Neutral Citation: [2014] IEHC 471

THE HIGH COURT

JUDICIAL REVIEW

Record No. 2012/11047 P

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 AGRICULTURE, FOOD AND THE MARINE, THE REGISTRAR GENERAL OF FISHING BOATS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 28th day of October 2014

1. This case concerns mussel seed fishing in Irish waters (i.e. waters within twelve nautical miles of the Irish coast). The corporate plaintiffs are the owners of Irish licensed sea fishing vessels, which are purpose built mussel seed vessels, and all the plaintiffs have a history of involvement in the bottom grown mussel industry. Each of the individual plaintiffs with the exception of the third named plaintiff who is the general manager and company secretary of the fourth named plaintiff as well as being the skipper of the Hibernia fishing vessel owned by the fourth named defendant, is a director of one of the corporate plaintiffs.

2. Central to the current proceedings is that the plaintiffs contend that mussel seed fishing in Irish waters by Northern Ireland vessels, as permitted by the Irish authorities, is harming the industry and causing them loss and damage. The essential case made by the plaintiffs is that the defendants, in permitting fishing by Northern Irish boats, are acting unlawfully and indeed unconstitutionally. There are a number of aspects to the plaintiffs' claim, but the core contention is that Northern Irish vessels cannot be permitted to fish in Irish waters unless provisions are made for this by law and that there is no law making provision for this. The plaintiffs say that the requirement which they say exists for an express legal authorisation for Northern Ireland fishing stems from the express provisions of the Constitution, from the constitutional order of the State and from statute.

3. Before turning to the legal issues, it is necessary to provide a little information about the mussel industry and to say something about the history of that industry. It appears that prior to the 1980s only a very limited amount of mussel fishing took place in Ireland involving a small number of families with a tradition of involvement in the mussel industry. In the 1990s bottom mussel fishing, which is what this case is about, as distinct from the rope mussel fishing industry on the west coast was largely centred in Wexford and in Cromane in Kerry.

4. In the late 1990s and the early years of this century, there were significant developments in relation to the bottom mussel seed industry and indeed the wider aquaculture industry. In that context, the National Development Plan 2000 to 2006 placed an emphasis on the potential for development of the aquaculture sector and financial assistance referred to as Financial Investment for Fisheries Guidance (FIFG) was made available. It is of significance that the plaintiffs received FIFG to support them in purchasing purpose built mussel vessels at a cost of between €3.4 and €3.795 million per vessel. The plaintiffs place emphasis on the fact that those seeking FIFG support were required to submit detailed business and aquaculture plans. These plans were based on mussel seed allocation requirements. However, the plaintiffs say that there has been a marked disparity between the allocations that were contemplated during the grant approval process and the actual allocations that they have received. The mussel industry involves wild mussel seed being dredged from natural mussel seed beds by specially designed vessels and then the second stage sees the seed transferred from the area where it was dredged to an aquaculture site where they are relayed and allowed mature. Typically the aquaculture sites where maturing takes place are situated in sheltered waters.

5. Maturing takes twelve to eighteen months. Mussel seed is a naturally occurring substance. Annual production levels are not constant, but levels vary appreciably. However, the trend in recent years has been very clear. In 2005, by way of illustration, Ireland produced 29,500 tons of bottom mussels, the National Development Plan envisaged that this would rise to 44,000 tons by 2015. However, in 2010, the figure had dropped to just over 13,000 tons and the figure for 2013, was down to 2,500 tons. To put those figures in some context, it should be noted that during the years 2000 to 2006, 20,000 was seen as a somewhat disappointing year.

6. The very poor return in 2013 is a cause of particular concern. Summer sea temperatures last year were several degrees above average and that should have produced a bumper yield, but the actual outcome was indicative of a fishery in collapse. The plaintiffs' case is that while some peaks and troughs are to be expected, that a decline of the magnitude that has occurred cannot be explained by natural occurring variations and environmental conditions, but is attributable to serious mismanagement of the fishery and specifically to over fishing. In terms of over fishing the plaintiffs point to an increase in the number of vessels fishing and specifically point out that in 2000, there were two or three Northern Irish registered mussel vessels active in Irish territorial waters, and none prior to that, at which stage there was no established mussel industry in Northern Ireland. Whereas by 2003, there were eleven Northern Ireland vessels fishing. There has been a drop off from that figure since, partly reflecting the decline in mussel seed stock, but there has been significant fishing by a number of Northern Ireland vessels. Apart from an increase in the number of vessels that are fishing, which is of itself a cause of major concern, the plaintiffs also say that Northern vessels have a tendency to engage in a particularly aggressive and unsympathetic form of fishing.

7. In this century, the mussel industry has been managed on an all island basis, known as "joint management" which refers to the joint administration of the mussel seed industry by the Department of Agriculture, Food and the Marine, and the Northern Ireland Department of Agriculture and Rural Development (DARD). The title of the Irish Department involved has changed on a number of occasions over the years and for simplicity I will simply refer to it as the Department of the Marine. Part of the joint management

initiative saw responsibility for the assessment of allocations of mussel seed being undertaken for a period by a non statutory cross border body known as the Seed Mussel Allocation Committee, (SMAC), with allocations being made on an all island basis. The legality of SMAC and the way in which it managed the mussel industry is at issue in related proceedings referred to as Barlow 1, which proceedings have been placed on hold pending the determination of the present proceedings referred to as Barlow 2.

8. I should say a little about the relationship between these sets of proceedings and about the so called Barlow 1 proceedings. Proceedings bearing Record No. 2006/2687P were commenced by the plaintiffs in 2006. The stage was reached where those proceedings were actually opened in October, 2012, but immediately following the opening there was an application to amend substantially the plaintiffs' pleadings. An application was refused leading to those proceedings adjourning and to the initiation of the present proceedings. In Barlow 1 the plaintiffs raised a number of complaints about how the mussel seed sector was administered. One of the complaints was that the Minister for the Marine had breached the terms of a Voisinage agreement (or neighbourhood agreement). I will be dealing in much greater detail presently with the terms of the Voisinage agreement and what significance is to be attached to it, but at this stage, suffice to say that the agreement makes provision for Irish fishing vessels, that is to say, vessels from this State and Northern Irish vessels to enjoy the right to fish on a reciprocal basis in each others' waters. However in the present proceedings the plaintiffs are seeking:

> (i) A declaration that Northern Ireland fishing boats fishing for mussel seed within Irish territorial waters are not authorised by law to so fish within the meaning of s. 10 of the Sea Fisheries and Maritime Jurisdiction Act 2006.
>
> (ii) Seeking if necessary a declaration that the exchange of letters (those that are alleged to constitute the Voisinage agreement) do not constitute an arrangement within the meaning of s. 8(1)(a)(iii) of the Sea Fisheries and Maritime Jurisdiction Act 2006.
>
> (iii) Seeking if necessary a declaration that s. 8 of the 2006 Act is unconstitutional having regard to Article 15.2 and Article 29.6 – this claim has not been pressed.
>
> (iv) If, which is denied, an existing arrangement was memorialised by the exchange of letters, a declaration that at all material times, the existing arrangement no longer existed.
>
> (v) If, which is denied, an existing arrangement was memorialised by the exchange of letters, a declaration that this was not covered or within the terms of the London Fisheries Convention [1966].
>
> (vi) If, which is denied, the defendants are entitled to rely upon an agreement and/or arrangement and/or a memorandum of understanding as a legal basis for mussel fishing by Northern Ireland fishing boats in territorial waters, a declaration that the same is justiciable and that the plaintiffs are entitled to rely on the legal effects of same.
>
> (vii) A declaration that the defendants acted contrary to Article 15 of the Constitution in adopting S.I. 311/2006 - The Mussel Seed (Fishing) Regulations 2006. However, in a situation where the defendants have accepted that the Statutory Instrument does not go further than recognising the existence of the Voisinage arrangement this relief has not been pressed.

9. The two sets of proceedings involve the plaintiffs presenting divergent claims. However, the plaintiffs' basic complaint is that by virtue of permitting Northern Ireland boats to fish, that the slice of the cake allocated to the plaintiffs is smaller than would otherwise have been the case, because there are more mouths to feed and moreover that the cake available for distribution is smaller than ought to have been the case because of over fishing and mismanagement. While the plaintiffs primary complaint is about the numbers permitted to fish and that those who ought not to be permitted to fish are in fact permitted to do so, they also make the point that, as I have already indicated, Northern Ireland boats have engaged in a particularly aggressive and unsympathetic form of fishing with consequential damage to the fishery.

10. The respective cases of the parties may be summarised as follows:-

The plaintiffs contend:

> (i) That the defendants have permitted Northern Ireland registered mussel vessels to fish for mussel seed in Irish waters without any legal basis grounding that entitlement.
>
> (ii) Mussel seed is a natural resource and as such under Article 10.3 of the Constitution, any management or alienation of it by the State must be prescribed by law.
>
> (iii) Permitting fishing of mussel seed amounts to a permanent alienation of the resource and also constitutes management of it within the meaning of Article 10.3 of the Constitution.
>
> (iv) So far as Irish vessels are concerned, the 2006 Act regulates by law through a detailed system of authorisation and allocations. However, there is no equivalent provision made in law for Northern Ireland mussel fishing vessels.
>
> (v) The Constitution requires that all executive action be governed by the rule of law so that the executive cannot take action without reference to a particular statutory provision or common law rule that justifies their action.
>
> (vi) This is particularly important when executive action affects rights, interests or legitimate expectations or creates entitlements.
>
> (vii) Section 10 of the 2006 Act expressly criminalises fishing by foreign sea fishing boats unless authorised by law and thus the fishing in Irish waters by Northern Ireland boats is unlawful and criminal.
>
> (viii) Section 8 of the 2006 Act cannot be regarded as providing the authority required by law as it only permits entry into Irish waters and does not permit fishing.
>
> (ix) Section 8 of the 2006 Act only has application when legal instruments are in force. The exchange of letters at issue in the present proceedings cannot be said to be "in force" as they are not legally binding. In the premises, say the plaintiffs, there is no statute or common law rule that justifies the actions of the defendants.

(x) The plaintiffs say that insofar as the defendants justify mussel seed fishing by Northern Ireland boats by reference to the exchange of letters or Voisinage agreement that the exchange of letters does not provide a justification as

- it is not binding in international law
- it is not binding in domestic law
- it is not subject to Oireachtas control
- it has never been incorporated into domestic law
- it is neither public nor precise.

(xi) In the alternative, if contrary to their primary submission, the exchange of letters permits some fishing by non Irish fishing boats, it does not permit the mussel fishing actually being carried out since such fishing is not as a matter of fact covered by the terms of the exchange. It is said that this is so because there is no reciprocity as Irish boats are prohibited by British law from fishing for mussel seeds in Northern Ireland waters, because Northern Ireland registered mussel vessels not owned by fishermen permanently resident in the six counties are permitted to fish in Irish waters, and because Northern Ireland registered mussel vessels greater than 75 feet in length are permitted to fish in Irish waters.

(xii) Northern Ireland registered mussel vessels were not habitually fishing in Irish territorial waters at the time of the exchange of letters [the relevance of a number of these assertions will become apparent when the terms of the letters exchanged are considered].

(xiii) The plaintiffs say that they have a legitimate expectation that fishing would be carried out in accordance with the terms of the letters exchanged and that the reliance placed upon the exchange to justify mussel seed fishing as practised by Northern Ireland vessels is in breach of that legitimate expectation. [However, by agreement consideration of the legitimate expectation issue has been deferred until Barlow 1 and does not require consideration at this stage.]

11. The defendants for their part in summary say:-

(i) The Voisinage arrangement is not justiciable at the suit of the plaintiffs.

(ii) The Voisinage arrangement is a memorandum of understanding of a technical and administrative character not requiring either to be laid before the Dáil or to be approved by the Dáil, i.e. coming within the first category referred to by Finlay C.J. in the *State (Gilliland) v. Governor of Mountjoy* [1987] I.R. 201, the case involving the extradition treaty between Ireland and the United States.

(iii) The Voisinage arrangement is recognised under the Common Fisheries Policy as an arrangement under existing neighbourhood relations between Member States. As such it is directly effective and confers rights and/or privileges on Northern Ireland fishermen independently of the provisions of domestic law.

(iv) Fishing by Northern Ireland mussel seed fishermen in the territorial waters of Ireland is not unlawful under s. 10 of the Sea Fisheries and Maritime Jurisdiction Act 2006, as properly construed.

(v) Statutory Instrument 311/2006 does not confer, though it does recognise, rights to fish under the Voisinage arrangement. Therefore, there is no question of the Statutory Instrument being either ultra vires or unconstitutional.

(vi) The plaintiffs are not entitled to a declaration to the effect that the existing arrangement no longer existed at all material times.

(vii) Further or in the alternative, the plaintiffs are not entitled to seek to enforce the terms of the Voisinage arrangement and are not entitled to and never had any legitimate expectation in relation to the observance of same and have no entitlement to damages.

12. Insofar as both sides' submissions have focused on the exchange of letters and the existence or otherwise of a Voisinage agreement, it is appropriate to turn first to the documents said to constitute the agreement. The first document in issue is a letter from a Mr. D.E. O'Sullivan of the Department of Agriculture and Fisheries and is addressed to J.V. Bateman of the Ministry of Agriculture in Belfast, dated the 13th September, 1965. That letter was in these terms:-

"With reference to our recent telephone conversation relating to the rights of your vessels to fish in our exclusive fishery limits, I wish to confirm that we propose to continue the present arrangement whereby your boats owned and operated by fisherman permanently resident in the Six Counties will be permitted to fish within our new limits.

Incidentally, the position as regards our own boats is that in accordance with the licensing of sea fishing vessels Regulations, 1960 (S.I. No. 4 of 1960) no vessel exceeding seventy five feet in length may be used for sea fishing, except under and in accordance with a licence issued under s. 9 of the Sea Fisheries Act 1952, as amended by the Sea Fisheries (Amendment) Act 1959. The present practice is to require vessels exceeding 90ft in length or 400 H.P. to refrain from fishing within our exclusive fishery limits and this will apply to the inner six mile zone of the extended limits.

The position will be, therefore, that your vessels up to 75ft in length overall may fish within our exclusive fishery limits subject only to the usual regulations which would effect our own boats also.

If there were any question of vessels exceeding that length, fishing within the inner six mile zone of our limits, it would be necessary for them to hold a permit to do so from the Minister for Agriculture and Fisheries under the Maritime Jurisdiction Act 1959(section 8) as amended by the Fisheries (Amendment) Act 1962 (section 34)."

13. On the 14th December, 1965, Mr. W.H. Elliott of the Ministry of Agriculture in Northern Ireland wrote to Mr. O'Sullivan. That letter was in these terms:-

"Voisinage arrangement under Article 9(2) of the Fisheries Convention

Dear Mr. O'Sullivan,

Thank you very much for your letter to Bateman of the 13th September. I am sorry it has taken us so long to reply.

I acknowledge your undertaking to the effect that Northern Ireland owned and operated fishing vessels will continued to be allowed to fish within your new limits and we assume that these limits include your territorial waters.

We for our part confirm that we consider ourselves bound by the terms of para. 6 of the note of the 25th August, 1964 from the Commonwealth Relations Office to your Government headed "London Fisheries Convention 1964, Extension of British Fisheries Limits".

14. Paragraph 6 of the note of the 25th August, 1964 from the Commonwealth Relations Office is in these terms:-

'In accordance with Article 9(2) of the Convention her Majesty's Government propose to leave unchanged the arrangement under which vessels of the Republic of Ireland are permitted to fish for all descriptions of fish within the exclusive fishery limits of the British Islands adjoining Northern Ireland except insofar as the said exclusive fishery limits lies within six miles (or during the transitional period three miles) of the base lines along the coast of Scotland. This arrangement will apply as long as the authorities of the Republic of Ireland continue to accord to Northern Irish vessels the same treatment as they accord to vessels of the Republic of Ireland in the waters around the coast of the Republic.'"

15. The reference in the documents to Article 9(2) of the Convention is to Article 9(2) of the London Fisheries Convention 1966 done in London on the 9th March, 1964. I will refer to the provisions of Article 9(2) in due course. Before going on to consider in detail the arguments that have been advanced, there are some matters that arise on an initial reading of the documents that merit mention at this stage. First, it is appropriate to note that the letters exchanged in 1965 were between officials of the Departments of Agriculture as distinct from notes passing between heads of Government, Ministers for Foreign Affairs or indeed diplomats. It will also be noted that the language of the letters do not exactly mirror each other, the letter from Mr. O'Sullivan speaks of boats owned and operated by fishermen permanently resident in the six counties, while the letter from Mr. Elliott refers to Northern Ireland owned and operated fishing vessels. If this was a question of identifying and interpreting the terms of a contract by reference to the doctrine of offer and acceptance, this divergence of language might well cause difficulties. What does emerge clearly is what was sought to achieve; which was to leave in place pre-existing arrangements. The 25th August, 1964, note, speaks of proposing to leave unchanged an arrangement while the O'Sullivan letter speaks of a proposal to continue the present arrangement. The fact that the two operative documents, the 1964 note and the O'Sullivan letter both refer to existing arrangements is particularly noteworthy. One final aspect of the document to which I will draw attention at this stage is the reference in the letter of Mr. O'Sullivan to vessel size. The significance of this is that at present, mussel fishing vessels whether Irish or Northern Irish routinely exceed 75ft in length. The plaintiffs take the view that whatever was decided upon in 1965, was specifically confined to vessels under 75ft in length and that it is not possible to look at the 1965 exchange as providing any form of authorisation for fishing by vessels larger than that. The defendants on the other hand, say that the 1965 exchange was providing for reciprocal permissions. For my part, I attach significance to the word "incidentally" and regard that as making clear that what followed was the incidental provision of information on what arrangements were then current. I do not believe that the correspondence is open to the interpretation that the practices that prevailed in September, 1965, were being set in stone and declared immutable.

The Constitutional Argument.

16. The plaintiffs argue that there is an express constitutional requirement for fishing for mussel seed by Northern Ireland vessels to be regulated by law. This argument is based on Article 10 of the Constitution. That article provides as follows:-

"10.1 All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.

2 All land and all mines, minerals and waters which belonged to Saorstát Éireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstát Éireann.

3 Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property.

4 Provision may also be made by law for the management of land, mines, minerals and waters acquired by the State after the coming into operation of this Constitution and for the control of the alienation, whether temporary or permanent, of the land, mines, minerals and waters so acquired."

17. Article 10.1 raises the issue whether mussel seed is a natural resource belonging to the State. There is no doubt that at one level, mussel seed can be described and indeed, as the plaintiffs point out has frequently been described, as a natural resource. It is natural as opposed to manufactured or artificial and in the sense that it is of value, it can be said to be a resource. However, I am doubtful whether that constitutes it a natural resource owned by the State. Obviously, the State, in common with other States, exercises jurisdiction over waters around its coast and does so for various purposes; economic development, prevention of pollution, defence and national security are some that come to mind. However, it is a major step from that to say that marine species are owned by the State as distinct from being capable of being managed by the State. Most fish species are migratory, indeed many very valuable species migrate huge distances crossing nautical boundaries. By the same token, wild animals and birds that could be regarded as an economic resource, either as a source of food supply or because hunting them is a significant tourist activity, roam freely and will sometimes cross State boundaries. Can it be said that the wild fish, birds or animals are owned by the State in which they are as of a particular time? States may license hunting or fishing, make provision for closed seasons and so on, but this is not to say that the State owns the fish or animals. To take an example far removed from the present, the South African state takes vigorous measures against poachers of rhino and elephant, but it does not own these great animals and is powerless to prevent them crossing its borders into neighbouring States.

18. Historically the view has always been that wild beasts, fowl and fish were "*nullius in bonis*" (no one's property). Again from an historical perspective there was an individual right of fishing, see Longfield on the *Fishery Laws of Ireland*. At p. 3 it observes:-

"..[T]here were recognised as vested in all the subjects of the realm two well established rights, that of free navigation and free fishing."

19. The situation was not altered by the establishment of Saorstat Éireann as emerges from *R. (Moore) v. O'Hanrahan* [1927] I.R. 406 There, Murnaghan J. quoted with approval the following passage from Viscount Haldane L.C. in *A.G. for British Columbia v. A.G. for Canada* [1914] A.C. 153.

> "But their Lordships are in entire agreement with him on his main proposition, namely, that the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity the Crown as parens patriae no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts." (at pgs 443-444)

20. Nor, was the situation altered by the 1937 Constitution as is clear from the judgment of Gavan Duffy P. in *Foyle and Bann Fisheries v. Attorney General* [1949] 83 I.L.T.R. 29. That the general right to fish extended to shellfish does not seem in doubt. Howard on the *Law of Aquaculture* comments as follows at para. 15.02:-

> "Although now modified in many respects by statute, the common law of England and Wales incorporates the right to take shellfish as a part of the general right of public fishery in the sea and in tidal waters and is enjoyed by all members of the public. (*Royal Fishery of the Banne* case (1610) Dav. Ir. 55; and *Attorney-General for British Columbia v. Attorney-General for Canada* [1914] A.C. 153)."

21. If I am doubtful that mussel seed could be regarded as a natural resource as that term is used in Article 10.1 I am all the more doubtful, whether what is being permitted to happen could be described in any real sense as the alienation of that property.

22. Murdoch in his *Dictionary of Irish Law*, defines alienation as the power of an owner or tenant in property to transfer his interest, while Javitt's definition is of transferring of property to another. In this case there is no transferring of property, all that is happening is that fishing activity is permitted, as it happens on a reciprocal basis. Whether the permission to fish results in seed being taken depends on whether seed is located, whether the fishery is open, whether the individual vessel is within the limits of its authorisation and other factors. The plaintiffs have asserted that the traditional notion of *nullius in bonis* must be reconsidered in the context of the assertion contained in Article 10.1 of the Constitution. But there is no hint of such a radical departure from the long established legal order to be found in Article 10. It is very hard to believe that the Irish people in adopting a Constitution could ever have contemplated that they were setting aside long established legal principles dating back from many centuries and in the process surrendering rights that their ancestors had enjoyed over the centuries.

The Constitutional Order

23. In addition to what they contend are the express requirements of the Constitution, the plaintiffs also assert that support for their view that authorisation by law is obligatory arises from the implied constitutional requirement of the rule of law. That the rule of law is the cornerstone of the Irish legal system is not open to doubt. See, if needed, the express observations to that effect in *Maguire v. Ardagh* [2002] 1 I.R. 385 by Denham J. (as she then was). The plaintiffs have drawn attention to her comments at p. 567 that the rule of law has three components being (i) everyone is subject to the law, (ii) the law must be public and precise and (iii) the law must be enforced by some independent body. By reference to those three principles and to a fourth principle which Hogan and Morgan have described as the principle of legality, the plaintiffs say, which is scarcely controversial, that these principles exclude unfettered discretion on the part of the executive and that, and again this is not at all controversial, that the executive now acts pursuant to law and the Constitution and that Royal prerogatives have not survived the enactment of the 1922 and 1937 Constitutions.

24. However, these statements of high constitutional principles must be seen in context. It is hard to justify references to the exercise of an unfettered discretion in permitting reciprocal fishing, when at the same time there is absolutely no cap whatever on the number of Irish boats that could be authorised to fish for mussel seed. Again, the context in which the State took the decisions that it did in 1965, is of considerable significance. Those decisions were taken in the context of the State considering how relations with its nearest neighbour should be ordered. The authorities are clear that a particular degree of restraint is required from the courts in entering onto foreign policy issues. In *Horgan v. Ireland* [2003] 2 I.R. 468, the Shannon stopover case, Kearns J. (as he then was) having considered the provisions of Articles 5, 6, 15, 28 and 29 of the Constitution stressed that the Government and the Government alone can exercise the executive power of Government. In doing so, he referred to certain observations by Walsh J. at p. 782 of *Crotty v. An Taoiseach* [1987] I.R. 713, where he had said:-

> "I mentioned earlier in this judgment that the Government is the sole organ of the State in the field of international relations. This power is conferred upon it by the Constitution which provides in Article 29 s. 4 that this power shall be exercised by or on authority of the Government."

25. Kearns J. also quoted with approval the remarks of Fitzgerald C.J. in *Boland v. An Taoiseach* [1974] IR 338. That case concerning as it did the Sunningdale agreement is one of particular interest as it is concerned with Anglo Irish relations and North South relations. At p. 361, Fitzgerald C.J. commented:-

> "In my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

26. Kearns J. was of the view that some quite egregious disregard of constitutional duties and obligations must take place before the courts could intervene under Article 28 of the Constitution. Kearns J. also dealt with the same topic in the course of his judgment in *Doherty v. Government of Ireland* [2010] IEHC 369, when considering the characteristics of justiciable controversy. There he commented that similarly [to the exclusion of purely political issues, revenue and borrowing powers of the State] in international relations and the conduct of foreign affairs, the courts have invariably taken the view that controversies which may arise are not justiciable at the behest of individual citizens as the provisions of Article 29.1 to 29.3 relate only to relations between the States and confer no rights upon individuals.

27. In my view, the requirements for restraint and circumspection on the part of the courts in the area of foreign affairs is heightened when what is at issue is relations with Britain; East/West and North/South relations. There is no authority, or indeed any justification

for the proposition that at the level of policy, the Government cannot conduct relations through neighbourhood agreements or arrangements.

28. The defendants have asserted strongly that the issues which the plaintiffs seek to litigate are just not justiciable. There is much force in the argument. However, in a situation where the plaintiffs have emphasised that their challenge is essentially a procedural one and that they are not seeking to review the merits, the wisdom and appropriateness of the decisions in relation to Northern Irish boats, it would not be appropriate to proceed to dismiss the proceedings *in limine*. However, we must not lose sight to the fact that the form and style in which relations are conducted - whether by way of formal treaty, signing ceremonies in circumstances of pomp and ceremony or at ministerial level or at official level - itself involves important exercises in judgment, which are properly taken by Government. A very considerable margin of appreciation should be afforded to the Government.

29. The Constitution itself envisages three different types of international agreements,

> "(i) An agreement or convention of a technical and administrative kind which does not require to be laid before the Dáil and which does not require to be approved by the Dáil.
>
> (ii) An international agreement involving a charge upon public funds where the State will not be bound unless the terms of the agreement have been approved by the Dáil.
>
> (iii) An agreement falling into neither of the first two categories which must be laid before the Dáil, but need not be approved by the Dáil.
>
> (See the State *(Gilliland) v. Governor of Mountjoy* [1987] I.R. 201).

The Voisinage arrangement in question, which is in the nature of a memo of understanding or arrangement, insofar as it can be described in a very broad sense as an international agreement would appear to fall into category (i). That being so there was, therefore, no requirement for the arrangement to be laid before the Dáil or to be approved by it. I reject the arguments based on the constitutional order of the State and accordingly, the challenge on constitutional grounds fails.

The Statutory Challenge.
30. The starting point for consideration of this issue is to be found in s. 10 of the Sea Fishing and Maritime Jurisdiction Act 2006. That section provides as follows:-

> "10(1) A person on board a foreign sea-fishing boat shall not fish or attempt to fish while the boat is within the exclusive fishery limits unless he or she is authorised by law to do so.
>
> (2) A person who contravenes subsection (1) commits an offence."

31. The defendants point out that s. 10 forms part of Chapter 2 of the Act – the regulation of sea-fishing and they say that s. 10 cannot be read in isolation, but must be read in the context of the rest of the chapter and in particular must be seen in the light of section 8. That section is in the following terms:-

> "8(1) It is not lawful for any foreign sea-fishing boat to enter within the exclusive fishery limits except for –
>
> (a) a purpose or purposes recognised by –
> (i) Community law,
>
> (ii) international law, or
>
> (iii) any convention, treaty or arrangement for the time being in force between the State and the country, to which the boat belongs,
>
> […]
>
> (2) If a foreign sea-fishing boat enters within the exclusive fishery limits in contravention of subs. (1) the master of the boat commits an offence."

32. For completeness sake, I should refer to the terms of s. 9 which are as follows:-

> "9(1) If a foreign sea-fishing boat enters within the exclusive fishery limits for –
>
> (a) a purpose or purposes recognised by –
> (i) Community law,
>
> (ii) International law, or
>
> (iii) any convention, treaty or arrangement for the time being in force between the State and the country, to which the boat belongs,
>
> or
>
> (b) any other lawful purpose or purposes, then –
>
> (I) the boat must leave the exclusive fishery limits as soon as the purpose for which the boat so entered has been answered, and
>
> (II) any regulations made under subs. (2) and for the time being in force shall be duly observed.
>
> (2) The Minister may make regulations in relation to the maintenance of good order amongst foreign sea-fishing boats for the time being within the territorial seas of the State and the persons on board such boats.

> (3) If there has been in relation to a foreign sea-fishing boat which has lawfully entered within the exclusive fishery limits or in relation to the persons on board that boat, a contravention (whether by commission or omission) of subs. (1), the master of the boat commits an offence."

33. Section 11 then deals with contravention of EC Regulations (Common Fisheries Policy), s. 12 deals with the management of the State's fishing quota and s. 13 deals with management and regulation of State's fishing opportunities and fishing efforts.

34. On a plain and literal interpretation of s. 8(1)(a)(iii), the Voisinage arrangement under discussion is an arrangement for the time being in force between the State and the country to which the boats belong. But the plaintiffs suggest that the word should be interpreted as meaning a legally enforceable instrument, pointing out that the surrounding words Convention and Treaty would be enforceable and they suggest that it is reasonable to assume that the three instruments referred to must all be enforceable. Further support, they say, can be found from the phrase "in force". They point out that the Oxford English Dictionary refers to an archaic use of the term "arrangement" as a settlement of a dispute or claim. With all due respect to that argument, the word "arrangement" is a very ordinary straightforward one in daily use. As the word is used every day, it would encompass the Voisinage agreement or Voisinage arrangement of 1964/65. In that regard, it is noteworthy that the word "arrangement" appears not just in s. 8 of the 2006 Act, but that it also features in Article 5(2) of Regulation 1380/2013, which is in these terms:-

> "In the waters up to 12 nautical miles from the baselines under their sovereignty or jurisdiction, Member States shall be authorised until the 31st December, 2022, to restrict fishing to fishing vessels that traditionally fish in these waters from ports on the adjacent coast, without prejudice to the arrangements for Union fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex 1, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing is pursued and the species concerned. Member States shall inform the Commission of the restrictions put in place under this paragraph."

35. The language of Article 5(2) with its reference to arrangements echoes the language of the Regulation previously in place, Regulation (EC) No. 2371-2002 and in particular Article 17(2) thereof. The relevant provisions of s. 8 properly interpreted provide that it is not lawful for any foreign sea fishing boat to enter within the exclusive fishery limit except for a purpose recognised by an arrangement in place between the State and its neighbour. There is such an arrangement and the purpose for which entry is authorised by the arrangement is to fish. The alternative interpretation contended for the plaintiffs in truth, requires adding the words "not being fishing" after the word "purposes" in s. 8(1)(a). I can find no justification for writing in language that does not appear in the text. Instead the Act in its plain and ordinary meaning permits Northern Ireland boats to enter the exclusive fishing limits in order to fish on a reciprocal basis, a lawful purpose recognised by the Voisinage arrangement.

36. I have already referred to the fact that the O'Sullivan letters of the 13th September, 1965, had referred to continuing the present arrangement, while the 25th August, 1964, note had referred to leaving unchanged an arrangement then in place. It is striking that both sides independently used the word "arrangements" to describe the pre-existing situation. In truth, it seems to me that the 1964/65 documentation is in the nature of a memo of understanding agreeing to leave unchanged pre-existing arrangements.

Alternative Arguments
37. I turn then to the plaintiffs' alternative submission, which is that even if there is a Voisinage arrangement in place that it does not apply to the type of fishing that is actually being carried out. Four factual issues are identified, in short these are a reciprocity requirement, a permanently resident requirement, the 75ft vessel length issue and a habitual fishing requirement. I turn now to consider these.

Reciprocity
38. In relation to reciprocity a number of points are made in support of the argument that the reciprocal requirement of the exchange of letters is not met. The plaintiffs point to the fact that Northern Ireland mussel vessels unlike Irish vessels do not have licences and the point is made that permits that are issued to Northern Ireland vessels are not the equivalent of licences. Again the fact that a Northern Ireland mussel farm can be the beneficiary of an allocation is pointed to. It is said there is a lack of reciprocity in the area in which fishing is permitted and that Irish licences do not on their face permit fishing for mussel seed in Northern Ireland waters and only permit fishing in Irish territorial waters. This argument does not take into account that the documentation clearly contemplates fishing in Northern Ireland waters as a phone number is provided to be contacted before exercising the right to fish in Northern Irish waters. Then, it is said, that the laws applicable in Northern Ireland would mean that it would be unlawful for the plaintiff to fish in Northern Irish waters. Moreover, they point to the fact that because the slipper limpet, described as a voracious predator, is present in Northern Ireland waters, which means those waters are closed, they are in practice prohibited by S.I. 477/2011 from importing mussel seed from Northern Ireland into Irish waters.

39. What all of these arguments have in common is that perhaps understandably, they focus on the current situation of Irish mussel fishing vessels. However, the arrangement in place is not species specific. The arrangement is a general one and covers all fish and is at that level that the issue of reciprocity requires to be considered. The fact that a particular species may be found in Irish waters and not in Northern Irish waters or vice versa is really neither here nor there. Equally, the fact that a particular fishery may be open or closed in respect of a particular species of fish at a particular time does not effect the fundamental situation which is that fishing in the waters around the island is permitted on a reciprocal basis.

Permanent Residence Issue
40. The argument that only boats owned and operated by fishermen permanently resident in the "six counties" arises from the language of the letters exchanged and specifically from the language used by Mr. O'Sullivan.

41. I have already commented on the fact that the language used by Mr. O'Sullivan and by Mr. Elliott diverges and that this would cause difficulty if what was involved was interpreting a contract. Indeed, if there had been an attempt to negotiate a binding detailed legal instrument it is very likely that the divergence would have been addressed. The argument though, ignores the fact that the structure of the fishing industry in Europe and indeed in Ireland has evolved in the half century since the exchange of letters occurred. It may well have been the case that in 1964 boats were owned and operated by individuals and that it was realistic to think in terms of permanently resident individual fishermen. However, almost 50 years on, where vessels are larger and more sophisticated, corporate ownership is now the norm as is illustrated by the fact that the corporate plaintiffs are each the owners of a vessel. It seems to me that the arrangement entered into is robust enough and flexible enough to deal with the structures of an industry which like other industries can be expected to evolve over time.

Vessels over 75ft
42. I have already addressed the issue in relation to vessel length and will not repeat what I have said. What was agreed or arranged

in the mid 1960s was not an arrangement for boats less than 75ft in length, but rather an arrangement/agreement that provided for reciprocal fishing. At the time two different regimes applied to Irish boats above and below this length. Therefore insofar as Northern Irish boats were being permitted to fish in Irish waters on the same basis as Irish vessels it was inevitable that at the time a distinction would be drawn between Northern Ireland vessels above and below 75ft in length. However, as the regime applicable to Irish boats altered, so, given that the aim was to treat Northern Irish vessels in a like manner as Irish vessels were treated, the regime applicable to Northern Ireland boats also altered.

The Habitual Fishing Requirement

43. This issue has its origin in Article 9(2) of the London Convention 1966. That Article 9(2) provides as follows:-

> "If a Contracting Party establishes the regime described in Articles 2 to 6 [making provision in respect of the 0 to 6 belt and the 6 to 12 mile belt], it may, notwithstanding the provisions of Article 2, continue to accord the right to fish in the whole or part of the belt provided for in Article 2 [the 0 to 6 mile belt] to other Contracting Parties of which the fishermen have habitually fished in the area by reason of voisinage arrangements."

44. Again, I would draw attention to the use of the word "arrangements". The plaintiffs for their part contend that mussel seed was not habitually fished in 1964 or in the period before that. That may well be so, however, the argument fails to appreciate that the arrangement relating to the seas around the island of Ireland was not mussel fishing agreement or arrangement, but an agreement or arrangement applicable to fish generally. The proof of that is that cockle fishing takes place in Dundalk Bay on foot of the arrangements and that small boats from border fishing ports north and south of the border exercise the right to fish pursuant to the Voisinage arrangements. What is required by the exchange of letters and indeed by the London Convention is that fishing should have occurred, not that there should have been habitual fishing of a particular species or habitual fishing involving particular fishing methods.

45. In summary then, I conclude that the fishing by Northern Ireland vessels is authorised pursuant to the terms of the Voisinage agreement. In conclusion I have to express some surprise that arrangements which have been in place for almost half a century are now being challenged and that the challenge comes at a time when relations between Britain and Ireland have never been closer and when north-south relations have never been better. I have spoken about the arrangements going back almost half a century, but I note that Clive Symmons writing on "*The Sea Fishing Regime of the Irish Sea*" (1989) 4 International Journal of Estuarine and Coastal law dates the arrangements from 1959. I am not entirely clear what occurrence that Mr. Symmons is referring to in choosing 1959, but it may be that it is a reference to the consideration of the issue by the Government to coincide with the coming into force of the Maritime Jurisdiction Act 1959. The memorandum brought to Government on the issue has been discovered. The memo details extensive fishing by what was described in the language of the time as six county fishermen in the Dunmore East fishery and the memo took the view that there was no compelling reason for altering the existing position in regard to six county fishermen within Irish limits. The decision taken by Government was to maintain what was described as the existing informal attitude. This offers further evidence that the all Ireland dimension to fishing is long established and at this stage deeply entrenched. I have already commented that I find it strange that the suggestion of reversing the long standing cooperation that has existed in relation to fishing comes at a time when Anglo Irish relations and North South relations have never been closer, the suggestion is made though, however, in my view the all island dimension is entrenched to the extent that it is inconceivable, having regard to the doctrine of separation of powers, that a court should now set aside an arrangement so well established. Change, if it is to come, is for the executive and/or the legislature. Accordingly, the plaintiffs' claim fails.