raise issues which are not necessarily the same, but nonetheless there is a close connection between both and I propose dealing with them together.

5.4 A second and separate area involves Atlantic's contention that it is entitled to damages for breach of legitimate expectation. I propose dealing with that question in due course, but will turn first to the question of breach of duty including breach of statutory duty.

6. A Breach of Duty or Statutory Duty?

6.1 The starting point under this heading has to be note that, while there may be a significant overlap between the area of breach of duty and breach of statutory duty in a context such as that with which I am concerned in these proceedings, it was not argued on behalf of either party (correctly in my view) that the two potential areas of claim are identical. The House of Lords in *Stovin v. Wise* [1996] A.C. 923, came to the view that, ordinarily, a common law duty of care would not arise in circumstances where any relevant statutory provision could not be said to have imposed a statutory duty on the person concerned. In the course of his speech in *Stovin*, Lord Hoffman said, at pp. 952/953 that if a statutory duty:-

> "[D]oes not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable lost caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit of service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care."

6.2 It is, however, important to note the Lord Hoffman used the words "ordinarily" to imply that there may be circumstances where that ordinary position will not apply. In that context, it is important to note that in *Glencar Exploration Plc v. Mayo County Council (No.2)* [2002] I I.R. 84, Fennelly J. noted the following 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* [1988] I.R. 337 or perhaps from the sort of reliance on the expertise of another which formed the background to *Hedley Byrne v. Heller and Panners Ltd* [1964] A.C. 465. …They were not engaged in any direct legal relationship with the respondent. Their prospecting licences had been granted by the State. They had not made any application for planning permission, not that that would necessarily alter the position. In short, I do not believe that the respondent owed a duty of care to the applicants either to take legal advice or to take further steps to follow it up."

6.3 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".

6.4 Having regard to those general principles, it seems to me that the following three questions arise:-

> A. Is a statutory duty placed on the Minister in respect of the licensing of sea-fishing boats with particular reference to the Code of Practice?
>
> B. If so, is the scheme of the relevant legislation such as it can be said that it was intended that entities or persons such as Atlantic and/or Mr. Rogers could maintain a claim in damages?
>
> C. If not, is there nonetheless a sufficient proximity or relationship between the parties such as to meet the test identified in *Glencar Exploration*.

6.5 In approaching the first of those questions it is important to have regard to what the statutory provision itself requires. For the reasons which I have analysed earlier in the course of this judgment, at para. 3.5, it is clear that the only statutory requirement present is in the form of a prohibition on the grant of a relevant sea-fishing boat licence unless the appropriate certification of compliance with the Code of Practice is in place. It might be said that there is a statutory duty not to grant a licence in circumstances where the necessary certification was not in place. However, it is not suggested on the facts of this case that the licences have been granted in the absence of relevant certification. Rather it is said that, on the basis of the interpretation of the Code of Practice urged on behalf of Atlantic, sea-fishing boats are licensed (presumably on the basis of an appropriate certification) in circumstances where those boats do not, in fact, comply with the Code of Practice and further that such boats operate other than in accordance with the Code.

6.6 It seems to me to follow that what, in truth, Atlantic urges is that there is a statutory duty on the Minister to ensure a high level of compliance with the Code of Practice through the licensing system. However, it seems to me that to impose such a duty, as a matter of statute, on the Minister, would require that the statute concerned contained wording which imposed a clear statutory obligation on the Minister to ensure enforcement of the licensing regime, not merely to the extent of the express statutory obligation not to permit the licensing of boats which did not have a Certificate of Compliance, but also to the extent of ensuring that such boats did actually and continue to comply with the obligations contained in the Code of Practice during the lifetime of any relevant licence. I am prepared to accept, for the purposes of argument, that there may be circumstances in which a failure of regulation can give rise to a breach of statutory duty. However, for such to be the case, it seems to me that the relevant legislation would need to provide in express or necessarily implied terms for a specific duty of a particular type on the relevant regulator, from which the court might conclude that the proper construction of the relevant statute was such as imposed a statutory duty on the regulator concerned to act in a particular way or to refrain from acting in a particular way.

6.7 I am not satisfied that the statutory regime in this case can be so construed. The only statutory obligation is such as precludes the licensing of a boat which does not have a Certificate of Compliance. The regime does not require that the licensing authority be satisfied, either at the time of licensing or thereafter, that the boat continues to be compliant. It may very well (indeed one could go so far as to say it must) be the case that it would be prudent for the Minister to take reasonable steps to ensure that the Certificate of Compliance system is not abused, either by fishing vessels being certified as being compliant with the Code of Practice when they are not or, by the operators of fishing vessels who have the benefit of a legitimate and correct Certificate of Compliance altering the boat or the mode of its operation in a way which brings the vessel concerned outside the Code of Practice. However, to read the Act as imposing a statutory obligation on the Minister to act in such a way would seem to me to be to read too much into the Act. It might well be said that a failure on the Minister to ensure that the Certificate of Compliance system is not abused could lead to legitimate criticism of the Minister. It is, however, in my view a "bridge too far" to say that any such failure amounts, if it be established, to a breach of statutory duty. For those reasons I am not satisfied that, properly construed, the relevant legislation imposes an obligation on the Minister, as a matter of statutory duty, to ensure continuing compliance with the Code of Practice.

6.8 As pointed out earlier, the Code of Practice has not direct statutory effect. Rather, it has statutory relevance in that it is a document by reference to which a statute operates. However, that aspect of the statute only operates as part of the licensing system and then only to the extent that a Certificate of Compliance with the Code of Practice needs to be produced. In those circumstances, there is just too much of a gap between the Code of Practice and the statute to suggest that there is an implied statutory obligation on the Minister to ensure compliance with the Code of Practice rather than the undoubted obligation to ensure that licences are not granted to those who do not have a Certificate of Compliance with the Code of Practice.

6.9 If I be wrong in that view, then it would follow that it would next be necessary to consider whether the policy of the statute is such that it can be said, considering the Act as a whole, that it was intended by the legislature that an aggrieved plaintiff would be entitled to damages for breach of statutory duty.

6.10 The first element of that question is to identify who the relevant aggrieved plaintiff might be. It is clear that the purpose of the relevant provision in the statute is to procure safety at sea by requiring that only licensed fishing vessels can fish and by stipulating that, in order to be so licensed, such boats are certified as complying with the standards specified in the Code of Practice. The persons who are in the direct contemplation as beneficiaries of the legislation are, therefore, fishermen.

6.11 There may be legislation whose primary focus is to regulate a particular industry, business or sector to ensure, for example, fair conditions as and between operators within the relevant area. It does not seem to me that the 2003 Act (as amended) is such legislation. The legislation is not designed to regulate the businesses of those who operate fishing boats as and between themselves for the purposes of ensuring fair competition between such businesses. Still less is the legislation designed for the purposes of conferring benefits on or otherwise regulating the business operations of those, such as Atlantic, who might provide services to fishing boats. Even if, therefore, the relevant legislation in this case could be said to impose a statutory duty of any type on the Minister, it does not seem to me that, taking the legislation as a whole, it could be said that the Act intended that a plaintiff, such as Atlantic, operating in the field of supplying services to fishing boats, should be entitled to obtain damages for any breach of that statutory duty.

6.12 A more difficult question might arise in circumstances where the relevant claimant was a fisherman who sought to suggest that he had suffered as a result of a failure by the Minister to comply with any statutory obligations on the Minister under the Act. A more detailed analysis of the Act as a whole might be necessary in such circumstances to determine whether it could be said that such a fisherman claimant might be a person whom the legislator intended would be entitled to damages. However, no such question arises on the facts of this case.

6.13 Even if, therefore, I had been satisfied that the 2003 Act (as amended) imposed a statutory duty on the Minister of the type alleged to have been breached in these proceedings, I would not have been of the view that it would have been open to Atlantic to maintain a claim for breach of such statutory duty, for it does not seem to me that the legislation, taken as a whole, can be said to

imply an intention on the part of the legislature that commercial operators in a position such as Atlantic would be entitled to damages for any such breach of duty.

6.14 Under this heading it is finally necessary to turn to the question of whether there might be circumstances in which an entity such as Atlantic might be able to claim damages for a common law breach of duty, notwithstanding the fact that it will only be in rare cases that such a common law duty will be found where the relevant statute does not give rise to a legitimate claim for damages for breach of statutory duty.

6.15 In that regard it is important to analyse the criteria identified by Fennelly J. in *Glencar Exploration*. First, Fennelly J. noted that 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". It seems to me that, for reasons similar to those which I have already analysed in relation to the claim for breach of statutory duty, it can not be said that a service provider to the fishing industry, such as Atlantic, comes within the scope of those whom the statute is designed to protect. It is clear that the statute is designed to enhance safety for the benefit of fishermen, rather than to protect the commercial interests of service providers to the fishing industry.

6.16 Fennelly J. further noted that it would probably be necessary, in order that it should succeed, that any relevant claim would arise from an individual transaction or special circumstances which would bring the potential claimant inside the proximity test. The basis put forward on behalf of Atlantic for suggesting that this limb of the test was met is the fact that Atlantic is itself certified to provide safety related services to the fishing fleet. There is no doubt but that that is so. It is also true that, by being so certified, Atlantic subjects itself to significant limitations on the way in which it can carry out its business. However, that fact, of itself, does not, it seems to me, create a sufficient degree of proximity between Atlantic and the Minister such as would give rise to a duty of care on the part of the Minister to operate an entirely separate licensing regime (*i.e.* that which operates in relation to sea-fishing boats by reference to the Code of Practice) which was designed for an entirely separate purpose, in such a manner so as to have regard to a duty of care to Atlantic.

6.17 In those circumstances, I am not satisfied that it can be said that the Minister owed any duty of care to a company, such as Atlantic, which operates as a fishing boat service provider in relation to the operation of the licensing system in relation to the operation of fishing boats themselves.

6.18 For all of those reasons I am not satisfied that there is any legitimate legal basis for the claim made on behalf of Atlantic in respect of either breach of duty or breach of statutory duty. It follows that it is next necessary to turn to the claim made in respect of legitimate expectation.

7. Legitimate Expectation

7.1 Atlantic claims that is has a legitimate expectation, which can give rise to a claim in damages, which is to the effect that the Minister will, in substance, rigorously enforce the licensing regime so that fishing vessels will not be permitted to carry life rafts which do not conform with the Code of Practice and the Marine Notices referred to in it.

7.2 Whether a legitimate expectation of that type can arise was the subject of dispute at the hearing before me. I should, firstly, note that complaint was made that a claim under this heading was not properly before the court having regard to the pleadings. However, counsel for the Minister, in my view quite correctly, did not vigorously pursue that point given that the factual basis for the claim under this heading was the same as the basis for the claim under the various other headings pursued, and the question of a legitimate expectation arising had been explored in the written submissions. I propose, therefore, dealing with this aspect of the claim.

7.3 In *Lett & Company Ltd v. Wexford Borough Corporation & Ors* [2007] IEHC 195, I had occasion to analyse the criteria, on the then current state of the jurisprudence, for the determination of the existence or otherwise of a legitimate expectation. I summarised my views in para. 4.7 of the judgment in that case in the following terms:-

> "4.7 In the light of those authorities it seems to me that, on the current state of the development of the doctrine of legitimate expectation, it is reasonable to state that there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from *Glencar Exploration* to which I have referred. The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley*, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall*, legitimate changes in executive policy to take place. I therefore propose to approach the contentions of the parties as to the existence of a legitimate expectation in this case by first considering the positive elements of the test."

7.4 As is also clear from my judgment in *Lett*, an issue arose in that case as to whether, at the level of principle, it is open to a party to claim damages *per se* for breach of a legitimate expectation. There is no doubt that the possibility of such a claim was noted by McCracken J. in *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403. However, for the reasons set out at para. 4.15 of my judgment in *Lett*, I came to the view that that issue did not, truly, arise in the case under consideration. The expectation which I found arose on the facts of *Lett* was, in itself, to the effect that the relevant plaintiff company would be entitled to compensation. The plaintiff in *Lett* did not, therefore, strictly speaking obtain damages for a breach of legitimate expectation but rather obtained compensation calculated by the court on the basis that it had a legitimate expectation to that compensation.

7.5 In addition to the question of damages, the issue also arises on the facts of this case as to whether a legitimate expectation can give rise to substantive rights rather than purely procedural entitlements. That debate was noted by Keane J. in the course of his judgment in *Glencar Exploration* but, for the reasons which he addressed, it was found unnecessary to resolve same. In this regard a useful starting point is, in fact, the comprehensive review of the authorities both in this jurisdiction and in other common law jurisdictions to be found in the 2nd Edition of Delaney on "*Judicial Review of Administrative Action*" between pp. 175 and 201. To that discussion might be added the fact that Lett itself is, at least in one sense, a case in which a substantive benefit (*i.e*. compensation) was provided. No claim was pursued which sought to establish an entitlement to a particular procedure being followed. Likewise, given that, as I pointed out in *Lett,* the genesis of the doctrine of legitimate expectation in Ireland is frequently traced back to *Webb v. Ireland* [1988] I.R. 353, it could also be said that that genesis derives from a case in which the relevant plaintiffs obtained a substantive benefit (again compensation) rather than a procedural benefit.

7.6 I have come to the view that there is no reason in principle why the doctrine of legitimate expectation cannot be invoked to obtain a substantive rather than a purely procedural benefit. However, it does seem to me that the negative factors which I identified

in *Lett* as being likely to prevent a legitimate expectation arising are much more likely to apply, in practice, to cases where a substantive rather than a procedural benefit is asserted. There are likely to be very few cases where a legitimate expectation concerning compliance with a particular procedure could infringe the principles frequently invoked against recognising a legitimate expectation on the facts of a particular case. It is highly improbable that imposing an agreed procedure could, for example, lead to a party obtaining a right which they did not have, such as led the Supreme Court to reject the claim in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160. Likewise, the preservation of an entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned, is most unlikely to be interfered with by requiring the relevant decision maker to comply with expectations legitimately arising in respect of the procedures to be followed. Other examples could be given.

7.7 The limitations on the doctrine of legitimate expectation which I summarised in the paragraph from *Lett* referred to above (and there may well, in time, come to be other such limitations) are much more likely to have application in cases where a substantive rather than a procedural expectation is sought to be relied on. It follows that those limitations will necessarily impact to a significant extent in cases where substantive expectations are sought to be advanced. It does not, however, in my view follow that there can be no circumstances where a substantive legitimate expectation can be enforced by the courts.

7.8 It will, therefore, fall to the court to determine whether the undoubted limitations which arise on the doctrine of legitimate expectation are such, in relation to an individual case and having regard to the policy considerations applicable to a case of that type, as outweigh the undoubted public interest in ensuring that decisions are properly made within the statutory or administrative framework applicable to them. To take but a simple example, one might consider two separate licensing regimes. In one case there might, for good policy reasons, be a limited number of licences capable of being offered (for example because of some physical limitation such as the availability of wavelengths). In the other, any person who met appropriate criteria might be entitled to a licence. In the first case the grant of a licence to any one individual would necessarily involve a potential adverse consequence for other contenders. In the second case, no such consequences would arise. It would be difficult to envisage circumstances where it would be possible to afford a plaintiff or applicant a substantive legitimate expectation which would have the effect of giving rise to an impermissible interference with the entitlements of third parties. A substantive legitimate expectation would be most unlikely, therefore, if at all, to be capable of being found in respect of a licensing regime of the first aforementioned type of case. However, a greater degree of latitude would undoubtedly arise in the second type. No third party rights or interests would be involved. Clearly a substantive legitimate expectation could not arise such as would cause someone who was not properly entitled (by reference to relevant criteria) to the licence concerned, for reasons such as those identified in *Wiley*. The purpose of the regime would, presumably, be to ensure that only those who met certain criteria could hold a licence. If a person clearly did not meet the necessary criteria, then it is difficult to envisage circumstances when a court could, in effect, force the grant of a licence to such person irrespective of what expectations might have been created in the mind of the claimant by the actions of those involved in the licensing process. In a case where, however, it was not established that the relevant claimant failed to meet the statutory criteria concerned, then the policy reasons for declining to enforce a legitimate expectation might be significantly less weighty.

7.9 I have, therefore, come to the view that it is possible for a legitimate expectation to exist in relation to a substantive rather than a purely procedural matter. However, significant care needs to be exercised in the case of a claim to a legitimate expectation for a substantive benefit, for the public policy requirements which need to be given significant weight are much more likely to be present and are much more likely to weigh heavily in the case of a substantive rather than a procedural legitimate expectation.

7.10 In addition, I see no reason in principle to depart from the view expressed by McCracken J. in *Abrahamson* to the effect that a claim in damages can, in an appropriate case, lie in respect of a breach of legitimate expectation. Indeed, there may well be cases where an award of damages, rather than a substantive interference with the statutory or administrative system under review, may be more appropriate. It is possible that there may be circumstances (particularly where a claimant has significantly changed his position as a result of a legitimate expectation) where it would be unjust not to provide the claimant concerned with some remedy. There may well, in those circumstances, be cases where it would not be appropriate to afford a substantive remedy as such in the sense of a remedy which interfered with the statutory or administrative process under review. In at least some of those cases it may well be that damages would be the appropriate remedy.

7.11 Against that general background it is next necessary to turn to the facts of this case.

7.12 The first issue that needs to addressed, applying the first test identified by Fennelly J. in *Glencar Exploration*, is to determine whether the relevant public authority has 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.

7.13 In assessing whether that aspect of the test is met, a number of facts need to be identified. First, Atlantic is itself certified in accordance with the SOLAS regime to provide safety equipment services to those who have to comply, under the sea-fishing boat licensing regime, with the Code of Practice and is, on the evidence, required to go to a significant effort and expense in maintaining that certification. Second, the Minister has promulgated the Code of Practice. Third, the Oireachtas has determined both that all sea-fishing boats need a sea-fishing boat licence and that a Certificate of Compliance with the Code of Practice is a mandatory requirement for the grant of any such licence. It seems to me that it can properly be said, therefore, that the Minister has "adopted a position" which amounts, at a minimum, to an implied representation, that only sea-fishing boats which comply with the Code of Practice, at least in general terms, will be allowed to operate under licence. I use the phrase "at least in general terms" because it would, of course, be important to note that the Minister could only refuse or terminate a licence where it was proportionate so to do in the light of any failure of compliance established. It must be noted that the primary purpose of the licensing regime is to ensure compliance rather than to punish non-compliance. The appropriate response to a minor non-compliance is to require that it be remedied in early course rather than to prevent the sea-fishing boat concerned operating thus depriving those involved in the relevant sea-fishing boat of their living. However, subject to that caveat, I am satisfied that it is appropriate to characterise the actions of the Minister as being such as amount to an implied representation that the Code of Practice will be applied albeit through the licensing regime.

7.14 The second requirement identified in *Glencar Exploration* is that the relevant representation must be addressed or conveyed either directly or indirectly to an identifiable group of persons, affected actually or potentially in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority, or that the person or group has acted on the faith of the representation. There can be little doubt that the primary group of persons to whom such representation might be held to have been made are fishermen whose safety on board sea-fishing boats is the focus of the legislation as a whole and the Code of Practice in particular. However, given that Atlantic is also certified by the same Minister to provide services which are intimately connected with that aspect of the Code of Practice with which I am concerned, I am also satisfied that such certified service providers, such as Atlantic, come within the scope of an identifiable group of persons affected by the representation and who are likely to place reliance on it in determining whether it is appropriate to incur the significant outlay of time, money and effort necessary to obtain and maintain their own licensed status.

7.15 As I pointed out in *Lett*, one of the principal reasons for the evolution of the doctrine of legitimate expectation stems from the fact that there may be cases where it is unjust to allow a public authority to stand on its technical legal rights. It follows that there may be circumstances where the parties who are within the group to whom an express duty of statutory care may be more confined than the group to whom a legitimate expectation obligation may be owed. It seems to me that this is such a case. Even if a statutory duty arose in this case, it could not extend beyond fishermen. However, a somewhat wider group, including closely connected entities such as Atlantic, can be said to be within the class of those to whom a representation may, by implication, be said to have been made, by virtue of the other elements which I have identified at para. 7.14.

7.16 The third test requires that the relevant representation must be such as to create a reasonable expectation in the group of persons concerned to the effect that the relevant public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. I am also satisfied that this test is met on the facts of this case. Atlantic has incurred significant expenditure and put in significant effort in maintaining its own certified position. In deciding whether it wishes to do so (and to continue to do so), Atlantic is, in my view, entitled to place reliance on the implied representation of the Minister that the Code of Practice will be reasonably enforced. It would, in my view, in those circumstances be unjust to permit the Minister to resile from the representation as to reasonable enforcement such as exists in this case. Atlantic is not, however, entitled to expect that the Code will remain unchanged. The risk that relevant regulatory regimes may change over time is one of the risks that any party contemplating an involvement in a connected business venture will have to have regard to.

7.17 In those circumstances it seems to me that the three positive criteria identified by Fennelly J. in *Glencar Exploration* are met on the facts of this case. It is next necessary to turn to the question of whether there are any reasons, deriving from the negative criteria which I identified in *Lett & Company* or otherwise, which might prevent an enforceable legitimate expectation arising.

7.18 First, there does not seem to me to be any factor of the type identified in *Wiley*. To require the Minister to reasonably enforce, through the licensing system, the Code of Practice, as for the time being promulgated, could not lead to any person getting something that they were not entitled to or to any person not getting something which they were entitled to. Second, it does not seem to me that the imposition of an obligation on the Minister to reasonably enforce the Code of Practice through the licensing system in any way fetters the Minister's discretion. If, on due consideration, the Minister does not think that the Code of Practice as currently promulgated is appropriate, then there is nothing to prevent the Minister from changing it. All that is being asked of the Minister is that he be consistent in enforcing, in a reasonable way, his current version of the Code of Practice. Such a requirement does not, in any way, fetter the Minister's discretion either under statute or otherwise. If the Minister chooses to change the Code of Practice, then any subsequent certification for the purposes of the 2003 Act will be in accordance with the Code as so amended. The Minister retains a full entitlement to alter the Code of Practice in any way which he may consider appropriate.

7.19 There does not, therefore, seem to be any overriding policy objection to recognising a legitimate expectation to the effect that the Minister will reasonably enforce the Code of Practice to the extent that that may be possible under the licensing regime. That licensing regime confers a licensing power. The regime operates by express reference to certification of compliance with the Code of Practice. Those factors create a legitimate expectation that the code will be enforced in that way. Atlantic is within the contemplation of those who might be affected by a lack of enforcement, by reason of the fact that it too is certified to provide some of the services expressly mentioned in the code, being the safety requirements in relation to life rafts and the like, to which I have referred. I am, therefore, satisfied that, at least in general terms, a legitimate expectation arises that the Minister will enforce or cause to be enforced the code of conduct through the licensing system to a reasonable extent.

7.20 However, it does not seem to me that any such expectation could extend to an obligation on the Minister to ensure that the code is enforced in all circumstances. The Minister clearly retains a discretion as to how to deal with any failure of compliance with the Code of Practice (save that it is not permitted to grant a license, by reason of the clear wording of the 2003 Act, as amended, in cases where a Certificate of Compliance is not made available). Likewise, no regulator or enforcement agency will ever achieve complete compliance with a relevant regulatory regime. It does not seem to me that any person could entertain a legitimate expectation that complete compliance would arise. Any representation which the Minister might impliedly be said to have made (so as to meet the first test identified by Fennelly J. in *Glencar Exploration*), could only extend to reasonable enforcement having regard to the resources reasonably available for enforcement and having regard to the need to act proportionately so far as the rights of individual fishing vessel operators are concerned, when cases of non-compliance are identified. Against the background of that finding, two further questions arise. The first is as to whether it can be said, on the evidence, that the Minister has failed to meet the legitimate expectation of enforcement identified. The second is as to whether damages lie in that eventuality. I turn to the first of those questions.

8. Has There Been a Failure on the Part of the Minister?

8.1 While it is true to say that concerns of the type now advanced were expressed on behalf of Atlantic some time ago, it seems clear on the evidence that almost all of those concerns were expressed in the early years of the last decade. In that context it is important to identify the time when any legitimate expectation, on which Atlantic might rely, first arose. Up to the passage of the 2006 Act, there was no statutory basis for the Code of Practice at all. While the code was there, the Minister had no means of enforcing it. It does not seem to me, therefore, that any legitimate expectation of enforcement could be said to have arisen prior to the Code of Practice achieving what I have described as a quasi statutory status on the enactment of the 2006 Act. It was only when that Act came into force that the Minister had a means, through the licensing system, of procuring its enforcement of the obligatory passages of the Code of Practice. A legitimate expectation as to enforcement necessarily implies the means of enforcement.

8.2 In those circumstances, it seems to me that many of the complaints made by Atlantic occurred at a time when no legitimate expectation existed. It does not appear that, other than in the context of this case through the giving of oral evidence in the witness box, the attention of the Minister was drawn to what seems to be a significant scale of non-compliance with the life raft provisions of the Code of Practice (on the basis of the manner in which I have interpreted those provisions earlier in the course of this judgment). It does appear, on the facts as they emerged in the course of evidence, that there are a significant number of fishing vessels which, by inference, operate outside of the 5 mile/4 person parameter, but which carry life rafts of a type which are not designated in Marine Notice 8 of 2005. For the reasons which I have already sought to analysis, I am satisfied that such boats do not comply with the Code of Practice in those circumstances.

8.3 I should also have regard to the fact there was evidence that some level of enforcement has been engaged in by Minister such that licenses have been suspended for failure to comply with some of the standards specified in the Code of Practice. In the circumstances, it does not seem to me to have been established that there has, to date, been a sufficient failure of enforcement on the part of the Minister so as to give rise to a breach of the legitimate expectation which I have found arises in favour of Atlantic on the facts of this case. I am satisfied on the evidence that there is a material level of non compliance. The evidence of Mr. O'Sullivan bears no other inference. However, there is no evidence as to those breaches identified by Mr. O'Sullivan, or the like, having been

brought to the attention of the Minister. There was evidence that there had been spot checks in the past which were designed to ensure that Certificates of Compliance with the Code of Conduct accurately reflected actual compliance. IT would, in my view, require evidence directed towards the failure of the Minister to take reasonable steps as to enforcement (having regard especially to the fact that the Minister could, legitimately, take some comfort from the presence of Certificates of Compliance) before a finding of breach of legitimate expectation could be made. However, it seems to me that evidence now having been placed before the Minister, in the form of the evidence given in this action, there is now a pressing obligation on the Minister to do one of two things.

8.4 The Minister must first review the terms of the Code of Practice and consider whether it should continue in its present form. If the Minister wishes, in the light of the issues which were addressed in the course of these proceedings, to amend the Code of Practice then it is, of course, open to him so to do. If any such amendment alters the position so that the apparent breaches of the Code of Practice identified in the evidence in this case would no longer be a breach of the Code of Practice, then no issue of continuing enforcement would arise.

8.5 Second, however, should the Minister decide to continue with the Code of Practice in something substantially like its present form insofar as life rafts are concerned, then it seems to me that there is a pressing obligation on the Minister to now act so as to procure a much higher level of enforcement than has been identified in the past. It is next necessary to turn to the question of damages.

9. Damages
9.1 In the light of those findings it does not seem to me that it would be appropriate to make an award of damages in favour of Atlantic. Any issues concerning compliance with the Code of Practice up to the coming into force of the 2006 Act could not, for the reasons which I sought to analyse, give rise to a legitimate expectation and thus no claim for damages in respect of any such period could, in any event, arise.

9.2 In relation to the period since then, it does not seem to me that there was sufficient evidence to satisfy me that the Minister was guilty of a culpable failure to enforce. I have come to this view not least because the detailed evidence of non-compliance put before the court had not been notified to the Minister prior to the hearing. However, in the light of the evidence given in this case, it would seem to me that, in the absence of any material alteration in the Code of Practice, a failure on the part of the Minister to take significant action to now ensure compliance might well amount to such a culpable failure.

10. Conclusions
10.1 It seems to me that it would not, for those reasons, be appropriate to make any award of damages to Atlantic. However, it does seem to me that Atlantic has established an obligation on the part of the Minister to either alter the Code of Practice or enforce it as it now is. In the circumstances, it seems to me that the appropriate course of action to adopt is to adjourn these proceedings for a period of time to allow the Minister to consider the findings contained in this judgment and to formulate the action which the Minister intends to take.

10.2 In those circumstances, I propose adjourning the proceedings for mention until the last day of Easter term. In the meantime, I would invite the Minister to consider the matters determined in this judgment and to indicate to Atlantic, in advance of that hearing, what position the Minister intends to adopt.