Neutral Citation Number: [2007] IEHC 195

THE HIGH COURT

[2004 No. 7059 P]

BETWEEN

LETT & COMPANY LIMITED

PLAINTIFF

AND

WEXFORD BOROUGH CORPORATION, THE MINISTER FOR COMMUNICATIONS MARINE AND NATURAL RESOURCES AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 23rd May, 2007.

1. Introduction

1.1 The plaintiff ("Letts") has been involved in mussel farming in Wexford Harbour for very many years. They were at the forefront of developments in the 1960s and 1970s which led to a more commercial approach being taken to mussel farming. Up to that time mussels were harvested in a traditional fashion from long established mussel beds within the harbour. Thereafter the process moved to one whereby mussel seed was harvested (normally in the Irish sea), transported to Wexford Harbour and left there so as to enable the mussels to grow to a size where they were saleable.

1.2 Letts had traditionally used a number of mussel beds within Wexford Harbour which, it is common case, were among the more productive beds within that harbour. Over the last decade or so Letts have suffered two disruptions to those mussel beds. The first occurred as a consequence of significant bridge work in Wexford which had the effect of changing the water flows around some of Letts more attractive mussel beds. The consequences of those works were the subject of previous litigation brought by Letts which was compromised between the parties to that litigation. The issues which arose in those proceedings are, therefore, not strictly speaking relevant to the case which I have to decide. However those proceedings are of some relevance to certain of the issues which do arise in these proceedings.

1.3 This case concerns the second intervention which has had an effect on Lett's mussel beds. There had, for many years, been a plan to engage in a significant upgrading of the sewage facilities for Wexford town and its environs. It would appear that, historically, much of the waste from Wexford town emptied directly into the harbour through a large number of separate pipes. Ultimately it was determined that a modern and sophisticated waste treatment plant should be constructed. It would appear that that waste treatment plant was intended to, and did in fact, adopt modern best practice in relation to what is described as the tertiary treatment of waste. It was, however, necessary that the waste, when treated, would have to be discharged into the sea at some point. In that context the ultimate outfall point determined on was in the middle of one of Letts mussel beds. In circumstances which it will be necessary to analyses in some detail a so called "exclusion zone" was imposed which had the effect of preventing mussel harvesting within a distance of 500 metres from the outfall point. It is in relation to what it contends are losses stemming from the imposition of that exclusion zone that Letts brings these proceedings. In substance it is contended that Letts have a legitimate expectation that they will receive compensation and that they have, in fact, suffered loss as a result of the imposition of the exclusion zone.

1.4 Against that general background I should outline the principal issues which have arisen in the proceedings and which it is necessary to determine in the course of this judgment.

2. The Issues

2.1 The first issue which arises is as to whether, in all the circumstances, Letts have a legitimate expectation that they will receive compensation. Clearly if no such legitimate expectation can be said to exist then nothing further arises.

2.2 In the event that an entitlement arises, in principle, to the payment of compensation then there is a second issue between the first named defendant ("Wexford Corporation") on the one hand, and the second and third named defendants ("The State") on the other hand as to whose obligation it is to pay such compensation. It will be necessary to analyse, again in some detail, the relationship between Wexford Corporation and, in particular, the second named defendant ("The Minister"). However in general terms it is sufficient, at this stage, to note that, in order to construct the outfall pipe, Wexford Corporation needed a licence from the Minister because a significant portion of that outfall pipe was to be constructed on the foreshore and, therefore, in the jurisdiction of the Minister. In that context discussions took place between Wexford Corporation and the Minister concerning the terms of a foreshore licence. The licence as ultimately executed makes provision for the payment of any compensation arising from losses resulting from the foreshore licence to be a matter for Wexford Corporation and also contemplates the imposition of an exclusion zone. It will be necessary to refer to the relevant provisions of the foreshore licence in due course. However while it is true to state that the foreshore licence contemplates an exclusion zone, it is argued on behalf of Wexford Corporation that the exclusion zone ultimately imposed by the Minister was not the exclusion zone contemplated by the licence. In addition, it is said, correctly so far as it goes, that the operation of the plant itself has never given rise to any practical difficulties in terms of pollution or the like. In those circumstances it is said that any losses attributable to the operation of the exclusion zone that was actually imposed by the Minister is a matter for the State rather than for Wexford Corporation. In the event, therefore, that Letts are found to be entitled to compensation, then a second issue arises as to whether that compensation should be directed as against Wexford Corporation on the one hand or the State on the other hand.

2.3 Again on the assumption that Letts are entitled to compensation in principle, there are very serious issues between the parties as to whether Letts have established any loss and if so the quantum of such loss. Briefly put both Wexford Corporation and the State argue that no losses have been established. Subject to that it is also common case between the parties that the question of whether there has been loss, and if so the amount of any such loss, needs, in the events that have happened, to be considered in relation to two different periods. To understand this division it is necessary to note that a significant practical change to the situation on the ground occurred in the weeks immediately before this case was due to commence hearing in the summer of 2006. At that time and, it would appear, placing reliance on reports as to water quality prepared in the context of this litigation, the Minister decided that the exclusion zone was no longer necessary.

2.4 Not unreasonably up to that time Letts had formulated their claim on the basis that the exclusion zone was likely to remain in place indefinitely. Given that the exclusion zone was, in the period immediately prior to the hearing, in effect discontinued, it became clear that the basis for approaching any loss into the future had been radically altered. Because none of the parties had had a reasonable opportunity to deal with this aspect of the case as it then emerged (by reason of the lateness of the decision to discontinue the exclusion zone) the case proceeded in two segments with the evidence relating to loss up to the time of the removal of the exclusion zone being the only matter relating to compensation considered during the first segment. Thereafter, a second

hearing was conducted in relation to the question of whether there are any continuing losses attributable to the existence of the exclusion zone notwithstanding its discontinuance.

2.5 Therefore, in the somewhat unusual circumstances of this case, there is at least a possibility that there exists a significant difference as to the basis upon which it is necessary to consider losses up to the date of the discontinuance of the exclusion zone on the one hand and losses thereafter on the other hand. Certainly on the case made by Letts that differences is quite radical. There are, within both of those questions, a whole series of subsidiary issues of scientific fact and opinion which were canvassed in the course of the hearing and at least some of which will have to be resolved in order to determine the extent, if any, of the losses which may be said to flow from the imposition of the exclusion zone whether up to the time of its discontinuance or thereafter. I propose setting out those issues in context when approaching the overall issues of losses later in the course of this judgment.

2.6 However, as indicated earlier, the first question that arises is as to whether Letts have established a legitimate expectation to an entitlement to compensation in the first place. I turn, therefore, firstly to the factual background put forward on behalf of Letts for their contention of an entitlement to such an expectation.

3. Legitimate Expectation – The Facts

3.1 As indicated earlier Letts operate a shell fish business in Wexford Harbour. Letts have fished certain parts of that harbour (now described as Beds 30A and 30D) since Letts was incorporated in 1963. It would also appear that those areas had previously been fished by members of the Lett family since the latter part of the 19th century. It would appear that local fishermen in Wexford Harbour, (including Letts) engaged in discussions in the late 1960s as a result of which a system of allocating particular mussel beds to particular fishermen was agreed on. As part of those arrangements the mussel beds then known as the river mussel bed and now known as Beds 30A and 30D were agreed to form part of the allocation of Letts. Letts also had allocated to them certain other beds which are of some relevance to these proceedings in that they have the potential to have an impact on the calculation of losses. It will be necessary to refer to those additional beds in due course.

3.2 In the mid 1990s a formal legal system for the licensing of aquaculture was introduced in respect of Wexford Harbour. It would appear from correspondence between representatives of the Minister's Department and Bord Iascaigh Mara ("BIM") that the Department considered that the arrangements previously agreed between the fishermen had worked well and that the Department intended to have full regard to those arrangements in formulating any licensing scheme "so as not to lead to conflict among existing operators". The licences ultimately granted were by reference to beds which were marked out with a numbering scheme. There would appear, on the evidence, to have been a number of minor areas of difficulty encountered in reconciling the applications for formal aquaculture licences with the beds actually being used by the fishermen. In some cases it would seem that those difficulties simply came down to questions of the proper identification of the boundaries of the beds actually being used. In one or two cases there seems to have been a more substantial dispute. However none of those disputes are relevant to this case. In any event it is clear that, at least so far as the first ten year round of aquaculture licences are concerned, the Minister, in each case, gave a licence to fishermen to operate in respect of the beds which they had traditionally fished and which had been allocated to the fishermen concerned in the arrangements entered into the 1960s to which I have referred.

3.3 I am, therefore, satisfied as a matter of fact that, were it not for the events surrounding the construction of the waste water treatment plant and its outfall pipe, Letts would, as a matter of virtual certainty, have obtained aquaculture licences for a ten year period in respect of beds 30A and 30D.

3.4 Letts did, in fact, receive a ten year aquaculture licence in relation to four other beds which were not the subject of the exclusion zone. The precise status of the exclusion zone actually imposed was not entirely clear on the evidence. As part of the regulatory regime which exists in respect of mussel farming and harvesting Letts required a licence to move fish stocks when it wished to harvest mussel seed and deposit it in Wexford Harbour. Such a licence was obtained on 22nd June, 2001 which prohibited Letts from placing mussel seeds with 500 metres of what was then the proposed location of the sewage outfall pipe.

3.5 At one stage in the case it appeared that it might be suggested on the part of the State that no other or continuing exclusion zone did, in fact, exist. However it is clear from the evidence of Mr. Desmond Lett (which I accept) that he was, at all material times, of the belief that the exclusion zone referred to in the licence to move fish stocks was still in place. I am also satisfied that his belief in that regard was reasonable and was consistent with the communications between Letts on the one hand and officials in the Department on the other hand. Indeed a senior official in the Minister's Department gave very fair evidence in the course of which he accepted that it was reasonable for Mr. Lett to be of that belief. Furthermore there is correspondence between Letts on the one hand and the Department on the other hand which makes it clear that Letts were operating on the basis that an exclusion zone of 500 metres from the outfall point was in place. No replying correspondence casting doubt upon that assumption was made.

3.6 Finally the very decision to discontinue the exclusion zone which, as I have indicated, was taken in the summer of 2006, implies that there was something there to remove. In all the circumstances I am satisfied as a matter of fact that there was an exclusion zone in place from the 22nd June, 2001 until June 2006 which was described by reference to 500 metres from the proposed location of the sewage outfall pipe. While dealing with this aspect of the case I should also add that there was one minor dispute between the parties as to the precise positioning of the exclusion zone. While not of very great significance, that dispute has the potential to have some effect on the measurement of losses. That dispute stems from the fact that, it would appear, the outfall pipe as actually constructed had its outfall point in a slightly different position than the one indicated on the plans which were originally made available to Mr. Lett. In those circumstances Letts contend that the exclusion zone was as specified in the licence to move fish stocks and was therefore, 500 metres from the proposed outfall point as indicated on the maps then made available to them. There is no evidence that Letts were ever informed that the exclusion zone might be taken to have been altered slightly by reason of the difference between the actual outfall point and that which appeared on those maps. In those circumstances I am satisfied that it was more than reasonable for Letts to consider that the exclusion zone was as originally specified. I am, therefore, satisfied that the exclusion zone which was, in practice, in force during the relevant period is as contended for on behalf of Letts.

3.7 Letts had been involved in making representations to the relevant authorities (most particularly Wexford Council) when plans for the waste water treatment plant were in the course of formulation. Letts drew attention to the potential consequences for their mussel beds, and in particular mussel beds 30A and 30D, in the event that the plan to position the outfall point went ahead in the manner contemplated. While certain evidence was canvassed in the course of the hearing before me as to the possibility that other outfall points might have been chosen, I am not satisfied that it has been demonstrated that there was anything inappropriate in the choice of outfall point or, indeed, in the formulation of the plans for the waste water treatment plant as a whole. Indeed as no contemporaneous challenge to those plans was mounted it is difficult to see how any claim could now be based on an alleged unlawfulness of the plant itself or the location of the outfall pipe. That there was a need for such a plant is clear. That there would have to be an outfall point from the plant is also clear. It may well have been that other outfall points could have been considered but there is no factual basis for a determination that there was anything wrong with the choice actually made. In any event, as a

matter of fact, Letts did not seek to challenge the plan at the time when it was being put in place.

3.8 However Letts were able to take comfort from the fact that, well in advance of the commencement of works, the Minister had entered into the foreshore licence to which I have referred with Wexford Corporation. While the precise terms of that licence are of particular relevance to the issue which has arisen between the Minister and Wexford Corporation it is also important to note that clause 14 of that licence (which is dated 1st April, 2000) notes that:-

> "Any claims for compensation for proven loss of income shall be assessed and settled in accordance with an agreement which shall be entered into by the licensee with mussel fishermen prior to any discharge from the outfall pipe and diffuser".

3.9 Thus it was always clear to the mussel fishermen (including Letts) that a scheme of compensation was to be put in place for loss of income arising out of the impact of the waste water treatment plant on their operations. In that context it is important to note that Letts solicitors approached Wexford Corporation, by letter of 4th November, 2002, with a view to agreeing compensation for the losses suffered as a result of the location of the outfall pipe. This correspondence was replied to on 19th December, 2002 suggesting a meeting in early January of 2003. That meeting took place and it would appear that a detailed calculation of the claim made on behalf of Letts was presented to that meeting.

3.10 It would also appear clear that the details of that claim were forwarded to the Department at that time. It is, in my view, reasonable to characterise the discussions at that time as tri partite involving Wexford Corporation, the State and the mussel fishermen (and most especially Letts - who appeared to be most affected). Thereafter nobody, whether on the side of Wexford Corporation or the State appears to have progressed Lett's claim for compensation in any material way. For their part Wexford Corporation did not indicate that they took the view (which now forms part of their case) that it was not for them to pay compensation at all because the exclusion zone which was allegedly giving rise to the losses in respect of which Letts were making their claim was not the exclusion zone contemplated in the foreshore licence. Similarly the State does not appear to have taken any action to ensure that an agreement was in place between Wexford Corporation and the mussel fishermen in advance of the waste water treatment plant coming into operation. Clause 14 contemplated that such an agreement would be put in place before the treatment plant became fully operational and gave rise to discharges. In addition no one seems to have raised any queries either at the level of principle or at the level of calculation in relation to the claim put forward by Letts.

3.11 In reality matters were allowed to drift on for a very considerable period of time giving rise, when met with little progress on the matter, to these proceedings.

3.12 Before turning to the legal principles applicable to the question of legitimate expectation I should also note that Letts place some reliance on the fact that over the years very considerable support has been given by the Minister's Department to the various ventures engaged in, most particularly by Letts but also by other fishermen in Wexford Harbour, designed to improve the overall operation of the mussel farming enterprise. In that context it is said, and I accept, that the Department were aware that Letts, for their part, were making significant investments in their mussel farming enterprise in Wexford Harbour and indeed I am also satisfied that the Department encouraged those developments. Against that overall factual background it is now necessary to turn to the legal principles applicable.

4. Legitimate Expectation – The Law

4.1 In *Glencar Exploration v. Mayo County Council* [2002] 1 I.R. 84 Fennelly J. stated:-

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected annually or potentially in such a way that if forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

4.2 As to the nature of the representation and the relationship between the parties which may give rise to a legitimate expectation Fennelly J. also stated, in *Daly v. The Minister for the Marine* [2001] 3 I.R. 513 the following:-

> "Those who come within the ambit of an administrative or regularity regime may be able to establish that it would be unfair, discriminatory or unjust to remit the body exercising a power to change of policy or a set of existing rules, or depart from an undertaking or promise without taking account of the legitimate expectations created by them. However the very notion of fairness has within it an idea that there is an existing relationship which it would be unfair to alter."

4.3 It is also clear that the expectation that the representation will not be resided from must be reasonable. In that context, in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160 at 166, the Supreme Court had to consider a claim based upon legitimate expectation maintained by the applicant in that case on the basis of previous decisions which had been made affording him an entitlement to the repayment of excise duty based on medical and other criteria. Despite there being no change in circumstances a more detailed consideration was given to the applicant's case on the occasion in question and he was refused such an entitlement. The High Court had been satisfied (and the Supreme Court agreed) that on a proper application of the relevant criteria the refusal was correct. In addition it was held that the mere fact that the applicant had (wrongly) obtained a benefit in the past, could not give rise to a legitimate expectation that it would continue into the future.

4.4 There has been some debate as to the extent to which it can be said that a legitimate expectation can relate to a substantive benefit rather than to an entitlement to have a process conducted in a particular way. In *Glencar Exploration v. Mayo County Council* [2002] 1 I.R. 84 Keane C.J., (having cited the decision of Costello J. *Tara Prospecting v. Minister for Energy* [1993] I.L.R.M. 77) said the following:-

> "It has been said that this is an unduly restrictive approach and that there is no reason, in logic or principle, why the

doctrine cannot be successfully invoked so as to declare a person entitled, in an appropriate case, not simply to fair procedures, but to the benefit which he was seeking in the particular case. (See the decisions of the High Court in *Duggan v. An Taoiseach* [1989] I.L.R.M. 710 and *Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403). It is unnecessary, however, in the context of the present case to determine whether the more expansive approach suggested by those decisions is to be preferred to the view of the law taken by Costello J. in *Tara Prospecting Limited v. Minister for Energy*."

4.5 The reference to *Abrahamson* relates, in particular, to a passage at pages 422/423 of the judgment where, amongst other things, McCracken J. laid down as part of the overall principles the following two matters:-

> "3. Where the legitimate expectation is that a benefit will be secured, the courts will endeavour to obtain that benefit or to compensate the applicant, whether by way of order of mandamus or by an award of damages, provided that to do so was lawful.
>
> 4. Where a Minister or a public body is given by statute or statutory instrument a discretion or a power to make regulations for the good of the public or a very specific section of the public, the court will not interfere with the exercise of such discretion or power, as to do so would be tantamount to the court ? that discretion or power to itself, and would be an undue interference by the court in the affairs of the persons or bodies to whom or to which such discretion or power was given by the legislature."

4.6 It would seem, therefore, that even the expanded view taken by McCracken J. in *Abrahamson* was not such as would permit the doctrine to require that a statutory discretion be exercised in a particular way. In similar vein it has also been suggested that the existence of a policy does not carry with it an entitlement to prevent the policy maker from changing that policy. The doctrine of legitimate expectation may, however, require that the way in which policy changes are effected do not breach existing legitimate expectations. For example in *Glenkerrin Homes v. Dun Laoghaire County Council* (Unreported, High Court, Clarke J., 26th April, 2007) I was persuaded, on the facts of that case, that a policy adopted by a local authority could not be changed without reasonable notice.

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

4.8 The first issue which, therefore, arises is as to whether it has been shown that a public authority has made a statement or adopted a position amounting to a promise or representation. On the facts of this case it is contended that it was, at all times, made clear on the part of the Minister that appropriate compensation would be paid in respect of any losses deriving from the permission contained in the foreshore licence to allow the outfall pipe to discharge into the mussel beds in Wexford Harbour. It seems to me that the evidence establishes that the Minister did, indeed, at a minimum, adopt a position which amounts to a representation to the effect that an appropriate compensation scheme would be put in place to deal with any adverse consequences of permitting the waste water treatment plant to operate in that fashion. The first test is, therefore, met.

4.9 The second matter that requires to be established is that the representation or promise must be conveyed either directly or indirectly to an identifiable person or group of persons. Again it seems to me that this test is met. The whole purpose of putting in place a scheme of compensation was expressly directed towards dealing with the concerns of the mussel fishermen. Letts are, therefore, within a group of clearly identifiable persons to whom the promise was made.

4.10 The third test is that the promise or representation must be such as to create an expectation, reasonably entertained, that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. It is clear that the Minister was persuaded that, in balancing the various rights, entitlements and obligations which were at play in considering to grant the foreshore licence, it was appropriate, in the public interest, to give Wexford Council such a licence, provided that an appropriate compensation scheme was put in place. To resile from that obligation, certainly in the absence of some compelling alternative factor, would, in my view, be unjust. No basis of fact or policy for departing from that promise was advanced.

4.11 As pointed out above in the current state of development of the doctrine of legitimate expectation there are both positive and negative elements which need to be considered. So far as the positive elements are concerned it is necessary that the three tests referred to in *Glencar*, and which I have already dealt with, are found to be present. For the reasons which I have set out I am satisfied that those tests are met on the facts of this case.

4.12 It is, therefore, necessary to turn to those factors which may limit the operation of the doctrine of legitimate expectation even though the three positive tests may be found to be met. As is clear from *Glencar* there are limitations on the operation of the doctrine so that it cannot be invoked to require that a statutory discretion be exercised in any particular way.

4.13 While the original decision of the Minister in this case was to the effect that a foreshore licence should be granted (and was, thus, an exercise of a statutory power) it does not seem to me that the question of the grant or otherwise of compensation (or a promise to that effect) was, in reality, a decision within a statutory framework. There is no legislation providing for compensation in this area. The Minister, in deciding whether it is appropriate or not to ensure that compensation be granted, is not, therefore, in my view, exercising a statutory discretion. It is not, therefore, the case that the limitations on the doctrine of legitimate expectation which preclude the Minister from being bound to exercise a statutory discretion in a particular way, have any application to the facts of this case.

4.14 Furthermore it does not seem to me that the further limitation which requires that the executive be free to change policy has any application to this case. One might consider a case where a person or body in a position such as Letts but operating in a different harbour at a different time, were to place reliance on the fact that compensation had been made available to the Wexford mussel harbour fishermen as a basis for alleging a legitimate expectation that they too might be entitled to compensation. It might well be answer to any such contention to point to the entitlement of the Minister to change policy over time. However the representation in this case is specific and related to a particular incidence. It does not bind the Minister to ensure payment of compensation into the

future in respect of any other development within the Minister's control which might impact upon the same or other mussel farmers. It is a promise to ensure compensation in respect of the development of this waste water treatment plant. In my view, therefore, the legitimate expectation of Letts in this case is not in anyway affected by the undoubted entitlement of the Minister to change policy.

4.15 Finally attention is drawn on behalf of both defendants to the fact that, it is said, in none of the legitimate expectation cases to which reference was made at the hearing, was an award of damages made. The only case relied on on behalf of Letts in which damages were in fact paid was *Duff v. The Minister for Agriculture* [1997] 2 I.R. 22 in which, it would appear, damages were awarded to compensate for a Ministerial mistake of law. However it seems to me that, in truth, Letts case is not so much one in which damages are sought for breach of a legitimate expectation but rather that the legitimate expectation itself is to the effect that compensation should be paid. It is worth noting that the genesis of the doctrine of legitimate expectation in Ireland is frequently traced back to *Webb v. Ireland* [1988] I.R. 353 in which case the Supreme Court determined that the plaintiffs were entitled to compensation in respect of the finding of the Derrynaflan Chalice because of representations to that effect previously made. The plaintiffs in *Webb* were not awarded damages as such, but rather were entitled to the payment of a reward or compensation because the nature of the legitimate expectation itself was to that effect. It seems to me that a similar situation exists here. The nature of the representation or promise here is that compensation will be paid. To give effect to that representation or promise it is necessary that compensation be paid. Compensation is, therefore, the matter in respect of which the legitimate expectation exists. This claim is not, therefore, in my view, properly speaking, a claim in respect of damages for breach of legitimate expectation. I would leave to a case in which that issue specifically arises a consideration of the extent, if any, to which a party may be entitled to damages for a breach of legitimate expectation.

4.16 Before leaving this topic I should make a number of comments.

Firstly it does not follow from the views which I have expressed earlier that Letts necessarily had a legitimate expectation that they would be compensated independent of the representations made on behalf of the Minister in the lead up to the grant of the foreshore licence. Letts place reliance upon the fact, which is undoubtedly true so far as it goes, that the Minister and his officials were aware of, and encouraged, investment by Letts in the harbour. However the facts in *Hempenstall v. Minister for Environment* [1994] 2 I.R. 20 disclosed that the Minister in that case had permitted, to his likely knowledge, a situation to evolve whereby the value of taxi plates had soared to extremely high levels. It followed that the Minister had, at least tacitly, accepted a situation where he knew that persons were likely to pay very significant sums indeed for taxi plates but where the value of those plates would be decimated as a result of the reforms in the licensing system to be introduced. Nonetheless the Minister was entitled to change policy. I am not, therefore, satisfied that Letts had any necessary legitimate expectation to receive compensation simply because they had invested in the harbour. All investment is open to some risk including a risk that its value will be affected by subsequent regulatory developments and changes in policy. The fact of that investment, of itself, could not, without more, give rise to a legitimate expectation that compensation would be paid in respect of any measures which might affect the value of the investment.

4.17 However for the reasons which I have set out earlier, I am satisfied that the Minister, in substance, made a promise that compensation would be paid and that it would be unjust to allow the Minister to resile from that promise. It is on that basis that the legitimate expectation in this case arises.

4.18 Finally, and as a preliminary to going on to consider the issues which have arisen between the Minister and Wexford Corporation, it is also important to note that, almost by definition, the question of legitimate expectation arises outside circumstances where there are formal legal entitlements. It is, of course, true to say that the foreshore licence was entered into between the Minister and Wexford Corporation. The rights and obligations specified in that licence are, therefore, those of the parties to it. If the mussel farmers had been party, at that time, to an agreement which defined the legal rights and obligations of all of the parties, then it might well be that it would be difficult to invoke the doctrine of legitimate expectation to suggest that the rights of mussel farmers went beyond those which had been formally agreed. However, as I have indicated, where parties have legal entitlements it is unnecessary for them to invoke the doctrine of legitimate expectation. The doctrine would, therefore, be redundant, if it were confined to cases where parties had rights in contract, tort or the like.

4.19 The doctrine of legitimate expectation is often seen as the public law counterpart of the equitable doctrine of estoppel. Without necessarily pushing the analogy too far it is, in my view, apposite to note that the doctrine of estoppel is designed specifically to deal with a case where it is not considered equitable to permit a party to rely on what would otherwise be their formal legal entitlements. In similar vein the doctrine of legitimate expectation is designed to ensure that a public authority may be required to deal with matters in a certain way when it would not be just to permit the public authority to rely on its strict legal rights. The fact that Letts and the mussel farmers in general are not parties to the foreshore licence does not, in my view, therefore, affect their entitlement to invoke the doctrine of legitimate expectation. They are, however, entitled to place reliance on the existence of that licence as part of their evidence for suggesting that the Minister has made a representation amounting to a promise sufficient to trigger the operation of the doctrine. In the same context I should state that there is one aspect of the application of the doctrine which arises from the foreshore licence and to which it will be necessary to return after I have considered the position as and between the Minister and Wexford Corporation to which I now turn.

5. The issues between the defendants

5.1 In simple terms the case made on behalf of Wexford Corporation is to the effect that the exclusion zone put in place by the Minister was not the exclusion zone contemplated by the foreshore licence. The factual basis for that contention is relatively straightforward. The relevant provisions of the foreshore licence granted to Wexford Corporation on 1st April, 2000 are as follows:-

> "12. The Minister shall, following a scientifically based study, determine the initial shell fishing Exclusion Zone around the said outfall pipe and diffuser, a microbiological and viral monitoring programme to allow those exclusion zones to be suitably amended as necessary shall be carried out on behalf of the Minister. The costs associated with the said study and monitoring programme shall be borne by the Licensee.
>
> 13. No liability shall attach to the Minister in respect of any claim for compensation by mussel fishermen arising from the operation of this licence.
>
> 14. Any claims for compensation for proven loss of income shall be assessed and settled in accordance with an agreement which shall be entered into by the Licensee with mussel fishermen prior to any discharge from the outfall pipe and diffuser. In the event that the Minister is satisfied that the Licensee has made a bona fide effort to enter into such an agreement on reasonable terms and the mussel fishermen refuse to enter into such an argument, this condition shall not apply".

5.2 It would appear from the evidence that the terms of the foreshore licence were the subject of significant, protracted and, at times, difficult negotiations between Wexford Corporation and senior officials in the Minister's Department. Indeed matters went so far

that it would appear that direct contact between the Secretary General of the Minister's Department and the Secretary General of the Department of the Environment (which department has an overseeing role in respect of local authorities including Wexford Corporation) was required before the final terms of the licence were agreed.

5.3 In those circumstances it is very surprising indeed that aspects of the scheme so carefully negotiated and worked out as a result of those discussions, seems to have been effectively abandoned immediately after the licence was granted. As is clear from clause 12 of the licence, what was contemplated was that there would first be a study and as a result of that study an exclusion zone would be imposed. Further studies were to be carried out from time to time as a result of which the exclusion zone might be amended in the light of the further information revealed in the course of such studies. However it is absolutely clear that the exclusion zone contemplated in the licence was one that would be put in place after a study. It is common case that no such study was, in fact, carried out.

5.4 Instead it would appear that it was decided to adopt an approach based on the so called "precautionary principle". Under this principle it is regarded as appropriate to adopt a precautionary approach to environmental protection and safety so that until there is adequate knowledge of the possible consequences of a particular proposal, care requires to be exercised in the manner in which new processes or developments are carried out. In other words rather than adapting a view that the new process or development should go ahead because where is no evidence that the proposed measures will cause any harm, the view is taken that such proposals should not go ahead (or should, more likely, only go ahead under strict conditions and monitoring) until such time as it has been shown that they will not, in fact, do harm.

5.5 There can be little doubt but that it was reasonable to take such a view in all the circumstances of this case. The exclusion zone was, therefore, fixed as a precaution until such time as there might be adequate evidence to satisfy the relevant authorities that there was no danger from the operation of the waste water treatment plant.

5.6 That arrangement was not, however, what was agreed in Clause 12 of the foreshore licence. It seems to me, therefore, that Wexford Corporation are correct when they argue that the exclusion zone that was imposed by the Minister was not, in fact, the exclusion zone contemplated by the foreshore licence.

5.7 Clause 13 of the foreshore licence does, of course, provide that no liability should attach to the Minister in respect of any claims for compensation by mussel fishermen "arising from the operation of this licence." It seems to me that such claims could, in theory, have arisen in one of two ways. Firstly the actual operation of the waste water treatment plant and the discharge from it on to the mussel beds could, of itself, have given rise to damage to the mussel beds giving rise, in turn, to a claim in compensation. For example the waste water treatment process might not have worked as expected, and damaging effluent could have been discharged onto the mussel beds with consequent loss. It is clear that any such losses were not for the account of the Minister. Similarly it seems to me that the combined effect of Clauses 12 and 13 make it clear that any losses deriving from the operation of the exclusion zone contemplated by Clause 12 were also a matter for Wexford Corporation.

5.8 However it seems to me that losses derived from the imposition by the Minister of an exclusion zone other than the exclusion zone referred to in Clause 12 (or one imposed to meet the consequences of an actual failure in the plant) cannot be said to be losses arising from the operation of the licence.

5.9 It seems to me, therefore, that Wexford Corporation are correct in their contention that the licence does not impose upon them an obligation to pay any compensation which arises from the imposition of an exclusion zone outside the terms of the licence. For the reasons which I have set out I am satisfied that the exclusion zone that was in fact imposed was outside the terms of the licence. For those reasons it does not seem to me that Wexford Corporation have any liability to pay compensation in this case. There was no suggestion that the operation of the plant itself gave rise directly to any losses.

5.10 However before leaving this aspect of the case a number of additional matters need to be addressed. Firstly it is important to note that Clause 14 contemplated that there be put in place an arrangement between Wexford Corporation and the mussel fishermen prior to the commencement of operation of the waste water treatment plant. As indicated earlier Letts put in a claim for compensation, which claim suggested a basis for the calculation of loss. It is clear that that claim was based on the fact of the existence of that exclusion zone. No one in Wexford Corporation at that time took the trouble to tell Letts that they should not be looking to Wexford Corporation for compensation in respect of that exclusion zone because it was not the exclusion zone contemplated in the foreshore licence. Neither, it should be said, did anyone in Wexford Corporation, or indeed anyone within the Department who had knowledge of the claim, indicate to Letts they were not going about things in the right way or that the basis upon which they putting forward their claim was misconstrued.

5.11 Also there was never any question of the proviso contained in the last sentence of Clause 14 coming into operation. That proviso, in effect, permitted the Minister to allow the waste water treatment plant to open notwithstanding the absence of an agreement between Wexford Corporation and the mussel fishermen on a scheme for compensation, where the Minister was satisfied that Wexford Corporation had acted reasonably in negotiations but that the mussel fishermen had not. In this case there were no negotiations. Letts put in a claim and the matter was let lie without rejection, counter offer or indeed even discussion for a considerable period of time during which the Minister clearly allowed the waste water treatment plant to commence operations.

5.12 In this respect also it has to be said that it is difficult to understand why carefully drafted and considered formal legal documents are put in place and then ignored. The Minister put in place a foreshore licence which contemplated one type of exclusion zone. For reasons which are undoubtedly understandable he then put in place a different type of exclusion zone. However no one seems to have paid attention to the fact that it might have been appropriate to revisit the terms of the foreshore licence given that the exclusion zone that had now been put in place was different from that contemplated in the licence. In addition neither the Minister nor Wexford Corporation seems to have given significant attention to what was contemplated in Clause 14 about an agreement for a compensation scheme being in place prior to the operation of the plant. No evidence was tendered that provided any meaningful explanation as to how a licence which has come about as a result of protracted negotiations was, in at least those two important respects, completely ignored thereafter.

5.13 I indicated earlier that I would, when I had considered the issues as and between the Minister and Wexford Corporation return to one aspect of the question of the legitimate expectation of Letts. It is clear that the foreshore licence contemplated that mussel fishermen would be compensated for any "proven loss of income". It does not seem to me that it would be just to allow the Minister to resile from the implicit promise contained in that document and deriving from the discussions between the parties at or around that time, just because the Minister chose to put in place, for reasons which were never fully explained, an exclusion zone which went outside the terms of the foreshore licence itself.

5.14 In those circumstances I am satisfied that Letts have established an entitlement to a legitimate expectation that they would be paid compensation for any "proven loss of income" and that that legitimate expectation lies against the Minister. I am not satisfied that any liability to pay such loss has been established as against Wexford Corporation. It follows that it is necessary to turn to the question of the calculation of such loss and to award any sum which may have been shown to have been lost as against the Minister alone. I, therefore, turn to the question of the calculation of the appropriate amount of compensation.

6. Compensation

6.1 Before going on to consider the detail of the claim made on behalf of Letts for compensation a number of background matters of fact which are not in significant dispute need to be set out for the purposes of understanding the way in which that claim is made and also for the purposes of understanding the very significant issues which have arisen between the parties as to the proper calculation of that compensation.

6.2 I have already noted earlier in the course of this judgment that it is necessary to divide the question of the assessment of compensation into two periods being the period up to the decision taken in June 2006 by the Minister to discontinue the exclusion zone and the period thereafter. I also noted that it is contended on behalf of the State (and was, indeed, contended on behalf of Wexford Corporation) that no losses have in fact occurred in either period. The State and Wexford Corporation adopted a joint approach to resisting the quantum aspect of Lett's case.

6.3 It is appropriate to start with a description of the way in which Letts conducted their business. For many years it is clear that Letts adopted a practice of dividing the totality of the mussel beds available to them in Wexford Harbour into two parts. The two parts operated on a staggered basis which was necessitated by reason of the seasonality associated with the laying of seed, its harvesting and the time taken for the seed to grow to a sufficiently mature state to be harvested. These features of the mussel harvesting business led naturally to a two year cycle in respect of any mussel bed. For that reason there was obvious sense in operating two separate areas on a staggered basis so that in each alternate year seed was laid in one set of beds and harvested in the other with the process being reversed in the second year.

6.4 Against that background historical figures concerning the level of mussels laid and harvested by Letts going back over a number of years were established in evidence. While there are some issues between the parties as to individual items of fact within those figures and also as to some areas of interpretation, it is fair, in my view, to describe those facts as being largely uncontroversial.

6.5 While it will be necessary to analyse those records in greater detail, for present purposes it is sufficient to note that the financial year of Letts has ended on 31st March in each year at all material times. It is common case that the mussels harvested in any financial year would have been laid in the calendar year two years before the March end date of the relevant financial year. Thus, for example, seed harvested in the financial year ending the 31st March, 2004 would have been laid in the calendar year 2002. For quite some time the staggered pattern to which I have referred resulted in seed from mussel beds 30A and 30D being harvested in financial years ending in an even number while mussels in beds 30E and 30F were harvested in financial years which ended in an odd number. As pointed out earlier the exclusion zone affected areas 30A and 30D. While it did not cover the entirety of those areas it did have a very significant effect indeed on the ability to use those areas in any effective manner.

6.6 It will, therefore, be seen that the direct effect of the presence of the exclusion zone was to prevent a significant part of areas 30A and 30D from being used but only in practice, so far as harvesting was concerned, with an effect on production in every second year given that those areas would only have generated harvested mussels in every second year. In practice, therefore, it is contended that the existence of the exclusion zone prevented the laying of seed in the calendar year 2002 (on the evidence it would almost certainly have been extracted from the sea and re-laid in the period June to October 2002) and the consequent harvesting of that seed in the financial year ending 31st March, 2004. Again it would appear that the relevant harvesting would have occurred after approximately September 2003 but before the end of the financial year. Up to the time when it became clear that the exclusion zone was discontinued, Letts had formulated their claim based on an estimate of existing losses and projected losses into the future for five seasons being the seasons in which harvesting would have taken place in the financial years ending 31st March in respectively 2004, 2006, 2008, 2010 and 2012.

6.7 When it became clear that the exclusion zone had been discontinued it followed that losses on the basis of the presence of an exclusion zone into the future were not going to occur. On that basis alternative evidence was subsequently presented on behalf of Letts to suggest that very considerable sums indeed would now need to be expended for the purposes of restoring the relevant mussel beds to the state in which they were prior to the exclusion zone being established. The extent to which any such works are necessary was a matter of very considerable contention. At the level of principle the argument put forward on behalf of Letts was that one of the consequences of the existence of the exclusion zone was that the relevant mussel beds were neither laid nor harvested for a four to five year period. As a result of that it is said that there was a build up of silt and other materials which rendered most of the beds incapable of effective economic use without remediation. Therefore, it is said, it follows that the cost of that remediation necessarily flows from the existence of the exclusion zone.

6.8 The issues which arise in relation to the calculation of compensation are many. So far as the questions concerning loss from the time of the removal of the exclusion zone are concerned, these turn on whether and if so to what extent, remedial works may be required which can be attributable to the existence of the exclusion zone.

6.9 So far as the earlier period is concerned there are very serious contentions between the parties as to the extent to which Letts did, in fact, suffer any loss to date. I will shortly turn to the detail of those arguments. However they raise one unusual and major issue which it is necessary to address at the beginning.

6.10 In the events that have happened it would seem that the total level of mussels harvested by Letts since the exclusion zone came into being has not fallen short of the amount of mussels that had, historically, been harvested, at least when one takes into account an appropriate allowance for the effects of the bridge works to which I referred earlier and in respect of which Letts have already been compensated.

6.11 The fact that there has not, therefore, been a drop off in the level of production as a result of the existence of the exclusion zone allowed the defendants to suggest that there had, in reality, been no loss. However the case made by Letts is more subtle. It is said (and so far as it goes I accept that the evidence establishes this) that it has now become clear that the beds in question are capable of a much higher level of mussel production than had previously been thought possible.

6.12 I am satisfied on the evidence that it is the case that the mussel beds concerned are, in fact, capable of a significantly higher level of production than that which had been achieved up to the imposition of the exclusion zone. I am again satisfied on the evidence that a number of matters led to this discovery.

6.13 Firstly, I accept the evidence of Mr. Desmond Lett to the effect that he attempted to place a higher level of mussel seed in the remaining beds within areas 30A and 30D to see if he could compensate for the production lost by reason of not being able to use that part of those beds contained within the exclusion zone. That experiment proved successful and demonstrates an ability on the part of beds 30A and 30D to produce a higher level of production than had previously been achieved.

6.14 Secondly, I accept the evidence to the effect that advice was given to mussel farmers generally to attempt to increase the level of production from individual beds so as to make the activity generally more economic.

6.15 Finally, it also seems clear that the existence of these proceedings has led to a much greater level of knowledge being available concerning the mussel beds within Wexford Harbour and in particular beds 30A, 30D and the other beds licensed to Letts. It could reasonably be said that no other part of the foreshore in the State has been the subject of such minute examination by a variety of experts. The level of knowledge of those beds and their capabilities has, undoubtedly, increased significantly by reasons of the preparation of the various expert reports which were required to deal with this litigation.

6.16 From the above factors it clear that, at least in part, the increased knowledge which has led to the realisation that the relevant beds are capable of a higher level of production stems from the very fact of the imposition of the exclusion zone itself. Furthermore, if there had been no exclusion zone then it may well be that the pressure on Mr. Desmond Lett to seek to achieve a higher level of production from the other parts of beds 30A and 30D would not have occurred and he might not, then, have learned, or at least learned as quickly, of the capability of the beds to sustain a higher level of production. In addition, as I have pointed out, there is no doubt but that the level of scientific knowledge now available about Letts beds would not be available were it not for these proceedings.

6.17 Taking a very strict view of the principles applicable to the calculation of compensation it might, on one view, be argued that the court should disregard any additional capability of production which could be said to be attributed to an increase in knowledge or understanding which in turn derived from the existence of the litigation in the first place. Put simply it might be argued that in the event that there had been no waste water plant and no outfall pipe, Mr. Lett might not have learned of the capability of the beds to produce a higher level of production. While there is, in strict theory, an argument to that effect it does not appear to me that it would give rise to a just result. The reality is that Mr. Lett did, in fact, learn of the higher production capabilities of his beds. It would, in my view, be unjust in principle to deprive him of the benefit of that knowledge just because it may, at least in part, have only come about because of the litigation.

6.18 On the other hand, it is clear that the knowledge as to the increased production capabilities of the relevant beds did not come about instantaneously on the imposition of the exclusion zone. It seems to me, therefore, that I should, as a matter of principle, approach the calculation of loss on the basis that Letts would have realised, over time, the increased capabilities for production of the beds and would, therefore, in the absence of the exclusion zone, have attempted to exploit those beds to a greater extent than they had up to the imposition of the exclusion zone. The extent and timing of any such likely increased exploitation which would have occurred had there not been an exclusion zone is necessarily a matter of estimation and judgment in the light of the evidence as a whole. I propose dealing with that estimate in the context of the overall evidence concerning the production which might be said to have been lost by reason of the existence of the exclusion zone. It should also be noted that the defendants suggest certain factors which, it is said, should lead the court to the view that Letts either could not or would not have, in fact, raised production. Having dealt with the issue of general principle I now turn to Lett's claim for losses to date.

7. Losses to Date

7.1 The way in which Letts put forward their claim is relatively straightforward. The total size of areas 30A and 30D was calculated as amounting to 85.77 hectares. It was common case that 14.78 hectares of that area had been subject to damage in 1995/96 as a result of the bridge works to which I have referred. The useful remaining area within areas 30A and 30D was, therefore, in my view, correctly asserted by Letts to be 70.99 hectares.

7.2 As calculated by Letts the portion of beds 30A and 30D covered by the exclusion zone is 45.11 hectares. For reasons which I have already dealt with I am satisfied that that is a correct estimate of the size of the exclusion zone that Letts were entitled to believe was in place. I propose approaching the case on that basis rather than on the basis if the slightly smaller exclusion zone that would have derived from a calculation based on 500 metres from the outfall point as actually constructed. I am satisfied that the figure calculated by Letts is, therefore, correct.

7.3 The case made by Letts started with a calculation of the production per hectare achieved in the non-excluded portion of 30A and 30D in the 2002 – 2006 period. It was, therefore, assumed that a similar level of production could have been achieved in the excluded portion of those beds. On the basis of such a simple calculation, an amount of lost production was arrived at. The price that could have been obtained for that alleged lost production was then calculated and certain additional costs of production were factored in to reach a figure as to the net loss for each season.

7.4 The calculation as finally presented on behalf of Letts was in the following form. I set out the calculation as claimed in respect of the harvesting year 2005/6. A similar calculation was also provided in respect of the harvesting year 2003/4.

7.5 Harvesting Season 2005/6

Tonnes Lost:

45.11 Hectares (number of hectares) X 39.04 tonnes

(average production per hectare) X 1 season – 1761 tonnes

Sales Value per tonne:

€1,050

Gross value of lost tonnage in one season:

1761 X €1,050 = €1,849.050

Less variable cost increases:

Seed requirement

1761 tonnes/0.83 yield = 2122 tonnes

Estimated Seed Price €311 Per Tonne

2122 X €311 €659,942

Additional Dredger costs in planting and fishing

Fuel

Add 25% of 2005/6 costs €3,130

Manpower

Provide 15% of 2005/6 costs for O/T €16,501

Additional Delivery costs

Freight out –

@ €1675 per load (in 2005/6) of

average 16.4 tonnes (net)

1761 X €102 per tonne = €179,622

Bags

1761 X €0.50 € 880

Pallets

1761 X €4 € 7,044

Insurances

Marine: 0.0021% of €1,849,050 (sales value) € 3,883

Credit: 0.0029% of €1,849,050 € 5,362

Total Variable Cost Increases €876,364

Loss €972,686

7.6 Before going on to analyse those figures it is important that I touch upon a question which loomed large in the course of both the evidence and the submissions, that is to say issues concerning the credibility of the case being put forward on behalf of Letts.

7.7 It is correct to state that the claim as made by Letts went through a number of different variations between the claim as originally presented to Wexford Corporation prior to the commissioning of the waste water treatment plant and the end of the case. I have already touched upon the fact that there is an entirely reasonable and appropriate explanation for the first change in the basis of the claim. That stems from the fact that the original claim as presented to Wexford Corporation was an estimate in advance of any experience on the ground while the subsequent claims sought to incorporate that experience.

7.8 As is normal practice in the Commercial Court the parties in the course of the pre-trial process exchanged expert reports. It was clear from the expert reports filed on behalf of the defendants (and in particular the report of Mr. Grant, the defendants' financial expert) that criticism was directed towards Letts methodology by reason, amongst other things, of an alleged failure to have proper regard to the extra costs that would have been involved in achieving the additional production on which the claim as to loss was predicated. It is clear that Letts experts took that criticism on board and attempted to incorporate an appropriate allowance for such additional costs into further figures which were then produced. Far from being a legitimate matter of criticism it seems to me that it was entirely appropriate that Letts experts should take that course of action. Part of the purpose behind the exchange of expert reports in advance of a hearing is to enable the experts to consider the competing point of view of their opposite number and, where appropriate, to take on board, in whole or in part, any such competing view. I cannot, therefore, see that there is anything inappropriate in the further evolution of Letts figures designed to meet the legitimate concerns expressed by the defendants' experts to the effect that insufficient regard had been paid to additional costs.

7.9 In addition it was, of course, necessary to recast Letts claim in the light of the developments concerned with the discontinuance of the exclusion zone. All in all I am not satisfied that any credible reason has been established for suggesting that Letts claims were not at all material times bona fide made. That is not to say that they are necessarily correct. It is simply to record that I am not satisfied that it has been shown that the claims lacked credibility. On the contrary I am satisfied that a reasonable explanation for each of the alterations which occurred in the claim as put to the court has been given.

7.10 Finally I should note that the claim in its final form (as for example shown in the Table at para. 7.5 above) had regard to the fact that the losses to date were, by that time, confined to the two harvesting years 2003/4 and 2005/6.

7.11 I will return in due course to the harvesting year 2005/6. However different considerations, it seems to me, arise in relation to the harvesting year 2003/4. It will be recalled that the mussel seed harvested in that year would have been required to be sourced and laid during 2002. There is no evidence to suggest that, as of that time, anyone in Letts was, in fact, aware of the potential for a higher level of production in the mussel beds and in particular mussel beds 30A and 30D. It is, of course, the case that it was the laying of a higher level of seed, in that season, in the remaining portion of beds 30A and 30D (i.e. the portion not covered by the exclusion zone) and the subsequent positive results that flowed from it, that led to the increased knowledge as to the productive capacity of the beds thereafter. However it seems to me to be most unlikely that Letts would have chosen (in the absence of an

exclusion zone) to suddenly move from a well established level of production to one which would have been almost double that which had historically been the case without having at least some clear evidence that such a higher level of mussel seed laying would bear dividends. I have set out, at para. 8.1, a conclusion as to the approach which would have been likely to have been adopted for 2005/6 by Letts. Those considerations apply, to a much more extreme extent, to 2003/4.

7.12 In all the circumstances it seems to me that it is more appropriate to approach the harvesting year 2003/4 on the basis that Letts suffered a loss of an opportunity to exploit mussel beds 30A and 30D in a more intensive fashion than had up to then been the case. Having regard to the fact that no information would have been available in advance of the laying of seed for that season which would have supported the likelihood of such significantly increased production being available, it does not seem to me that that loss of opportunity can be rated too highly.

7.13 As is clear from the decision of the Supreme Court in *Philip v. Ryan* (Unreported, Supreme Court, Fennelly J. 17th December, 2004) a court faced with attempting to assess the consequences of hypothetical events, is required, as a first step, to asses the likelihood of the event occurring. In the course of his judgment in *Philip* Fennelly J. quoted with approval from the speech of Lord Reid in *Davies v. Taylor* (1974) A.C. 207 in the following terms:-

> "When the question is whether a certain thing is or is not true – whether a certain event did or did not happen – the court must decide one way or the other. There is no question of chance or probability. Either it did or did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen.
>
> But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All you can do is to evaluate the chance. Sometimes it is virtually one hundred per cent; sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of fifty one per cent and a probability of forty nine per cent."

7.14 In *Philip* the court was concerned with the consequences of a failure to advise the plaintiff in that case correctly, in a medical context, and the consequential possibility that, having been properly advised, different decisions might have been taken. It was, on the facts, far from certain that a different decision would have been taken had proper advice been given. However the court considered that the plaintiff was entitled to damages for the loss of the opportunity to make a properly informed decision but was, in approaching the question of damages, also concerned with determining the likelihood, in all the circumstances, that anything different would have happened in the event that proper advice had, in fact, given.

7.15 Thus in a case where it is virtually certain that a party would have taken an alternative course had it not been for the compensatable wrong, then the court should assess damages at or close to the full value of the claim based on the assumption that the alternative course would have been adopted. Some discount perhaps might be allowed to reflect the small possibility that the alternative course might not have been adopted. At the other end of the scale, where it would appear most unlikely that anything different would have happened in the event of the wrongdoing not having occurred, then the damages are likely to be small or even nominal. While the speech of Lord Reid speaks of past and future events it seems to me that there is, in reality, included within the "future" events, hypothetical questions as to what would have occurred post the wrongdoing but which would, in fact, have occurred (if they were to be assumed to have occurred) prior to the case coming on for hearing. Such issues are equally hypothetical as questions as to what would happen in the future. In other words what someone would, in fact, have done had it not been for the wrongdoing is every bit as much a hypothetical question as what they will do in the future in the light of the wrongdoing.

7.16 Applying that principle to the facts of this case it seems to me that, in relation to the season 2003/4, I need to consider the extent of the likelihood of Letts having achieved any significant increase in production were it not for the imposition of the exclusion zone.

7.17 For the reasons which I have set out it seems to me that it is highly unlikely that Letts, in that season, would have done more than slightly increase (if at all) the level of production given the absence of any real data from which they could have inferred, at the time of laying the relevant seed, that an aggressive attitude to production was likely to be successful.

7.18 In all the circumstances it seems to me to be appropriate to assess the loss of opportunity for that season in the sum of €50,000.

8. The Season 2005/6

8.1 However a different situation had come about by the time the 2005/6 harvesting season had arrived. By the time seed was laid for that season (in 2004) there was a significant volume of additional data available which suggested that a much higher level of production could, possibly, be achieved. For the reasons which I have analysed above, it would not seem to me to be just to disregard the fact that, in reality, Letts had that additional knowledge by the time that decisions would have been made in 2004 leading to an effect on the production season 2005/6. However, at the same time, it does seem to me to be unrealistic to assume that Letts would, in one harvesting season, have been willing, or have found themselves in a position, to move to the maximum level of production. In coming to that view I have had regard, firstly, to the fact that the knowledge as to the production capabilities of the mussel beds concerned was only emerging at that time. I have also regard to the fact that, while progressive and innovative over the years, Letts policies do not convey to me a sense of a company that was necessarily at the very high end of the risk taking spectrum in commercial terms. As will be seen from the table above the maximum possible loss attributable to potential production in the season 2005/2006, in terms of the gross amount of the tonnage lost was, based on 1,761 tonnes lost. While it is impossible to make any detailed calculation of the amount of additional tonnes that might have been considered by Letts to be prudent to attempt to produce in that season (from beds 30A and 30D, and in the absence of an exclusion zone), it is, in my view, appropriate to consider the maximum tonnage that might have been attempted to be approximately 850 tonnes. It will also be necessary to address in due course a number of issues raised which suggest further limitations on that figure.

8.2 I should, at this point, emphasises that while very significant attacks indeed were mounted by the defendants against the assumptions made in Letts claim as to the amount of lost tonnage, there was no major attack on the details of the costs figures that were included in the final version of Letts claim and which are set out in the table referred to earlier in this judgment. Taking the bottom line from that table, reducing the number of tonnes of production said to have been lost and making an appropriate allowance for the fact that the additional costs attributable to the extra production may have been slightly understated, I have come to the view that the sum attributable to the maximum amount of possible lost production for the harvesting year 2005/6 is €450,000.

8.3 While it would be possible, in theory, to attempt what would superficially be a more mathematically rigorous means of calculating

both that sum and, indeed, the sum of €50,000 which I have determined as appropriate for the earlier harvesting season, it seems to me that such an exercise would lend a false air of scientific rigour to the process.

8.4 These losses are quite hypothetical. Predicting what would have happened during the relevant harvesting season in the absence of an exclusion zone is highly problematic. The possibilities vary widely and it is only possible to estimate, as best one can on the evidence, the most likely scenario. In those circumstances a detailed calculation resulting in a very specific figure would falsely suggest that the losses were capable of precise calculation.

8.5 I should now deal with a number of other issues that arose in the course of the hearing, and which, if correct, would lead to a conclusion that even the level of additional production on which the above figures are predicated was either not possible or would not have been attempted.

8.6 Much evidence and argument was addressed to the question of availability of mussel seed. It was suggested by the defendants that a significant limiting factor on the ability of Letts to increase production would have been a lack of supply of mussel seed. There can be little doubt but that some difficulties have been encountered in obtaining mussel seed in the traditional manner from the Irish Sea. However Letts tendered evidence, which I accept, to the effect that there is a growing possibility of so called "rope mussels" being made available as mussel seed. Rope mussels are mussels grown on ropes (as the name implies) which can be permitted to grow to maturity on the rope and harvested by the aquaculturist concerned. As an alternative the rope mussel grower may chose to spread his risk by selling some of his rope mussels at a stage where they are suitable to be transported to mussel beds such as Wexford. While some doubt was cast upon the stability of that available source, I am satisfied that it has the potential to make a significant contribution to the availability of mussel seed for companies such as Letts.

8.7 It may well have been the case that it would have been necessary, in the event that I was required to calculate loss into the future on the basis of the existence of a continuing exclusion zone, to take a view as to whether, and if so to what extent, the difficulty in sourcing mussel seed might have been a limiting factor on the overall ability of Letts to further increase and sustain their production.

8.8 If that had been the case I would have come to the view that there might well have been difficulties in Letts increasing their production by more than 1,250 tonnes per annum and that any estimate of the loss of future income that involved a contention that production could have grown by more than that amount would have to have been discounted to reflect the risk that such additional production could not be achieved by reason of the absence of sufficient mussel seed.

8.9 However, as is clear from the calculations set out above, same are not based on a suggestion that Letts would have produced anything more than 850 tonnes extra in any of the two harvesting seasons which I now have to consider. I am not satisfied that the evidence supports the view that Letts would have had any difficulty, attributable to the availability of mussel seed, in achieving that level of increased production.

8.10 Secondly a lot of evidence and argument was directed towards the question of the general profitability of Letts mussel seed business. There is no doubt that in most years in the recent past Letts traded at a loss.

8.11 The following table shows the profits and loss for the various financial years between 1996/1997 and 2002/2003

Year ended 31 March 2003 – Loss (€246,461)

Year ended 31 March 2002 – Profit (119,252)

Year ended 31 March 2001 – Loss (600,428)

Year ended 31 March 2000 – Loss (€417,773)

Year ended 31 March 1999 – Loss (€473,256)

Year ended 31 March 1998 – Loss (923,493)

Year ended 31 March 1997 – Loss (€504,909)

8.12 In addition the actual profit before tax and before exceptional items and inter company adjustment for the year ended 31st March, 2004 amounted to a profit of €10,448. It is clear, therefore, that, as a matter of fact, Letts have made significant losses in recent years. It is not clear as to the extent to which those losses could be said to be attributed to exceptional events (including the effect on their mussel beds of the bridge developments in Wexford Harbour to which I have referred). At the end of the day, however, it does not seem to me that this factor is really very relevant. A company which would have made losses of €100,000 but which as a result of some external compensatable event suffers losses of €500,000 has suffered a loss of €400,000 just as much as a company whose profits are reduced by that amount. There obviously may be limiting factors where the court may have to take in account the possibility that losses which would have occurred, even in the absence of the compensatable event, might have led to the business not continuing in any event irrespective of that event. However there is no evidence to suggest that such an eventuality had any likelihood in this case. It does not, therefore, seem to me that the question of the historical losses of Letts is of any real relevance. Provided that they were worse off because of the exclusion zone, then they had a legitimate expectation that they would be compensated to the extent that they were worse off.

8.13 A further issue relied on by the defendants was to suggest that Letts had made insufficient use of certain other mussel beds within Wexford Harbour which are licensed to them. There was a significant dispute between the parties as to the extent to which those beds were capable of effective beneficial use.

8.14 The case made on behalf of the defendants suggested that a number of inferences should be drawn from the level of use which Letts have, in fact, made from their other beds. Firstly it is suggested that Letts failed to mitigate any loss attributable to the presence of the exclusion zone by failing to attempt to make proper use of those mussel beds in substitution for the productive capacity lost by reason of the imposition of the exclusion zone.

8.15 Secondly it is suggested that the absence of significant production in those beds over the years is consistent with the suggestion put forward on behalf of the defendants to the effect that there were other limiting factors (such as the lack of availability of mussel seed) on the production capabilities of Letts. That, in turn, it is said, leads to the suggestion that the imposition

of the exclusion zone did not have the effect contended for. If it were, in fact, the case that the total amount of mussel seed available to Letts was in fact fixed by reason of external factors then it would, of course, follow that Letts would have been unable to increase the overall level of their production when the increased productive capabilities of beds 30A and 30D were discovered. Given that it proved, in practice, possible to produce the same level of production from those portions of beds 30A and 30D outside of the exclusion zone then, it would follow, it is argued, that no losses at all could be said to arise.

8.16 In a related issue there was a significant amount of evidence concerning problems encountered by Letts in relation to one of their boats which was out of action by reason of an absence of having an appropriate licence for a number of months. This issue was, tangentially, relevant to the question of the appropriate inferences to be drawn from the reduced mussel production achieved by Letts during the relevant season. I should state that I am not satisfied (contrary to the case made by Letts) that there was anything inappropriate in the actions taken by the relevant officials of the Minister's department in relation to the licensing of the boat concerned. It may well be that there could have been more effective communication between Letts on the one hand and the Minister's officials on the other hand. I am, however, satisfied that Letts were at least as responsible (if not more so) for any failure of communication. In any event I am satisfied that factors such as the problems encountered in licensing the boat are no more than the difficulties frequently encountered by any business operating within a regulatory regime where, for wholly understandable reasons, a more strict approach is now taken to health and safety issues than might heretofore have been the case. I do not, therefore, believe that it is appropriate to draw any inference one way or the other from the reduced production which was attributable to the boat in question being out of commission by virtue of being unlicensed for the period concerned.

8.17 The fundamental questions which arise in relation to the use of the other mussel beds concern the extent to which it was practical or reasonable to expect Letts to have sought to have used those beds. There is no doubt, in my view, but that there was the potential for significant difficulties to be encountered in seeking to commercially exploit the beds in question. They are undoubtedly all located in very shallow water. It seems to be common case that at least some portion of the beds are not, in practice, capable of commercial exploitation. The evidence tendered on behalf of the State does seem to suggest that some degree of exploitation would have been possible in respect of some parts of the beds concerned, but I am equally satisfied that any such possible exploitation was significantly circumscribed by reason of the shallowness of the beds and, in many cases, the presence of rocks or stones. Furthermore it seems clear that exploitation would only have been possible in most cases during higher tides when the shallowness would not have been as much of a problem.

8.18 Finally it should be noted that the level of detailed knowledge of these beds is almost certainly greater now (not least because of the many expert reports prepared in respect of these proceedings) than would have been the case at the time when Letts would have made their decisions concerning the possible exploitation of those beds as an alternative to the beds lost to the exclusion zone.

8.19 In all the circumstances of the case I have come to the view that, while it would, factually, have, with the benefit of hindsight, been possible to exploit a relatively small amount of the beds in question, I am not satisfied that it would be appropriate to regard Letts as having failed to mitigate their loss in this regard. The exploitation of the beds concerned would have been problematic. Success, while possible, was by no means guaranteed. It is far from being beyond the bounds of possibility that any attempted exploitation could have resulted in additional losses rather than gains which might be set off against the claim in this case. I am not, therefore, satisfied that it would be appropriate to conclude that Letts have failed to mitigate their loss.

8.20 Likewise I am not satisfied that it is appropriate to draw any inference from the failure to exploit those beds either during the existence of the exclusion zone or, indeed, before that time, to the effect that there were limiting factors on the level of possible production. The more appropriate inference to draw is that the exploitation of those beds was legitimately seen as problematic and uncertain. It is, however, important to note that the record of Letts in relation to the exploitation of those beds provides a further basis for the conclusion which I drew at para. 8.1 to the effect that it is unlikely that Letts would have adopted a high risk approach to the possible exploitation of the emerging knowledge concerning the increased production capabilities of beds 30A and 30D. To that extent it confirms the conclusions which I have already reached. Those factors do not, however, in my view, justify taking any different view to the level of production which could have been achieved in the relevant seasons in respect of areas 30A and 30D were it not for the existence of the exclusion zone. They do not, therefore, provide any basis for altering the prima facie view reached in relation to the losses of €50,000 in respect of 2003/04 and €450,000 in respect of 2005/06.

8.21 For the reasons which I have set out above I am satisfied that a just estimate (and it can be no more than a very generalised estimate) of the losses attributable to the existence of the exclusion zone up to its discontinuance in June 2006 come to a total of €500,000. To that must be added that any losses attributable to the need to remediate the mussel beds so as to allow them to come to full production. I now turn to the issue of future losses.

9. Future Losses

9.1 The parties were given an opportunity, in the light of the late development concerning the discontinuance of the exclusion zone, to reformulate their position in respect of future losses. Letts supplied the defendants with a revised claim which suggested that very substantial sums indeed were required to remediate the relevant mussel beds. Much of the scientific evidence presented on both sides in relation to that claim was hotly contested.

9.2 Before going on to deal with that evidence I think that it is worth noting the degree of difference of scientific opinion that was demonstrated in this case. It should be emphasised that there was no suggestion on either side that the experts called on behalf of the other side were doing anything other than expressing their genuine scientific view. The case does, however, emphasise the real possibility that competent experts having carefully considered the matter, may come to very widely divergent views on matters of fact and opinion. It is sometimes suggested that the courts would be better advised to move to a situation where the court appoints a single expert who could, it is said, then come up with an "objective" assessment of issues of expert view. This case, in my view, demonstrates the extreme danger of adopting such a position. The financial consequences of the different views expressed by the experts on both sides in relation to this aspect of the case ranged from a suggestion that losses into the future were negligible to one which put the sum required to compensate for such losses at a figure in excess of €5 million. If the court had appointed its own expert then who knows as to what point on that spectrum the expert would have determined on as a conclusion. To have then deprived the parties of the opportunity to put the contrary case to that which had been determined on by that expert would, certainly on the facts of this case, have had the potential to give rise to a very significant injustice indeed.

9.3 Having said that it is, of course, necessary for me to decide on the balance of probabilities as to what remediation, if any, is required.

9.4 There are two major areas of controversy. The first involves a question concerning the amount of deposition of material that has, in fact, occurred on the beds in the period since they were last actively used prior to the imposition of the exclusion zone. On Letts case a very significant volume indeed of such materials was, in fact, deposited. That is significantly contested by the defendants.

9.5 The second general set of issues concerns the extent to which the beds are now capable of being used for the commercial production of mussels without further significant remediation. The answer to that question is, of course, at least in part, dependent on the answer to the first question. I therefore turn to that first question.

10. What was deposited?

10.1 As it happens there has been a number of surveys (called "bathymetric surveys") of the sea bed in the vicinity of beds 30A and 30D over the last number of years. Based on these surveys evidence was tendered on behalf of Letts to the effect that there had been a significant deposition of material over most of the beds in question in the period since the exclusion zone came into effect. Just before the commencement of the resumed hearing in respect of this aspect of the case, the State sought to question the validity of one of the underlying surveys. To this end further expert evidence was called as to the surveying methodology and, indeed, in a very belated way, evidence and rebuttal evidence from experts designed to assist the court in relation to the extent to which it might be expected, from the movement of waters within the harbour, that a build up of the type contended for would have occurred.

10.2 Faced with this battery of expertise the court can only do the best it can. In fact four bathymetric metric surveys were carried out. A survey by Irish Hydro Data Limited ("IHD") was carried out in July and August 1998. A further survey was carried out by IHD in July 2006. It would appear on the evidence that both surveys were carried out with similar equipment and within the same parameters of accuracy. In addition Hydro Graphics Surveys Limited ("HSL") carried out surveys in the year 2002 and on the 13th October, 2006. While there were some not insignificant differences between the surveys carried out in 2006 (i.e. the IHL survey of July and the HSL survey of October) the real issue between the parties concerns the differences between, on the one hand, the surveys of 1998 and 2002 and on the other hand the differences between that survey of 2002 and that of July 2006. Taking each of the surveys at face value they demonstrate erosions or depositions in cubic metres as per the following table

Survey 1	Survey 2	Erosion (m3)	Deposition (m3)	Net Change (m3)
IHD July 1998	HSL 2002	98,819	840	97,976 Erosion
HSL 2002	IHD July 2006	1,517	97,005	95,489 Deposition
IHD July 2006	HSL Oct 2006	32,064	5,381,	26,683 Erosion

10.3 As will be seen the suggestion, if one accepts the readings from each of the surveys as accurate, is that over most of the relevant area there was an erosion totalling just short of 100,000 cubic metres between 1998 and 2002 with a corresponding deposition of virtually the same amount between 2002 and 2006. A somewhat lower deposition might be taken if one used the October 2006 survey. These facts raised the question as to whether the 2002 survey was accurate.

10.4 I am persuaded by the evidence given on behalf of the State which seems to demonstrate that, to a quite significant extent, the readings in respect of the sea bed in the contested survey are approximately 20 cm lower in most areas than seems to have been the case in both the earlier survey and the most recent survey. While the issue is far from free of doubt, I have come to the view that, on the balance of probabilities, the most likely explanation for this fact is that the datum by reference to which the contested survey was conducted was out by approximately 20 cm and that this explains the disparity between the readings. It is the relative uniformity of the difference that most leads me to that conclusion. I am not, therefore, satisfied that there has, in fact, been a build up of materials on the mussel beds, between 2002 and 2006, of the order of magnitude suggested on behalf of Letts.

10.5 In the light of that finding it is necessary to turn to the second question. A number of different surveys were conducted on the sea bed using different methodologies. Much debate occurred between the experts as to the relative merits of the different methodologies adopted. However it seems to me that the preponderance of the findings of the experts do not differ all that significantly. The site of the exclusion zone can conveniently be divided, for this purpose, into three sectors. The first sector, i.e. that nearest the bridge, can, it is common case, be immediately used for whatever level of mussel production it is capable of bearing. There is a second area at the opposite end of the exclusion zone which, it is again common case, is not currently capable of being used for mussel production. The dispute between the experts concerns the extent to which the middle area is capable of immediate use or whether, and if to what extent, it requires remediation. While there is some difference between the experts as to the size of the two respective side areas, I am satisfied that they are both of the order of approximately 15% of the total.

10.6 I should deal, first, with the area which, it is agreed, is not currently capable of use. It is by no means clear to me that this area was ever of any very significant level of productive capability. The evidence from the experts called to deal with water movement within Wexford Harbour makes it clear that it is more likely that material will be deposited as water flows decrease. The water coming down river into Wexford Harbour is channelled initially between the two banks of the river and, thereafter, between what are described are training walls which are specifically designed to help the flow of water and thus prevent the silting of the harbour at that point. However the portion of the exclusion zone which is furthest away from the mouth of the river is the one where the water flow will have spread to the greatest extent and thus where deposition is now and at all material times was more likely to have occurred. While there is no doubt but that, as a fact, this area is not capable of mussel production without some degree of remediation I am not satisfied that it is significantly worse than it was likely to have been in the absence of an exclusion zone.

10.7 While there was no real evidence as to whether there was a variation in the productive capacity of various parts of areas 30A and 30D, prior to the imposition of the exclusion zone, all of the evidence supports the fact that the way in which mussels grow is in a cluster form so that rather than having an absolute uniformity of the distribution of mussels across a mussel bed (such as might be experienced on land with the growing of a crop on a reasonably uniform piece of land) mussels are likely to be found in clusters. It is entirely possible that those clusters might well be more likely to be located in those parts of the mussel beds where the conditions suitable for their development were best. Thus while there is no doubt but that the evidence establishes that mussel beds 30A and 30D, taken as a whole, were among the best in Wexford Harbour, it does not follow that each and every portion of those beds were of the same quality. Indeed the very fact that it has now been established that the beds appear to be capable of a much higher level of production than had been established in the past seems to me to be consistent with the fact that parts of the beds were being under used in any event.

10.8 For those reasons it seems to me to be appropriate to largely disregard the portion of the mussel bed furthest away from the bridge. It will, however, be appropriate to make some minor allowance for the possibility that that part of the bed was capable of some production prior to the imposition of the exclusion zone which has been impaired by reason of the deposition of extra material during the continuance of the exclusion zone.

10.9 The real issue which remains concerns the central portion. For all of the detailed scientific survey evidence the real question under this heading comes down to a contest of subjective expert opinion as to whether, having regard to the condition of that zone as demonstrated in the various surveys, it is or is not capable of commercial mussel production without remediation. Dr. Tony Meaney on behalf of Letts says that it is not. Dr. Ronnie Russell on behalf of the defendants says that it is. Both have significant expertise in the matter. Having carefully considered all of their evidence I have come to the view that the mussels beds within the contested central part of the former exclusion zone are potentially capable of a relatively early return to commercial mussel harvesting without the necessity of engaging in the elaborate dredging and laying of shale stated to be necessary by Letts. However I am of the view that, as Dr. Russell said, it would be necessary to proceed with some caution. In the light of the legitimate areas of expert disagreement it would be very brave indeed on the part of Letts to go ahead with an immediate laying of the maximum level of mussel seed that the beds might be regarded as being capable of taking. This would run the risk that, if Dr. Meaney's view is correct, a significant portion of those mussels could be lost with significant consequential damage to Letts.

10.10 In those circumstances it seems to me that a better way of approaching the losses of Letts into the future is to assume that for two further growing seasons Letts possibility of production from the former exclusion zone will be reduced by reason of the need to exercise caution in the build up of mussel production.

10.11 For the reasons which I have outlined in an earlier portion of this judgment I have come to the view that the losses attributable to the harvesting year 2005/6 ought to be estimated as being of the order of €450,000. It should be recalled that that figure was, in itself, based on a notional level of additional production which was below (by about half) that which would appear to be the maximum possible capabilities of the mussel beds. In those circumstances it seems to me that it would be reasonable to assume that larger losses (of the order of perhaps €700,000 per annum allowing for external limitations such as the availability of mussel seed) would have been attributable to future harvesting years were it not for the discontinuance of the exclusion zone. However now that the exclusion zone has been removed it seems to me to be reasonable to estimate that having regard to a cautious approach to the re-introduction of commercial mussel growing to the former exclusion zone, coupled with the possibly that it may transpire that some level of remediation work will be required, that losses of the order of €425,000 and €225,000 will derive from the next two mussel harvesting seasons respectively but that, after that, it will be possible for Letts to produce as much mussels from beds 30A and 30D as they would have been able to had there been no exclusion zone.

10.12 Those estimates are based on the assumption that the additional profits which can, everything else being equal, be derived from the extra production now capable of being generated from the former exclusion zone is of the order €700,000. Approximately 15% of that extra production is undoubtedly immediately available without any caution being exercised. This equates to the removal of a loss of profit of approximately €105,000. The balance is, therefore, just short of €600,000. The estimates are based on the assumption that only one third of any extra production could reasonably be expected to occur in the first harvesting season while two thirds of that extra production might reasonably be expected to occur in the second harvesting season. An addition is made to reflect the possibility that further costs may be incurred and to reflect the risks involved.

10.13 Obviously Letts may well be able to accelerate the level of additional production by means of the investment of moneys in remediation. However the extent to which it would be prudent to invest those moneys is a matter of commercial judgment. Having regard to the fact that Letts estimated that a total sum of in excess of €5 million needs now to be invested to bring the beds back to full production I would, in any event, have come to the view that it would not be appropriate to assess damages on that basis even if I had being satisfied that remediation to that cost was required. For the reasons which I have analysed above I am not satisfied that losses into the future have been established which would put the extent of those losses beyond a sum of €600,000 per annum.

10.14 It will be recalled that Letts originally estimated their losses into the future on the basis of calculating losses for five harvesting seasons in total. Those losses were, therefore, calculated on the basis of three future harvesting seasons lost. Before the case concluded I was informed that Letts have now received a new ten year aquaculture licence in respect of beds 30A and 30D. Even allowing for a calculation on the basis of the five harvesting seasons that would occur within the period of that licence, it would seem that the appropriate calculation of the losses attributable to not being allowed to use the area of the exclusion zone at all could not exceed €3.0 million which sum should, in the reality, be discounted to reflect the fact that most of the sums would not be paid for some time. In those circumstances it is difficult to see how remedial works of the type suggested by Letts would amount to the proper approach to the calculation of damages in any event.

10.15 For those reasons it seems to me that the approach which I have indicated above is a more appropriate basis for the calculation of damages. It should also be noted that the level of deterioration of the beds concerned is, in substance, only due to a failure to disturb any accumulated silting during the two harvesting seasons during which the exclusion zone was in place. It is difficult to see how the gradual approach suggested by Dr. Russell to the reestablishment of the mussel beds within the former exclusion zone would not be a more appropriate approach in those circumstances rather than the radical relaying of the beds which is implicit in the Lett approach.

10.16 I am also satisfied that the approach which I have adopted does reflect, properly, the possibility that, in practice, some remediation may be necessary. If it should transpire that remediation could legitimately give rise to an accelerated return to full production relative to that which underlays the assumptions which I have made, then same would only be the case if the investment in remediation justified the returns. If it did justify the returns then it would have the effect of reducing rather than increasing the losses attributable to the future. If the investment would not justify the returns then it is difficult to see how it would form an appropriate basis for the calculation of loss in the first place.

10.17 It, therefore, seems to me to be appropriate to calculate the losses into the future in a total sum of €650,000.

11. Conclusions

11.1 In summary therefore I am satisfied that Letts have incurred losses attributable to the existence of the exclusion zone in the sum of €500,000 up to the time of the discontinuance of the exclusion zone and a further sum of €650,000 attributable to losses which will be incurred during the period when the beds contained within the former exclusion zone are being brought back to a level of production which would otherwise have pertained had the exclusion zone not been imposed in the first place.

11.2 I am, therefore, satisfied that the losses attributable to the existence of the exclusion zone total the sum of €1,150,000.00. For the reasons set out earlier in the course of this judgment I am satisfied that Letts have demonstrated that they have a legitimate expectation to be compensated in respect of those losses and that Letts are, therefore, entitled to a declaration that they are entitled, as against the Minister, to compensation for proven losses in respect of the imposition of the exclusion zone in that sum.