THE HIGH COURT

COMPETITION

[2005 No. 3195 P.]

BETWEEN

ISLAND FERRIES TEORANTA

PLAINTIFF

AND

THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL AND THE MINISTER FOR AGRICULTURE, FISHERIES AND FOOD

DEFENDANTS

JUDGMENT (No.2) of Mr. Justice Cooke delivered the 26th day of June 2012.

1. In the judgment given by the Court on the 18th October, 2011, in this action, the Court found in the plaintiffs favour on one of the principal claims which it advanced in its challenge to new and increased charge introduced by the respondent Minister under the Fishery Harbour Centres Acts 1968-1980 for the use by the plaintiffs vessels of Rossaveel Harbour. In particular, the Court declared unlawful as *ultra vires* the powers of the Minister under those Acts, charge No. 10(a) of Schedule 1 of the Fishery Harbours Centres (Rates and Charges) Order 2003 (SI 493/2003) ("the 2003 Order"), which had been introduced with effect from the 1st May, 2004 and which the plaintiff had since refuse to pay. (See para. 66 of the judgment.)

2. The Court found it unnecessary in those circumstances to consider other claims made challenging the compatibility of the provisions of the 2003 order and of the Act of 1968 (as amended) with provisions of the Constitution as well as other claims for declaratory reliefs in relation to the bye-laws mentioned in para. 67 of the judgment.

3. On the basis stated and for the reasons given in the subsequent paragraphs of that judgment, the Court did however, make a conditional finding in favour of the plaintiff in respect of the claim made for infringement of s. 5 of the Competition Act 2002, alleging that the Minister had abused a dominant position at Rossaveel Harbour by the imposition of the new passenger charge.

4. At a resumed hearing on the 29th February, 2012 and the following days, the Court has heard further evidence and submissions on the plaintiff's claim for damages on the basis of the findings of the Court in the earlier judgment.

5. The plaintiff's claim for damages seeks to recover both the compensatory damages and exemplary damages. Whilst acknowledging that the findings made by the Court in relation to the claim under s. 5 of the Competition Act 2002, were made on a purely conditional basis for the reasons given in the judgment, the plaintiff asks the Court additionally to make a conditional award of damages under s. 14 of that Act.

Compensatory Damages

6. Under the heading of compensatory damages, the plaintiff seeks to recover the amounts of the losses claimed to have been sustained as the result of the unlawful imposition of the new charge and particularly the costs incurred and profits lost as a result of the interruption of its business by the revocation of the passenger vessel permits for two of its vessels and the detention of one of them between the 17th August and the 3rd October, 2005. The MV Ceol na Farraige was detained pursuant to s. 4(2)(b) of the Fishery Harbour Centres Act 1968, and was thus out of use by the plaintiff until the company was in a position to furnish a bond to procure its release by agreement with effect from the 3rd October, 2005. The full heads of special damages claimed by the plaintiff as calculated and set out in the first report of the consultants DHKN are as follows:-

1	Cost of bond/guarantee	Bank commission/fee @ €2000 per quarter	€24,333
	Net interest cost		€38,119
2	Other Costs and Lost Profits	Non operation of two vessels 47 days 18/8/2005 to 3/10/2005	€41,110
		Operation of MV Draoicht from Galway	€3,005
		Profits lost on non operation of two vessels for 47 days	€84,942
		Fixed Costs incurred on MV Ceol during detention	€11,868
3	Cost of diverted staff		€36,255
4	Administration and travel expenses		€10,293
		Total	€249,825

7. To appreciate the basis upon which these special damages are claimed it is necessary to summarise briefly the events of August/September 2005. As explained in greater detail in the main judgment, the plaintiff was operating its daily services from Rossaveel Harbour using its two main vessels MV Ceol na Farraige and MV Draoicht na Farraige ("Ceol" and "Draoicht"). For some time previously the company had been testing the viability of a service to be operated to the Aran islands from Galway Harbour using one of its smaller vessels.

8. On the 30th June, 2005, Mr. Ward of the Sea Fisheries of the Administration Division of the Department of Communications, Marine

and Natural Resources ("the Department") wrote to Mr. O'Brien of the plaintiff demanding payment of the outstanding harbour dues and charges in the sum of €201,476.74. He said "in order to facilitate you, the Department is prepared to agree to a payment of €100,000 by Monday the 18th July and the balance to be paid before the 31st December, 2005, by way of agreed instalments and current liabilities to be discharged within 30 days of billing. Failure to comply with the foregoing payment proposals will result in the withdrawal of operating permits for your vessels from Rosamhil harbour".

9. An exchange of correspondence then ensued between the Department and the plaintiffs solicitors in which the demand was challenged and the arguments as to the legality of the charges which subsequently became the basis of the proceedings were advanced. On the 19th July, 2005, Mr. Ward wrote to the plaintiff's solicitors, Comerford and Co., enclosing a copy of the Fishery Harbour Centre (Rossaveel) Bye Laws of 1999 and drawing attention to the prohibition in bye-law 4:-"The Master or person in charge of a passenger vessels of 14mtrs or less in length shall not operate the vessel or take on board or disembark passengers from the vessel at the harbour at Rossaveel Fishery Harbour Centre save under, and in accordance with any terms and conditions of, a permit in that behalf granted by the Minster". The letter pointed out that the permit "may be revoked at any time where it is considered necessary in the interest of safety or for the good management or operation of the harbour" and furthermore that "in the event that any rate or charges is in arrears by 90 days or more the Minister may withdraw all services from that vessel or any other vessel owned by the same person and refuse entry to any of the fishery harbour centres to which this order applies until such time as the debt is discharged".

10. On the 4th August, 2005, Comerford and Co. responded asserting that the threatened withdrawal of operating permits from the vessels "is *ultra vires* and illegal" and that the Minister was acting in breach of competition law. The rates and charges which the Minister sought to levy was said to be "entirely unreasonable, lacking in transparency, unfair and discriminatory and not based on actual costs and thus the Minister is guilty of an abuse of dominant position". The plaintiff's position in this regard was summarised:-

> "1.The Minister has no power to seek to levy the charges he sought to levy under the 2003 order;
>
> 2.The said order is invalid, unlawful and *ultra vires*;
>
> 3.The Minster has no power to withdraw Island Ferries Teo's permits for non payment of charges;
>
> 4.The said permits are, in any event *ultra vires* of the 1968 Act."

The letter also claimed that the threat made by the Department to revoke the permits would have serious implications for the plaintiff, particularly when, during the summer months, it employed 70 people and the withdrawal of the permits would put the business in serious jeopardy. An undertaking was sought that the permit would not be withdrawn and that the vessels would not be excluded from the harbour pending the determination of these issues and an application for an injunction against the Minister was forewarned.

11. In a letter of the 16th August 2005, Mr. Ward of the Department acknowledged the letter of the 4th August, saying: "Your allegations with regard to the legality of the Minister's actions are disputed and I am satisfied that the proposed actions and legislative basis for them are adequate and sound". The undertaking sought by the plaintiff was refused and a warning was given that any actions brought against the Department would be vigorously defended. He concluded: "In the event of your client's failure to make full settlement of outstanding arrears, you can be assured that all legislative and enforcement measures available to the Department will be utilised until a satisfactory outcome is achieved".

12. On the following day, Mr. Ward wrote directly to Mr. O'Brien and, after referring to the previous correspondence and the failure to make the demanded payments, informed him that:

> "The current operating permits of the following vessels will be revoked and are to be null and void from midnight on the 17th August, 2005, until further notice;
>
> MV Ceol na Farraige - passenger vessel permit issued on the 25/03/05
>
> MV Draoicht na Farraige -passenger vessel permit issued on the 23/02/05
>
> It is illegal for the master or person in charge or operator of any of the above named vessels to operate the vessel or take on board or disembark passengers from the vessels at Rossaveel harbour pending the issue of a new passenger vessel permit."

13. On the 18th August, 2005, the MV Ceol na Farraige was detained by the harbour master Captain Donnelly at Rossaveel pursuant to s. 4(2)(b) of the Act of 1968 and bye-law 85 of the Bye-Laws of 1979. Written confirmation of the seizure was served on the plaintiff.

14. In the light of the warning in the letter of the 17th August, 2005, Mr. O'Brien decided that the MV Draoicht should not be returned to Rossaveel and it was diverted to Galway Harbour. Over the following days the MV Draoicht was used to operate the service from Galway Harbour to the islands and the smaller vessel was brought to Rossaveel to provide that service. To maintain the Rossaveel service the plaintiff's three smaller vessels were put into service and an additional daily sailing had to be provided. Additional costs over and above the normal operating costs of the two main vessels were thereby incurred. Furthermore, as a larger vessel, the cost of operating the Galway service using MV Draoicht was greater than that of the smaller vessel.

15. The detention of MV Ceol lasted from the 18th August, 2005, until the 3rd October, 2005. Following negotiations an agreement was reached and set out in a letter from the Chief State Solicitor dated the 28th September, 2005, according to which the MV Ceol would be released from detention and the two passenger vessel permits restored in return for the company putting up a bond or bank guarantee in the sum of €200,000. This agreement came into effect as from the 3rd October, 2005.

16. These, accordingly, are the events which are claimed to give rise to the principal heads of compensation sought to be recovered as listed in para. 6 above.

17. There is no disagreement between the parties as to the legal principles that apply to this claim. Damages are not automatically recoverable where losses incurred are the result of an *ultra vires* act on the part of a public authority. In addition to the *ultra vires* act, one of a number of alternative conditions must be established as met. The law in this regard is to be found in the judgment of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 and of Keane C.J. in *Glencar Exploration Plc. v. Mayo County Council (No. 2)* [2002] I.R. 112. The state of the law can be succinctly summarised from the passage in the judgment of

Keane C.J. at p. 127 as follows:-

> "It follows that the *ultra vires* exercise of the power in the present case could not of itself provide the basis for an action in damages. This view of the law is authoritatively confirmed by the judgment of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment [1987]* I.R. 23 where he cited with approval the following statement of the law in Wade on *Administrative Law* (5th Ed.) at p. 673:-
>
> 'The present position seems to be that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:-
>
> 1. If it involved the commission of a recognised tort, such as trespass, false imprisonment or negligence.
>
> 2. If it is actuated by malice, e.g. a personal spite or a desire to injure for improper reasons.
>
> 3. If the authority knows that it does not possess the power which it purports to exercise.'
>
> The Chief Justice added that he was satisfied that there would not be liability for damages arising under any other heading."

18. The plaintiff relies on the first of these conditions and asserts that the defendants' action in detaining its vessel at Rossaveel on the 18th August, 2005, was an actionable trespass, there being no debt lawfully due to the Minister as claimed because the charge sought to be recovered by the detention of the vessel had not been lawfully imposed.

19. In the judgment of the Court, that proposition is correct. As is clear from the correspondence summarised in paragraphs 8 to 12 above, the revocation of the permits and the detention of the MV Ceol na Farraige had as their explicit purpose the recovery of payment of the sum of €201,476.74 being the accrued amount of the charges which the Court has found to have been imposed without authority. The detention of the plaintiff's vessel when the legal basis for doing so was non existent is, in the view of the Court, a trespass and, as such, actionable per se. Furthermore, although the above quotation from Wade cited by Finlay CJ refers to the the commission of a tort such as trespass or negligence, there does not appear to be any reason why in the Irish context an entitlement to damages should be excluded where the impugned administrative action involves any civil wrong including breach of contract or a breach of statutory duty. It is to be noted that in s.2 of the Civil Liability Act 1961 "negligence" is to be interpreted as including breach of statutory duty and "wrong" as including a tort and a breach of contract. Here the revocation of the permits when the amount sought to be recovered was not due was effectively a breach of contract in that the condition attached to the permit enabling its revocation did not exist. In the alternative, the revocation was a breach of duty in that the Minister and the Harbour Master had a duty to permit the vessels to operate from Rossaveel during the currency of the permits so long as the plaintiff complied with all relevant conditions. As the new charge had not been lawfully imposed, the permit holder had not defaulted in paying a due amount.

20. It is also relevant to observe in this regard that this was not an instance in which an *ultra vires* act was executed inadvertently or without any forewarning of a possible flaw in authority as subsequently found. Here the precise issue as to the *ultra vires* character of the new charges had been explicitly raised by the plaintiff's solicitors with the Department in the exchange of letters of the 4th and 16th August, 2005, cited above at paragraphs 10 - 11. This is not to say, however, that the Department could therefore be said to have come within the ambit of the alternative conditions (b) and (c) of the principle referred to above in para. 17, that is, that the action was motivated by malice or that the Department was aware that it did not possess the power it purported to exercise. The Department clearly considered its new charges to be validly imposed and Mr. Ward was acting in obvious good faith in pursuing recovery of the amount by having recourse to the relevant powers of recovery available to the Minister under the per-existing regulations and bye-laws.

21. In response to the claim, the defendant has sought to distinguish between the *ultra vires* act in the adoption of the charges and the immediate cause of the losses which form the subject of the claim for damages, namely the detention of the vessel at Rossaveel. It was submitted that the only *ultra vires* act found by the Court was the Minister's adoption of the head of charge at Item 10(a) in Schedule 1 of the 2003 order (see para. 1 above). The plaintiff's vessel was detained in exercise of the power contained ins. 4(2)(b) of the Act of 1968 and bye law 85 of the 1979 Bye Laws. (see para. 13 above). Neither of these has been found to be invalid.

22. In the judgment of the Court, this argument is not well founded. It is wholly unrealistic in the circumstances of the exchanges between the parties from the 30th June, to the 18th August, 2005, to seek to dissociate the demand for payment of the charge from the decision to detain the vessel. The explicit purpose of the detention was to compel payment of the charge. The trespass was thus committed in order to exact payment of an amount which was not due. Further, the new charge was introduced in the 2003 Order within an existing regulatory framework which facilitated the collection and recovery of such charges. In the judgment of the Court, there was such an integral connection between the imposition without authority of the particular per capita passenger charge at Rossaveel (and in fact only at Rossaveel), and the exercise of the power to revoke the passenger ferry permits at Rossaveel and detain the vessel, as to bring the claim within the first of the conditions approved by Keane C.J. from the passage in Wade cited above, namely "it involved the commission of a recognised tort such as trespass ...". For that purpose the Court considers that the expression "tort" extends to include other civil wrongs as explained in paragraph 19.

23. In these circumstances it is unnecessary for present purposes to consider the further arguments advanced on behalf of the plaintiff based on possible alternative wrongs of causing loss by unlawful means or infringement of constitutional rights.

24. The entitlement to compensatory damages having been established in principle, the Court will rule as follows on the heads of claim set out in in summary at paragraph 6 above.

25. Some of these amounts have been agreed as regards their calculation between Mr. Hannon, the author of the reports submitted by the plaintiff from their consultants DHKN on the one hand, and Mr. O'Malley, author of the two reports on behalf of the Minister. Several items, however, are disputed either as being irrecoverable in principle; or as not having been incurred in fact; or as incorrect or exaggerated calculations of the relevant costs or losses. The respective positions of the two sides in evidence and in the opinions given on the claim can be illustrated in the following table based on the figures given in the two DHKN reports of the 2nd December, 2011, and 23rd February, 2012, and the two O'Malley reports of the 16th December, 2011, and the 28th February, 2012.

1. Cost of Bond	**DHKN Report 02.12.11**	**O'Malley Report 16.12.11**	**DHKN Supplemental Report 23.02.12**	**O'Malley Supplemental Report 23.02.12**

Commission	€24,333	€24,333	€24,333	€24,333
Net Interest Cost	€38,119	Nil	€38,119	Nil
2. Other Costs Incurred and Loss of Profits				
(a) Costs associated with the non-operation of MV Ceol na Farraige and the MC Draoicht na Farraige in the 47 day period 18.08.2005 to 03.10.2005: (the Relevant Period)	€41,110	€24,370	€24,370	24,370
(b) Operation of the MV Draoicht na Farraige in place of the Banrion Chonamara (Queen of Aran II) from Galway to the Islands for the Relevant Period	€3,005	€3,005	€3,005	3,005
(c) Loss of Profits resulting from non-operation of the MV Ceol and Farraige and the MV Draoicht na Farraige in the 47 day period 18.08.2005 to 03.10.2005: (the Relevant Period)	€84,942	Nil	€84,942	Nil
(d) Fixed Costs incurred on the MV Ceol nd Faraige while detained in the Relevant Period	€11,868	Nil	€11,868	Nil
3. Costs of Staff Diverted	€36,155	€36,155	€36,155	36,155
4. Administration and Travel Expenses	€10,293	€10,293	€10,293	€10,293
TOTAL	€249,825	€98,156	€233,085	98,156

Costs of Providing Bond

26. This head of claim has two parts: the commission of 2% per annum paid to the bank quarterly in advance amounting to the sum of €24,333 (as of the 31st October, 2011), and the "net interest cost" of €38,119. This latter sum is based on the fact that in order to obtain the bond, the company had to place the sum of €200,000 on deposit with the bank (AIB) with a lien over the amount as security for the bond; and on the proposition that had this deposit not been necessary the amount could have been applied to reduce the company's bank debt and thereby reduce its loan interest charges. The calculation is based upon the difference between the loan interest rate paid by the company for borrowings (4.125% for example, as at the 31st December, 2005) and the rate it earned on deposits of the bank, (1.5% as at that date). At the relevant time the company had long term loans from the bank which had financed the building of it latest vessels amounting to €5.203m at 31 October 2005 and €3.565m at 31 October 2010. (DHKN Report of 23/2/2012.)

27. The Court accepts (as, indeed, do the respective accounting experts for the parties) that the sum of €24,333 is recoverable under this heading. It is a direct and necessary cost to the plaintiff arising out of the detention of the vessel and out of the need to procure its release in order to minimise further continuing losses. The particular figure in the reports under this heading results from an apportioning of the quarterly fee to 31 October 2011 for the purpose of the report made up on 2 December 2011. On the assumption that the bond has remained in place since, it falls to be adjusted to take account of the quarters which have intervened on 1 January and 1 April 2012 so that the current sum will be €28,000. The Court also accepts that it was a necessary consequence of the terms upon which the bond became available that the bank required to take a lien over the counterpart sum of €200,000, thereby, in effect, depriving the company of the opportunity to make alternative use of that amount in its financial arrangements.

28. The defendants argue that the company did not in fact use the surplus cash to reduce by way of offset any interest it was paying to the bank on its loans. Mr. O'Malley gave evidence to the effect that during the years 2005-2010 the company had cash in its bank account as of the 31st October, ranging between €825,000 in 2009 and €343,000 in 2005, while its overdraft ranged between zero (in 2009) and €34,000 (in 2005). He said that there is "no evidence that surplus cash was used to reduce interest on interest bearing loans".

29. The purpose of an award of compensatory damages is to place a plaintiff as nearly as may reasonably be done in the position it would have been in had the wrong not been comitted. In the judgment of the Court the necessary evidential basis to sustain a claim under this heading has not been made out.

30. In his evidence Mr Hannon explained that he had based his calculation on his understanding that historically the plaintiff had financed the cost of its vessels by raising money from AIB and that the amounts of these loans over the years ranged between €4.5 million and €3 million. Because this sum of €200,000 was frozen by the bank's lien it was not available to the plaintiff to be applied as surplus cash which could be set off against these loans so as to reduce the interest rates payable. When questioned on the basis for this contention he said: "I have just discovered that there was a set-off arrangement with the bank for excess cash to be taken into account when the bank was calculating interest on its loans." He also conceded however that the term loans in question were apparently paid down in accordance with their terms.

31. In the judgment of the Court if this claim was to be sustained it would have been necessary to adduce appropriate evidence of the existence of such an agreement or arrangement with AIB at the time and of its having operated in practice. No such evidence has been adduced from the bank nor has there been any evidence from the plaintiffs own bank records of such a set-off having been applied at any point before the month of August 2005. It cannot therefore be said that this amount is recoverable in order to place the plaintiff in the position it would have been in had the sum not been rendered unavailabe to it for set-off use by the lien. The plaintiff has not proved that it was ever in fact in that position. It did have surplus cash at the end of the season but this was preserved to tide the company over the lean part of the year and there is no evidence of such use being made of cash in the past.

Lost Profit due to Non Operation of Two Vessels 47 Days

32. This claim is based on the fact that the permits for two vessels Ceol and Draiocht to operate from Rossaveel were revoked between the 18th August, 2005, and the 3rd October, 2005. The former vessel was detained and did not operate at all. The latter

was by decision of Mr. O'Brien diverted to Galway and operated from Galway during the period. Because three of the company's smaller vessels had to be substituted at Rossaveel to maintain services to the islands (including those which the company was contracted to provide,) additional costs over and above those normally attributable to operating Ceol and Draiocht were incurred. Because of reduced capacity for passengers, 23 additional sailings had be provided by these vessels thereby incurring extra costs in wages, fuel and so forth. To these items are added amounts claimed as loss of profits due to the non operation of the two vessels during 47 days when the permits were withdrawn and fixed costs incurred by MV Ceol while detained at Rossaveel.

33. As regards item 2 (a) in the table above, costs incurred in the non operation of the two vessels for 47 days, the initial figure of €41,110 in the DHKN report of 2/12/11 had been calculated by Mr. Hannon on the basis of the additional outgoings in fuel, wages and other costs including amounts attributable to the cost of a standby crew for 25 days. These calculations were disputed and revised by Mr. O'Malley in the report of the 16/12/11 giving a reduced figure of €24,370. Mr. O'Brien in evidence explained that his calculation had been based upon his recollection of the number days and personnel of the standby crew but conceded that he was unable to corroborate it by reference to documentation. On that basis he was prepared to agree Mr. O'Malley's reduced figure of €24,370.

34. The figure at item (b) of €3,005 was calculated by Mr. Hannon as the additional cost incurred in operating the MV Draoicht in place of Banrion Chonamara on the Galway Harbour route for eleven sailings based upon the additional fuel oil required- Draoicht has three engines while the MV Banrion Chonamara had only two. As a calculation, this amount has not been disputed by Mr. O'Malley. An issue clearly arises, however, was to whether such a claim is properly recoverable when the next item at (c) for loss of profits is also pursued.

35. The sum at c) of €84,942 is a claim for loss of profits due to the non operation of the two principal vessels during the 47 day period and is the larger of the two amounts which are fully disputed. The amount of this claim has been arrived at by comparing the average number of passengers carried on those vessels when operating between Rossaveel and the Aran Islands during the same periods of 2003 and 2004, with the actual passenger numbers carried in that period in 2005 using the smaller substitute vessels and operating the additional sailings. On this basis the average number of passengers in the period during 2003 and 2004 was 28,744, while in 2005 it was 24,025 a loss in passengers numbers of 4,719. On the basis of an average fare in October 2005, of €18, the loss in turnover is calculated as €84,942.

36. These variations in the number of passengers carried within any particular period over the summer season can obviously be influenced by a wide variety of factors including the weather and the buoyancy of the tourist season. In the particular period in question, however, there is obviously one major factor which may have caused or at least contributed to the particular result in 2005, independently of the detention of one of the plaintiff's vessels and the substitution of the three others. This is the fact that during the period in question a competing ferry service to the islands was operated from Rossaveel by Inishmore Ferries. This company had provided services on the crossing for only three of the relevant 47 days in 2004. The evidence given on behalf of the plaintiff indicated that a large part of its tourist traffic during the summer season was attributable to prearranged contracts with tour operators. This suggests passengers carried by the rival operator during 2005 were those provided by other tour operators not contracted to the plaintiff or by non-contracted "passing trade". In the judgment of the Court, it has not been established on the balance of probabilities that the passengers carried by the competitor in the relevant period of 2005 chose that competitor's vessel by reason only of the fact that the plaintiff's service was being operated by the substitute vessels. According to the evidence, the total number of passengers carried to the islands from Rossaveel in the relevant period in 2004, was 31,528 and 30,715 in 2005, a difference of less than 1,000 passengers. In 2005, the competitor is said to have carried 6,690 passengers. In the judgment of the Court it is unrealistic to suggest that the competitor would not have carried those passengers or a large proportion of them during that period in 2005 had the detention of the plaintiffs vessels not taken place. Thus, quite apart from the possible influence of other factors from one year to another, the mere presence of the competitor on the route and differences of departure timings and prices, together with, one assumes, prearranged contracts between the competitor and tour operators, suggest that a substantial part, at least, of the plaintiffs drop in passenger numbers might have occurred whether or not its vessel had been detained. In the judgment of the Court, this claim for loss of profits is not made out to the required standard of proof.

37. Under the heading of paragraph (d) in the table above, the sum of €11,868 is claimed for fixed costs incurred on the MV Ceol while it was detained during the relevant period. In the judgment of the Court, this amount is recoverable in that it represents the fixed costs incurred by the company in maintaining the MV Ceol throughout the year apportioned to the 47 day period during which the vessel was unable to operate and therefore to generate any income to defray those costs. As the Court has rejected the claim for loss of profits above, this claim is necessarily valid and this is so notwithstanding the fact that three other vessels replaced it and generated their own income for the company. Those vessels incurred their own fixed costs, which had to be defrayed out of the income generated by their operation of the substitute services.

38. Similarly, the Court considers that the amount of €3005 at item b) is recoverable as an amount that was reasonably incurred in minimising the losses on the Rossaveel routes by substituting the MV Draoict on the Galway service. Had these steps not been taken with the result that no service operated out of Rossaveel for 47 days, the losses caused by the detention and permit withdrawal would have been much greater.

39. The final heads of special damages relate to the costs of diverted staff in the sum of €36,155 and administration and travel expenses incurred by the company throughout the period from June 2005, to October 2011, in the sum of €10,293. The first of these figures is calculated by reference to the costs said to have been incurred by the company as a result of the fact that during that period, Mr. O'Brien and his daughter Ms Susan O'Brien, together with five other employees of the company were diverted from their normal work in the company in order to deal with the matters arising out of the defendant's claim against the company, the detention of the vessels and the subsequent litigation.

40. In the judgment of the Court this sum for staff costs is not recoverable. The plaintiff in this action is the company. The company has incurred no additional costs and has not sustained any specific loss as a result of the time devoted by the directors and employees in question to the crisis which undoubtedly faced the company. In response to questions from the Court, Ms. O'Brien confirmed that as a director and employee she was paid a fixed salary by the company irrespective of the duties upon which she might be engaged in any particular time throughout the year. Such salaries are the only remuneration taken from the company by directors, members and employees. It may well be that the entire crisis was a distraction for the directors and employees of the company over the period of detention of the vessel and thereafter and it may well be that extra hours had been worked by some of the individuals concerned and that other tasks therefore received less than the normal attention that would otherwise be given: nevertheless, in the absence of evidence that the company incurred any resulting loss, the Court is satisfied that this amount has not been proven as a special item of damage.

41. The final item is attributed to administration and travel expenses incurred in the company during the period of June 2005, to October 2011, as a result of the fact that directors and employees were incurring other non salary expenses in dealing with the

defendant's claims against the company and resulting litigation. The sum includes mileage expenses in attending consultations with legal representatives and attending the High Court. In the judgment of the Court this sum is an amount attributable to the litigation rather than a sum which qualifies as a loss which was reasonably foreseeable as a consequence of the civil wrong concerned. If this amount is properly recoverable it is recoverable as the costs in the proceedings rather than as a head of special damages.

42. Accordingly, so far as concerns the claim for special damages, the award of the Court will be for the sum of €67,243 made up as follows:

Cost of bond (commission) €28,000

Cost of non operation of two vessels in over 47 days €24,370

Cost of substitution of MV.Draoicht on Galway route €3,005

Fixed costs on MV Ceol €11,868

Total €67,243

Exemplary Damages
43. Although there has been some controversy in common law jurisdictions as to the circumstances in which exemplary damages may be awarded, since the speech of Lord Devlin in *Rookes v. Barnard* [1964] A.C. 1129, it is clear from subsequent judgments of the Supreme Court in this jurisdiction that those circumstances comprise at least those in which it is appropriate to punish the wrongdoer for the nature of the wrong or the manner in which it has been committed. As was pointed out by O'Flaherty J. in his judgment in *McIntyre v. Lewis* [1991] 1 I.R. 121, at p. 140, citing a passage from Salmon on *Torts* (19th Ed.) "Aggravated damages are given for conduct which shocks the plaintiff; exemplary damages are given for conduct that shocks the jury".

44. In what is probably the leading case in this area, *Conway v. I.N.T.O.* [1991] 2 I.R. 305, Griffin J. in the Supreme Court explained the purpose of such an award: "The object of awarding exemplary damages is to punish the wrong doer for his outrageous conduct, to deter him and others from any such conduct in future, and to mark the court's ... detestation and disapproval of that conduct".

45. Notwithstanding the controversy of Lord Devlin's speech, both O'Flaherty J. in *McIntyre v. Lewis* [1991] 1 I.R. 140 and Griffin J. in the *Conway* case adopted with approval three considerations formulated by Lord Devlin as to the exercise of the jurisdiction to award exemplary damages:

> "(1) The Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour.
>
> (2) The power to award exemplary damages constitutes a weapon which, while it can be used in defence of liberty, can also be used against liberty. The learned judge was there pointing out the need for restraint in the amount of damages that should be awarded.
>
> (3) The means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the Defendant's conduct is relevant."

46. Having regard to the status of the principal defendant in this proceeding and the basis upon which the plaintiff's claims were made, it is appropriate to note that one of the circumstances recognised an award of exemplary damages by Lord Devlin in *Rookes v. Barnard* was "oppressive, arbitrary or unconstitutional action by the servants of Government". In *Shortt v. Commissioner of An Garda Síochána* [2007] IESC 9, the Supreme Court indicated that exemplary damages can be justifiably awarded in cases of outrageous breach of the rights of an individual.

47. In the judgment of the Court, the facts of the present case, do not come within any of the circumstances in which an award of exemplary damages would be justified or appropriate. In practical terms, a mistake was made as to the basis upon which increased charges might be levied by use of the power to make a statutory order under the Act of 1968, with a view to increasing revenue from the uses of harbours and particularly from the use of the harbour by passenger vessels at Rossaveel. Clearly, the Minister's officials felt obliged to respond to the criticisms that had been made by the Comptroller and Auditor General of the deficit in the fisheries harbours accounts. (See paragraph 31 of the Court's judgment of 18th October 2011.) Having regard to the evidence of Mr. Ward on behalf of the Department, the Court is satisfied that the solution to the financial problem was formulated, adopted and subsequently enforced in good faith. There was nothing outrageous or reprehensible about the conduct of the Minister or his officials, such as would warrant that he be punished or that the Court go beyond the award of compensatory damages to the plaintiff in order to express its disapproval.

48. It is true, as submitted by counsel on behalf of the plaintiff, that the Court has found that the statutory power to make the 2003 order was exercised in the manner which had an effect on the plaintiff at Rossaveel which was unreasonable and oppressive. However, the fact that the Court has characterised the effect of the order in this way for the purpose of assessing whether it was beyond the competence in law of the Minister to make it, does not imply or entail that the Court was also considering that the conduct of the Minister or of his officials in the adopting the order was outrageous or oppressive in the sense in which those terms are used in the exemplary damages cases. The Minster's purpose was to seek to rectify an imbalance in the accounts of the fisheries harbours. He was mistaken in the way in which this purpose was pursued, but not, in the judgment of the Court, in a manner or to an extent which requires the Court to mark its disapproval by imposing a punishment. In the judgment of the Court, this is a case in which compensation of the plaintiff for the harm sustained is adequate to meet the requirements of justice.

49. In the judgment of the Court, no case has been made out that the adoption of the charges at Rossaveel now found to be *ultra vires* was undertaken by the respondent upon the basis of a calculation that the charges would yield more revenue than might be payable in compensation to the plaintiff. Having regard in particular to the evidence given on behalf of the respondent by Mr. Ward, it is clear that the Department acted in good faith in formulating, proposing and adopting the 2003 Order in the belief that it came within the delegated powers of the 1968 Act and with a view to solving an immediate financial problem which faced the Department. In the judgment of the Court no basis has been made out for the award of exemplary damages.

General Damages
50. Although the Court is disallowing several of the heads of special damages identified in para. 6 above, there is no doubt but that the detention of the vessel and the disruption of the plaintiffs operations as a result, caused the plaintiffs day to day business considerable disruption and a loss which is not easily quantifiable under a specific head of special damage. While the Court has held

above that the particular claim based upon the difference between the deposit interest earned on the amount of the bond and the alternative use that might have been made in reducing the company's indebtedness has not been made out, there can be doubt but that the freezing of that amount deprived the company of the possibility of making alternative use of it at the time. Similarly, while the amount may be unquantifiable, it is clear that prior to the commencement of litigation, the directors and some other employees of the company were diverted from their normal tasks in their dealings with the Department and in taking the steps necessary to obtain legal advice and safeguard the position of the company. The putting in place at short notice of the arrangements necessary to continue the Rossaveel services with substitute vessels and transfer the larger vessel to the Galway route involved extra administrative work in engaging and rostering crews and so forth. Furthermore, as explained by Ms O'Brien in evidence, the detention of one of the two best vessels and the forced removal of the other from the Rossaveel route was very probably a cause of commercial embarrassment and possible reputational damage especially with tour operators. In these circumstances an award confined to the proven heads of special damages set out above does not, in the judgment of the Court, represent adequate compensation to the plaintiff company for the disruption of its business and general loss of amenity. Accordingly, in the view of the Court, it is justifiable to supplement the award of special damages indicated above by an award of general damages in the sum of €25,000.

Competition Act Damages

51. As indicated in para. 5 above, the plaintiff has requested the Court to make an additional and conditional award of damages under s. 14 of the Competition Act 2002, in relation to the Court's findings made on the claim under s. 5 of that Act in the main judgment.

52. On the same basis as the Court indicated its views as to the claims under the Act of 2002, and only on that conditional basis; and in order should the occasion arise to obviate the need for the Supreme Court to remit the matter to the High Court, the Court will indicate that an award of damages under s. 14 of the Act of 2002, would have followed the same assessment of loss and the award of compensatory damages already set to above. As indicated, the Court considers that a case has not been made out for the award of punitive or exemplary damages and no different consideration arises for the purpose of s. 14 of the Act of 2002. It is possibly true that in the context of the private enforcement of the competition rules, the power to award exemplary damages may have the policy objective of enhancing deterrence and making the remedy attractive to undertakings, nevertheless the Court does not consider that it would be justifiable to award such damages unless there was present some element of conduct on the part of the infringing undertaking which called for sanction or particular condemnation. Unlike the cartel infringement of s. 4 of the Act which it is highly improbable an undertaking could commit inadvertently, the conduct involved in an abuse of dominance may be undertaken by an undertaking innocently without realisation for example of the existence of the position of dominance. Insofar as the Court has indicated that it considered that there had been an abuse of a position of dominance by an undertaking, it was one which arose out of the statutory position of the defendant and was not, as such, the consequence of the aggressive exploitation by a purely commercial undertaking of a position of market dominance. When considering claims brought against a public authority under s. 14 of the Act of 2002, based upon a claim of abuse of a dominant position attributable to the statutory status and functions required of the defendant, it is important in the view of the Court to bear in mind that the defendant's position is not equivalent to that of a public authority under Article 106 TFEU. Under that article particular criteria are defined which enable a balance to be struck by a court or competition authority between the application of the competition rule on the one hand the safeguarding of the public and legislative objective entrusted to the public undertaking in question on the other. Notwithstanding the absence of any equivalent provision in the Act of 2002, it falls to the Court to strike a balance between, on the one hand, the application of the competition rule contained in s. 5 and, on the other hand, the commercial task assigned to the undertaking in question by the Oireachtas in defining its commercial functions and purpose. In the Fishery Harbour Centres Acts, particular objectives were defined to be pursued in the public interest. The Court has found that in adopting the 2003 Order, the defendant has erred as regards the scope of the power conferred by those Acts in relation to the charges imposed at Rossaveel. The error was, however, made in good faith and the steps taken for enforcement on foot of it were not undertaken maliciously or recklessly. Accordingly, had the Court been required to rule on an application for damages under s.14 of the Act of 2002, its approach to the measure of damages would have been the same as it has adopted in this judgment on the claim based on the general and special losses suffered as a result of the trespass to the vessel and the withdrawal of the permits.

53. Accordingly the Court will order the defendants to pay the plaintiff the sum of €92.243 by way of compensatory damages.