THE HIGH COURT

[2006 No. 2687 P.]

BETWEEN

PAUL BARLOW, WOODSTOWN BAY SHELLFISH LIMITED,

MICHAEL CROWLEY, RIVERBANK MUSSELS LIMITED,

GERARD KELLY, FRESCO SEAFOODS LIMITED,

TARDRUM FISHERIES LIMITED,

ALEX MCCARTHY AND HALCOME MERCHANTS (IRELAND) LIMITED

TRADING AS ALEX MCCARTHY SHELLFISH

PLAINTIFFS

AND

MINISTER FOR COMMUNICATIONS, MARINE

AND NATURAL RESOURCES, REGISTRAR GENERAL OF

FISHING BOATS, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 22nd day of March, 2019

Introduction

1. The individual plaintiffs and their associated companies were involved in fishing, harvesting and sale of mussels. In these proceedings the plaintiffs are seeking compensation for financial losses which they allege was caused or contributed to by the defendants. The plaintiffs' claims arise under a number of headings. These headings are breach of constitutional duty/rights; negligence and breach of duty (including negligent misstatement); breach of legitimate expectation; breach of statutory duty and unlawful delegation. The plaintiffs further seek to rely upon a breach of the provisions of the European Convention on Human Rights (ECHR) and refer to a recent decision of the European Court of Human Rights (ECtHR) in *O'Sullivan McCarthy Mussel Development Limited v. Ireland* (App No. 44460/16).

2. These proceedings commenced in 2006, some thirteen years ago. There have been a number of earlier hearings, in particular, a decision of the Supreme Court, dated 27 October 2016, in related proceedings (*Barlow v Minister for Agriculture, Food and the Marine* [2017] 2 IR 440) (the *Barlow II* proceedings). The statement of claim, first delivered on 10 July 2006, has undergone numerous amendments and the final amended statement of claim was delivered on 6 October 2017. The claims being made by the plaintiffs have evolved and developed over a long period of time.

Mussel fishing

3. There are only certain times of the year when the plaintiffs fish for mussel seed. Mussel fishing is not fishing in the normal sense in that what is involved is a dredging type operation whereby quantities of mussel seed are retrieved from the sea by vessels specifically designed for that purpose. Once retrieved, the mussel seed is transported to aquaculture sites where it is re-laid. Over a period of time the mussel seed matures into fully grown mussels which are then harvested and sold for commercial gain. The mussel industry is regulated by domestic legislation. These Regulations unsurprisingly cover a wide range of areas, for example the type of vessels that can be used, the locations that can be fished for mussel seed and, importantly for the instant proceedings, the amount of mussel seed that can be fished for.

4. Central to the *Barlow II* proceedings was the "Voisinage Agreement" of 1965, set out correspondence between officials in the Ministry of Agriculture in Belfast and the Department of Agriculture and Fisheries in Dublin. This agreement provided for cross-border cooperation in the area of fisheries. The practical effect of this was that vessels registered in Northern Ireland were permitted to fish for mussel seed in the State's territorial waters (the territorial waters). The Voisinage Agreement proved to be very contentious.

5. In the *Barlow II* proceedings the legality of Northern Ireland registered vessels fishing in territorial waters was successfully challenged by the plaintiffs. In giving the judgment of Supreme Court, O'Donnell J. stated at p. 445:

> "[3] At first sight, the issues for resolution in this case are of much more recent origin. For the last 50 years and, it seems likely, since the foundation of the State, fishermen resident in Northern Ireland have fished waters which, from time to time, have been designated as the territorial waters of the State. This fishing has been carried out with the knowledge and approval of the authorities here and, it appears, in circumstances where reciprocal facilities were afforded to Irish fishermen in the waters adjoining the coastal area of Northern Ireland. This case raises the question of the legality of the practice of what may be described in general terms at this stage, as Northern Ireland fishermen fishing in Irish territorial waters. This question arises in the context of mussel harvesting, which for a number of reasons has become much more commercially significant in recent times. For reasons which it will be necessary to set out at some length, I have concluded that the current practice of fishing or harvesting of mussel seed by Northern Ireland registered boats in the territorial waters of this State is not lawful, as it constitutes the exploitation of a natural resource which must by Article 10 of the Constitution be provided for by a law enacted by the Oireachtas. I conclude that there is no such law at present. It follows from this conclusion however that there is no insuperable constitutional objection to making provision by law for such fishing. This is the narrow conclusion of the large issue in this case."

6. Article 10 of the Constitution provides:

> "All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State

subject to all estates and interests therein for the time being lawfully vested in any person or body."

7. Therefore, two matters arise from the decision of the Supreme Court. Firstly, mussel seed, being a natural resource, is the property of the State. Secondly, in the absence of law enacted by the Oireachtas, fishing for mussel seed by Northern Ireland registered vessels in the territorial waters is not lawful.

8. For many years the mussel industry was undeveloped with those involved using methods and vessels that had not changed for generations. However, this was all to change in the latter years of the 1990s when the economic potential of mussel harvesting became apparent. This resulted in new vessels being purchased with mussel seed being fished and harvested at an industrial level. At the same time vessels registered in Northern Ireland were fishing for mussel seed in the territorial waters. This, together with allegations of the mismanagement of the mussel seed resource and the allocations of mussel seed, is central to the plaintiffs' claim.

The plaintiffs

9. Each of the individual plaintiffs gave evidence before the Court. Though the particular situation of each of the plaintiffs differed there are a number of matters common to all of them. Each of the plaintiffs recognised mussel seed as being an untapped resource with enormous commercial potential. Each of the plaintiffs invested in their own businesses by building and operating new and modern vessels, the older vessels had limited capacity and not purpose built for the task. This required the plaintiffs to obtain grants and loans and thereby incur financial liabilities. The plaintiffs were encouraged in their efforts by the defendant State agencies, in particular Bord Iascaigh Mhara (BIM). All this was reflected in the National Development Plan. Initially there were no significant problems, however, in or about the middle of the first decade of this century it became clear that commercial gains were not going to be achieved and the plaintiffs thereby incurred financial loss. These losses were attributed to the mismanagement of the mussel seed resource by the first named defendant's allocations and, importantly, to fishing vessels registered in Northern Ireland being given access to mussel seed in the territorial waters to the detriment of the plaintiffs.

10. The first named plaintiff, Mr. Paul Barlow, has been working in the fishing industry for most of his life. He established the second named defendant, Woodstown Bay Shellfish Limited, a company which is also involved in the harvesting of oysters. In the mid-1990s the first named plaintiff became involved in the mussel industry. He entered the industry by securing a lease from the Duke of Devonshire who held a private foreshore that had a fishery located in Youghal, County Cork which consisted of 440 hectares of mussel or oyster and fishing grounds.

11. Subsequently, the first named plaintiff signed a contract with a Dutch company to construct a new vessel, the "Creadan Lady", at a cost of some €3.45million. This sum was obtained by grant aid and personal borrowings secured on his family home and business. The "Creadan Lady" was the first vessel purposely built for mussel fishing in Ireland and was delivered in November 2004. In order for his business to be viable an allocation of some 3,000 to 4,000 tonnes of mussel seed was required.

12. Initially the first named plaintiff made his application for an allocation to the Seed Mussel Advisory Committee (SMAC). Upon becoming aware of the involvement of officials from Northern Ireland in SMAC, the first named plaintiff applied directly to the first named defendant for allocations of mussel seed.

13. The first named plaintiff was given allocations which he submitted fell well below what was required to make his mussel business viable. Subsequently, the "Creadan Lady" was sold to a Dutch operator and the monies received were paid in discharge of debts owed to the bank.

14. The third named plaintiff, Mr. Michael Crowley, began mussel fishing in 1999. He is the General Manager of Riverbank Mussels Limited, the fourth named defendant. The fourth named plaintiff started trading in Ireland in 2003 by acquiring a vessel and a number of aquaculture sites for the relaying of mussel seed. The third and fourth named defendants made applications for allocations for mussel seed to SMAC but subsequently applied directly to the first named defendant. The third named plaintiff, and through him the fourth named plaintiff, claimed that the allocations they received were less than what was required and that they, like the other plaintiffs, had been lead to believe that they would be given allocations of mussel seed which would make their businesses viable.

15. The fifth named plaintiff, Mr. Gerard Kelly, is a lifelong fisherman and moved into mussel fishing in 1997. He is involved with the sixth and seventh named plaintiffs, Fresco Seafoods Limited and Tardrum Fisheries Limited.

16. In 1998 the fifth named plaintiff bought a vessel. To finance this he sold his family home where he lived with his young family. Subsequently he bought a purpose built vessel called the "Joanna Elida" which was approximately 20 years old at the time. This vessel was purchased from personal funds and was neither the subject of a loan or a grant. In 2003 the fifth named plaintiff applied to BIM for grant aid to finance a new vessel he named the "Deirdre K". This vessel arrived in July 2005.

17. In common with the other plaintiffs, the fifth named plaintiff applied directly to the first named defendant for an allocation of mussel seed. Again, like the other plaintiffs, the fifth named plaintiff claims that the allocations given fell below that which was required to keep his business viable.

18. The eighth named plaintiff, Mr. Alex McCarthy, is the Managing Director and principal shareholder of the ninth named plaintiff. The eighth named plaintiff is a qualified civil engineer and while involved in a project at Aughanish Alumina in County Limerick developed an interest in the mussel industry. In 1983/84 he obtained a licence from Aughanish Alumina to move mussel seed which had attached itself to a pier to an aquaculture site which was further down the River Shannon.

19. The eighth named plaintiff developed his business by arranging to supply mussels to the UK market, in particular by supplying ready-made meals for Marks and Spencer. The plaintiff's business developed and he acquired aquaculture sites in Carlingford Lough and Wexford Harbour. In common with the other plaintiffs, the eighth named plaintiff had a purpose built vessel constructed in Holland, the "Cornelius Geritt". In 2003 an application was submitted to BIM for a grant to build a new mussel dredger. This new vessel, the "Wings of the Morning", was delivered in April 2005. In addition to the grant aid, purchase of this vessel was funded from borrowings from a bank.

20. The eighth named plaintiff applied directly to the first named defendant for an allocation of mussel seed thereby bypassing SMAC for the same reasons as those of the other plaintiffs, namely, the involvement of officials from agencies in Northern Ireland. The eighth named plaintiff also complained that the allocations given were less than what was required to make his business viable. This, he claimed, resulted in serious financial loss both for himself personally and for his company, the ninth named plaintiff.

21. It can be seen from the foregoing paragraphs that the plaintiffs have a number of matters in common. Each of them recognised the enormous commercial potential of the mussel industry. This required investment in new vessels and aquaculture sites for the

relaying of mussel seed. In doing so each of the plaintiffs incurred significant financial liabilities which, unfortunately, resulted in financial losses.

22. Each of the plaintiffs gave evidence of the difficulties which they said they encountered in obtaining an allocation of mussel seed sufficient to make their businesses viable. The plaintiffs were especially critical of vessels registered in Northern Ireland fishing in the territorial waters and also the "aggressive" fishing practices adopted by them. This, the plaintiffs' claim, resulted in over fishing of the available mussel seed with dire consequences for the industry. In response to this a number of the plaintiffs took part in "protest fishing" in the waters of Northern Ireland. They claim that this highlighted another aspect of unfairness with the arrangements under the Voisiange Agreement in that vessels registered in this State could not fish in the waters of Northern Ireland.

Regulations
23. The mussel industry is subject to a number of Regulations. For the purposes of this action following are the relevant Regulations:

(i) The Sea Fisheries and Maritime Jurisdiction Act 2006 (the Act of 2006) provides:

> 10.— (1) A person on board a foreign sea-fishing boat shall not fish or attempt to fish while the boat is within the exclusive fishery limits unless he or she is authorised by law to do so.
>
> 13.— (1) The Minister may, for the proper and effective management and conservation and rational exploitation of fishing opportunities and fishing effort for Irish sea-fishing boats under the common fisheries policy, at his or her discretion—
>
> *(a)* …
>
> *(b)* …
>
> grant to the person an authorisation ("authorisation") in respect of the boat, authorising, subject to this section, the utilisation of the boat's fishing effort for the capture and retention on board of a specified fish stock ("stock") …"

(ii) The Molluscan Shellfish (Conservation of Stocks) Order 1987 (S.I. No. 118 of 1987) provides:

> "4. A specified vessel or a person on board a specified vessel shall not, except under and in accordance with a license under this Order engage in dredging for, fishing for or taking molluscan shellfish within the exclusive fishery limits of the State…"
>
> "6. The master of a specified vessel shall not, except under and in accordance with a licence under this Order, cause or permit the boat to be used within the exclusive fishery limits of the State for the transhipment of molluscan shellfish from a specified vessel."

(iii) The Mussel Seed (Conservation and Rational Exploitation) Order 2003 (S.I. No. 241 of 2003) provides:

"5. (1) The Minister may, subject to the provisions of this Article, issue a mussel seed licence authorising, during such period as may be specified in the licence, any or all of the following activities:

> *(a)* the fishing for mussel seed from a specified vessel in the specified area or such part thereof as may be identified in the licence, and
>
> *(b)* the landing or transhipment of mussel seed taken in the specified area or such part thereof as may be identified in the licence.

(2) An application for a mussel seed licence shall be in such form as may be specified by the Minister.

…

(8) In considering an application for a licence under this Order the Minister shall have regard to such matters as appear likely to him or her to assist in the rational exploitation of mussel seed in the specified area or any part of that area, including —

> *(a)* the experience of the applicant in relation to mussel seed fishing,
>
> *(b)* the proportion of permitted tonnages licensed to the applicant previously which was harvested,
>
> *(c)* the distance from the harvesting zone to the area where the mussel seed are to be relayed…"

(iv) The Mussel Seed (Fishing) Regulations 2006 (S.I. No. 311 of 2006) provides:

> "6. The master of an authorised boat shall keep a record of the transplantation on to a place or waters specified in an aquaculture licence of mussel seed fished under an authorisation, which shall include the following information:
> *(a)* …
>
> *(b)* the amount of mussel seed so transplanted…"

Proceedings
24. These proceedings were commenced in June 2006 and the statement of claim has been amended on three separate occasions. Initially, the objection to the Voisinage Agreement was that there was a failure to enforce it on a reciprocal basis rather than that it was unlawfully operated. The statement of claim which concerns the action before this Court was delivered in October 2017. I can see little merit in detailing how various claims were developed or were not proceeded with over the years. I propose instead to concentrate on the claim as it is formulated in the statement of claim of October 2017.

25. Paragraph 20 of the statement of claim alleges that "the first named defendant has acted in breach of duty, including constitutional and statutory duty and/or has acted negligently."

Particulars of breach:

"(a) Pursuant to Article 10 of the Constitution the first named defendant was precluded from allowing Northern Ireland registered vessels to fish for mussel seed in the State's territorial waters save in accordance with provision made by law.

(b) In the absence of such provision being made by law, the first named defendant permitted Northern Ireland registered fishing vessels to fish for mussel seed in Irish territorial waters allocated mussel seed to the said fishing vessels, permitted the said fishing vessels to remove mussel seed from the territory of the State and/or engaged in management and control of alienation of a natural resource without provision made by law, contrary to Article 10 of the Constitution"

The plaintiffs claim breach of their constitutional rights under Arts. 40.3.1; 40.3.2; and 43.2.1.

26. Paragraph 18 alleges that "the first named defendant acted *ultra vires* when delegating his allocation functions to SMAC and/or permitting SMAC to make recommendations and/or making decisions in respect of mussel seed allocation on an all-Ireland basis."

27. Paragraph 19 claims the purported transfer of these powers is "improper, in breach of statutory duty and constitutes an improper failure to exercise discretionary powers and is null and void and of no force or effect."

Under the heading "particulars of breach" the following is alleged:

"(b) the purported transfer of his assessment function to SMAC is in breach of the principle of *delegatus non potest delegare*…

(f) the first named defendant has breached his duty by failing to ensure appropriate assessments of the seed industry are carried out on an ongoing basis.

(g) the first named defendant has breached its duty by failing to set adequate conservation objectives and management plans providing for sustainable exploitation of the mussel seed resource."

28. Paragraph 21 alleges that "at all material times the plaintiff had a legitimate expectation that the defendants would act in accordance with, and enforce, the procedural and substantive terms of international agreements, including the Voisinage Agreement."

29. The plaintiffs seek a number of declarations in respect of the claims made and damages. The defendants have delivered a full defence.

30. Therefore, the issues which have to be determined by the Court are:

(i) Breach of constitutional duties/rights;

(ii) Breach of statutory duty;

(iii) Negligence and breach of duty;

(iv) Wrongful delegation;

(v) Legitimate expectation

31. Further, the Court was referred to a judgment of the ECHR in *O'Sullivan McCarthy Mussel Development Limited v. Ireland*, delivered 7 June 2018. This judgment arose from an application made by the unsuccessful plaintiffs in *Cronane Seafoods Limited v. the Minister for Agriculture, Fisheries and Food* [2017] 1 I.R. 119. The Court will consider this decision in the context of the claim being made in these proceedings.

Evidence on issues

32. I have already referred to the evidence given by each of the individual plaintiffs. Though there are claims concerning mis-management of the mussel seed resource by the first named defendant, it seems to me that central to the claims being made by the plaintiffs was the presence and fishing activities of vessels registered in Northern Ireland in the territorial waters and an allegation that same caused them loss and damage. The presence of these Northern Ireland registered vessels was as a result of the implementation of mussel seed fishing on a cross-border basis under the Voisinage Agreement. This gave rise to SMAC which had representatives of the relevant agencies both North and South of the border. All this was taking place against a background of an official recognition by the State of the need to exploit the commercial potential of the mussel industry. The situation was well summarised in the following passage from a report prepared in 2008 entitled "*Rising Tide – A Review of the Bottom Grown (BW) Mussel Sector on the Island of Ireland*":

Paragraph 1.1

"Large areas of seabed have been granted aquaculture licences in both jurisdictions, and significant investment has been made in the acquisition of vessels and other facilities to fish for seed mussel and to relay and harvest. These factors are driving a heavy demand – far in excess of available supply for seed mussels which are a naturally occurring resource shared by both jurisdictions. In these circumstances a 'bonanza' type mentality has crept into the sector, making it very difficult to achieve consensus amongst the competing operators. Thus the regulatory authorities are in a no-win situation being subject to sharp criticism from completing interests within the sector seeking access to the seed mussel fisheries."

33. Whatever about the presence of Northern Ireland registered vessels in the territorial waters, mussel seed is a finite resource and so requires good management. This is probably best encapsulated by what is described as the "precautionary principle", a principle which recognises that the amount of mussel seed is limited and is subject to a number of factors both man-made and natural. Amongst the natural factors are the weather and the presence of starfish who appear to have a voracious appetite for consuming

mussel seed. Indeed, the Court heard evidence that the mussel industry in Holland, which is considered to be the world leader, was almost destroyed not by human activity but rather by ducks. An application of the "precautionary principle" could have resulted in access to mussel seed areas being limited for specified time periods or, in some cases, being completely denied for significant lengths of time.

34. The Court heard evidence from experts in this area. Firstly, on behalf of the plaintiffs, Dr. Julie Maguire gave evidence. Dr. Maguire is highly qualified, has a doctorate in the area of shellfish, has considerable research experience and has published wildly. The report which Dr. Maguire furnished to the Court sets out, in detail, the amounts of mussel seed fished in the Irish Sea by both vessels registered in Northern Ireland and vessels registered in the State. It is clear from her data that there was some 35,000 tonnes of mussel seed fished in 2003, reducing to a figure below 25,000 in 2004 and 15,000 in 2005. The year 2006 appears to have been a disaster in respect of fishing for mussel seed. The years from 2007 – 2016 did show some recovery, in particular 2010, however they came nowhere near to what was achieved in 2003/2004. Dr. Maguire provided figures for the amount of mussel seed fished by Northern Irish registered vessels in territorial waters. This appears to have amounted to some 10,000 tonnes in 2003, a figure which dropped significantly in 2004. In these years there were a significant number of Northern Irish registered vessels operating in the Irish Sea, the main mussel seed grounds. Dr. Maguire states:

> "The Supreme Court delivered a unanimous judgment in October, 2016 stating that Northern Irish fishing vessels cannot legally fish or harvest mussel seed in the Republic of Ireland's territorial's waters. In my opinion, the granting of the licences to these vessels in the past directly impacted on the amount of seed available to Republic of Ireland vessels. Before the Northern Ireland vessels had entered fishery, the mussel seed fishery was sustainable with some good practices employed e.g. fishing seed later in the season to minimise mortality and allow the seed itself to recruit to the fishery. However, by 2003/2004 these practices could no longer exist, due to the expansion of the fleet to include UK vessels, which lead to fierce competition and some inexperienced fishermen who often took seed that was too small to survive and thrive. The result was two year masses of seed fished in these years.
>
> The amount of seed that was directly re-laid from ROI sea beds to Northern Ireland is easy to measure, however, the amount of seed lost due to bad management to the fishery is more difficult to ascertain. However, management practices employed during the 80s and 90s have proven that the fishery was sustainable. Even though SMAC only existed for a short time it set the tone for subsequent years whereby allocation to the ROI vessels was significantly curtailed by the allocation to the UK vessels. In my opinion this is the primary reason why the ROI mussel seed stock collapsed in recent years."

35. Dr. Maguire also analysed the allocations of mussel seed that were made in the years 2004 to 2016. Her report shows that in each year the uptake of mussel seed in the Irish Sea fell short of the amount that was actually allocated, dramatically so in some years. She was also very critical of the basis upon which allocations were given. Allocations were not based on scientific evidence and according to Dr. Maguire:

> "Allocations were not based on information provided through annual surveying for mussel seed. In general terms, both the industry and agency survey effort covered a geographical broad area with the aim of finding new seed in previously unsettled areas or new settlement in traditional seed bed areas. Once a bed was located the agency survey effort, should have focussed more on characterising the seed beds in terms of size and limits of the bed seed biomass, size and quality of the seed itself. However, this was not always done. Allocations were awarded before the amount of seed was known and in recent years' allocations are just rolled over from the previous years.
>
> This was one of the main deficiencies of the Seed Mussel Allocation Committee (SMAC) in making recommendations for seed allocations, the shortfall in good real time survey data. SMAC allocated seed tonnage in the absence of scientific evidence that this tonnage was available or not."

36. Dr. Maguire was also strongly of the view that the "precautionary principle" ought to apply, that is, one should be conservative in allocating a finite resource, all the more so when there is no scientific data available. Dr. Maguire also gave evidence as to whether or not mussel seed "over wintered". Clearly, if mussels over winter this increases the amount available the following year.

37. Dr. Terence O'Carroll gave evidence on behalf of the defendants. Dr. O'Carroll has a doctorate in Marine Biology from UCD and has been employed by BIM since October 1988. He has been involved with the mussel industry since starting with BIM and has been involved in trials designed to improve the mussel industry, was a member of SMAC between 2003 and 2006. Though he agreed with Dr. Maguire on a number of points there were areas of disagreement. In particular, on the issue of over wintering, Dr. O'Carroll was of the view that there was considerably more evidence to suggest that over wintering occurs more frequently than that accepted by Dr. Maguire. Further, Dr. O'Carroll placed considerably more emphasis on mussel seed being a creation of nature and thus subject to many influences over which humans have no control. Contrary to the views of Dr. Maguire, Dr. O'Carroll was not convinced that restricting fishing for mussel seed areas to specific periods of time would be beneficial.

38. I have already referred to SMAC and will return to it again later in this judgment in the context of the plaintiffs claim of unlawful delegation. The plaintiffs had a number of criticisms of SMAC. Firstly, a number of the plaintiffs gave evidence that they were not initially aware of the involvement of authorities from Northern Ireland in SMAC. When they did become aware of their involvement, the plaintiffs made their applications for allocations of mussel seed directly to the first named defendant. Secondly, there was criticism of both the allocations of the mussel seed and how they were arrived at.

39. As to the first criticism, it would seem that the plaintiffs were aware of the make-up of SMAC from the circulation of minutes from meetings held from 2002 onwards. I am not convinced that this controversy is directly relevant to the claims being made by the plaintiffs. While it may be argued that, as a result of the Supreme Court decision in the *Barlow II* proceedings, the involvement of officials from Northern Ireland in allocating a natural resource of this State was unlawful it seems to me that the central issue is the amount that was allocated to each of the plaintiffs and how this was calculated.

40. On the evidence it seems that the allocations from the early years were simply "rolled over" from year to year. In Dr. Maguire's report there is an analysis for the years 2004 to 2016 of the total allocation of mussel seed in the territorial waters and the amount actually fished. In each year, save for 2004, the amount of mussel seed actually fished does not come close to the amount that was allocated (exhibited in figure 5 of report of Dr. Maguire dated 14 May 2018). This finding by Dr. Maguire is entirely consistent with a schedule for each of the plaintiffs, which was referred to in the course of the hearing, setting out the allocation of mussel seed sought by each plaintiff, the amount of the allocation that was given and, significantly, the amount of mussel seed that was actually fished. Thus the problem facing the plaintiffs was not the allocation but rather the availability of mussel seed. This leads back to the issue concerning the management of the mussel seed resource and the fishing activities of Northern Ireland registered vessels in the

territorial waters.

41. As to the management issue, as I have referred to, Dr. Maguire supported a greater application of the "precautionary principle". For this to be done, however, it would seem that it would have led to the closure of some mussel seed areas which otherwise would have been fished. This, in the short term at least, would have led to an impact on the fishing activities of the plaintiffs. There was no evidence to quantify what this would have been. Indeed, it should be pointed out, as Dr. Maguire stated in her report that:

> "[T]he amount of seed lost due to bad management of the fishery is more difficult to ascertain".

42. It seems to me that at that heart of the plaintiffs' claim is the fact that for a number of years fishing vessels registered in Northern Ireland were unlawfully fishing for mussel seed in the territorial waters. The effect of this was compounded by the aggressive fishing methods and activities of these vessels which, the plaintiffs gave evidence of, included fishing for mussel seed which was too small. This, it was submitted, lead to over fishing of mussel seed and the consequent collapse in 2006. The plaintiffs claim that all of this inevitably led to less mussel seed being available to the plaintiffs. By contrast, the plaintiffs argued that the more traditional methods of fishing followed by themselves and their colleagues would have resulted in a preservation of the mussel seed.

43. Though the evidence of the activities of the Northern Ireland registered vessels was clear, evidence of its actual effect on the livelihoods of each of the plaintiffs was less so. In her reports, Dr. Maguire presented statistics on the amount of mussel seed fished by Northern Ireland registered vessels and re-laid to aquaculture sites in Northern Ireland. However, though this to my mind establishes a generalised loss for the mussel industry of this State, it does not establish any particular losses in respect of the individual plaintiffs. I do not think that it would be permissible for me to arrive at a figure representing the loss to each of the plaintiffs by simply apportioning amongst them the amount of mussel seed fished by Northern Ireland registered vessels. Though the plaintiffs may well have had the capacity in their aquaculture sites to re-lay the additional mussel seed which would have been made available had the Northern Ireland vessels not been fishing, it can be reasonably anticipated that other mussel fishermen in the State would also have increased their catch. Indeed, an additional supply of mussel seed may well have attracted other entrants into the market.

44. Mr. Martin Hill, chartered accountant, gave evidence on the losses being claimed by the plaintiffs. For each of the plaintiffs, the figures arrived at by Mr. Hill were based on each plaintiffs assertion that the aquaculture grant application detailing the expected allocation of mussel seed should have been the amount allocated by the first named defendant. For the reasons stated later in this judgment the plaintiffs are not legally entitled to make such an assertion. In any event, there was no specific evidence for each of the plaintiffs establishing that the difference between the allocation of mussel seed set out in the grant application and the amount actually allocated (or fished) was the result of the fishing of Northern Ireland registered boats and/or mismanagement of the mussel seed resource. In my view, in the absence of such evidence, a court could not be in a position to assess damages were such to arise.

45. The plaintiffs submitted that in assessing damages, the Court should adopt the approach taken in *Lett and Co. Limited v. The Wexford Borough Council* [2012] 2 I.R. 198. In this case the plaintiff was involved in mussel farming in Wexford for many years. A plan to upgrade local sewage facilities was adopted which included the construction of a waste treatment plant which would involve an exclusion zone encompassing the plaintiffs' mussel beds. The plaintiff brought proceedings claiming damages arising from a breach of legitimate expectation that he would receive compensation due to the imposition of the exclusion zone. In assessing the damages to which the plaintiff was entitled the High Court, and on appeal to the Supreme Court, had available basic figures of profit and loss both before and after the imposition of the exclusion zone. It also had figures based on increased income due to an increased density of mussel harvesting. There are no comparable figures in the instant case.

46. By reason of the foregoing, I make the following findings:

> (a) Had vessels registered in Northern Ireland not been fishing for mussel seed in the territorial waters, there would have been additional mussel seed available for the plaintiffs and other vessels licensed by the State.
>
> (b) There was insufficient evidence to quantify how much of the mussel seed made available by the absence of Northern Ireland registered vessels would have been fished by the plaintiffs. Further, account would have to be taken of the extra amount that could be fished by vessels other than the plaintiffs registered in the State and new entrants into mussel seed fishing.
>
> (c) Though the manner in which the allocations of mussel seed to the various plaintiffs were made may be open to criticism, the evidence shows that, for the most part, the amount of mussel seed fished by each of the plaintiffs fell short of their respective allocations.
>
> (d) Even if it were established that the first named defendant failed to manage the mussel seed resource appropriately, there was no evidence to quantify this. Indeed, an aspect of good management as proposed by the plaintiffs would have led to a closure of areas for mussel seed fishing which would have led to a reduction in the amount fished.

Applicable legal principles

47. In previous paragraphs I have identified what I believe to be serious deficiencies in the evidence given by the plaintiffs. It is necessary for me to examine the legal principles as apply to each of the heads under which the plaintiffs make their claim.

Breach of constitutional duties/rights

48. The plaintiffs successful appeal to the Supreme Court in the *Barlow II* proceedings established that under Article 10 of the Constitution mussel seed, being a natural resource, is the property of the State. Mussel seed therefore is not the property of the plaintiffs and this has legal consequences. I refer to *Casey v. Minister for Arts* [2004] 1 IR 402 a case concerning Skellig Michael, a national monument under the National Monuments Acts 1930 – 1994. As part of a programme for the conservation and restoration of the island a review of access, safety and control of visitors on the island was carried out in 1994. This review identified that the increasing number of visitors was causing damage and deterioration. Following consultation and discussions with boat operators, it was decided that landing permits would be granted to existing boat operators and operators who had invested in boats for operation during the particular season. The applicant sought an order of *certiorari* quashing the respondent's refusal to grant him a landing permit. In giving the decision of the Supreme Court, Murray J. (as he then was) stated:

> "[51] What is clear is that the appellant wishes to carry on a quite legitimate business of using his boat for tourist or commercial pleasure purposes. There is no complaint that he is restricted in carrying on such a business other than that he has not been given permission by the respondent to land his customers at Skellig Michael. Skellig Michael belongs to

the State not to the applicant. In complaining that his constitutional rights have been breached he is in effect saying that he has a constitutional right to land his customers on Skellig Michael as part of his pleasure or tourist business.

[52] I think one only has to state this proposition to see that it cannot be right. It seems to me that the applicant has misconceived the nature and ambit of the right to earn a livelihood. To engage in such a lawful business activity for the purpose of earning a livelihood is something which a citizen is entitled to do as of right. It is self-evident that the right to carry on such a business does not entitle the citizen to have access, as of right, to the property of third parties and use it for business purposes. It does not matter whether the property, in this case a national monument, is privately owned or owned by the State"

Adopting the authority of this decision, though the plaintiffs have a personal right to earn a livelihood this does not extend to them having a right to mussel seed which is the property of the State. Although it has been established by the Supreme Court that there has been a breach of Article 10 in permitting Northern Ireland registered vessels to fish for mussel seed in the territorial waters this, in my view, was not a breach of a personal constitutional right so as to entitle the plaintiffs to damages (see *Greene v. Minister for Agriculture* [1990] 2 IR 17).

49. The plaintiffs sought to rely upon *An Blascaod Mór Teoranta v. Commissioners of Public Works (No.4)* [2000] 3 IR 565. In this case, the relevant issue was whether a claim for damages could arise against the State for passing through the Oireachtas an Act that was unconstitutional. Though in the instant case the issue is the lack of legal authority for mussel seed fishing rather the passing of an unconstitutional Act, the decision of Budd J. is, nonetheless, instructive. At p. 590, Budd J. stated:

"There is no case in point to give a guideline where damage is alleged to flow from the actual invalid enactment. It seems to me that the appropriate redress in this type of case is a declaration of invalidity. In the circumstances of this case redress should not extend to damages. Having heard cursory evidence, I have concluded that there are a number of imponderables in respect of the heads of damage and that there is a lack of the type of direct causal link necessary. The plaintiffs have never been dispossessed of their property on the island and indeed the publicity arising from the litigation may well have made the culture of the Great Blasket even more well known."

And at p. 591:

"My conclusion is therefore that under Articles 15.4.2º and 34.3.2º of the Constitution the court has jurisdiction to declare an Act invalid and to give necessary and appropriate redress only for such damage as is proved to have flowed directly from the effects of the invalidity without intervening imponderables and events."

In my view, the plaintiffs have failed to establish that the damage which they claim to have suffered flowed directly from the unlawfulness ultimately found by the Supreme Court. The plaintiffs contend that the damage which they have suffered is a breach of their right to earn a livelihood. This right however is based on a right to mussel seed which the Supreme Court has found is the property of the State and in respect of which the plaintiffs do not have a right.

50. The further hurdle that confronts the plaintiffs are the principles set out in *Glencar Exploration PLC v. Mayo County Council* [2002] 1 IR 84. In that case, the applicants were involved in the exploration, prospecting and mining of ores and minerals. They had secured a number of prospecting licenses from the State in respect of certain lands in County Mayo. On foot of these licenses, the applicants carried out extensive prospecting and had achieved encouraging results. Unfortunately for the applicants the respondent County Council, despite advices to the contrary, ratified a development plan which incorporated a mining ban. The applicants successfully challenged this mining ban and the development plan was held to be *ultra vires* the respondent and was null and void. The applicants then claimed damages from the respondent for, *inter alia*, interference with the constitutional rights, breach of statutory duty, negligence, and breach of legitimate expectation. At p. 128, Keane C.J. stated:

"As for the damages allegedly sustained by the applicants as a result of the breach of their constitutional rights, a similar claim was made in *Pine Valley Developments v. The Minister for Environment* [1987] IR 23, but was also rejected. In that case, the *ultra vires* decision by the Minister for Local Government, to grant permission for the development of the plaintiff's lands was treated by Finlay C.J. in the course of his judgment, as having probably contributed towards a diminution in the value of the land in the plaintiff's hands. Similarly, it could no doubt be said in the present case that the imposition of the mining ban contributed to a reduction in value of the property right represented by the prospecting licences which was vested in the applicants. Finlay C.J., however, said at p. 38 that:-

'I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims or compensation where they act *bona fide* and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved.'

I am satisfied that those considerations apply to the present case. The remedy available to person affected by the commission of an *ultra vires* act by a public authority is an order of *certiorari* or equivalent relief setting aside the impugned decision and not an action for damages, to allow which, in the case of public officials, would be contrary to public policy for the reasons set out by Finlay C.J. in passage just cited."

Earlier in his judgment, Keane C.J. at p. 127 stated:

"This view of the law is authoritatively confirmed by the judgment of Finlay C.J. in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23 where he cited with approval the following statement of the law in Wade on *Administrative Law* (5th Ed.) at p. 673:-

'The present position seems to be that administrative action which is *ultra vires* but not actionable merely as a breach of duty will found an action for damages in any of the following situations:

1. If it involved the commission of a recognised tort, such as trespass, false imprisonment or negligence.

2. If it is actuated by malice, e.g. a personal spite or a desire to injure for improper reasons.

3. If the authority knows that it does not possess the power which it purports to exercise.'"

51. *Glencar Exploration* was considered in *Cromane Seafoods Ltd v. Minister for Agriculture* [2017] 1 IR 119, a case which also

concerned mussels where one of the plaintiffs was involved in the production of mussels in Castlemaine Harbour. This harbour had been designated as a special protection area under the relevant EU legislation by the first named defendant. When announcing the intention to designate the area as being a special protection area, the defendant stated that it was not envisaged that the designation would restrict the then current usage of the area. However, the European Commission took a contrary position and brought proceedings against the State in the Court of Justice of the European Union (CJEU). The CJEU found in favour of the Commission and, as a result, Castlemaine Harbour was closed to the plaintiff's mussel seed harvesting activities. Thought the harbour subsequently reopened it was not until after the end of the harvesting season. As a result, the plaintiff was unable to harvest mussel seed for a further year and thereby sustained loss and damage. I think it is important to note that in *Cromane Seafoods Ltd* what was involved was aquaculture sites in respect of which the plaintiffs had a proprietary right. In the instant case, however, what is involved is mussel seed which is the property of the State and in respect of which, as I have found, the plaintiffs do not have a right. The Supreme Court in *Cromane Seafoods Ltd,* as per MacMenamin J. at p. 181, again referred to the earlier decision of *Pine Valley*:

> "[166] The first of these, *Pine Valley Developments v. Minister for Environment* [1987] IR 23, this court, held, unanimously, that where a Minister is exercising a public statutory duty, he or she will not be liable in damages, even for an *ultra vires* action, unless the exercise of the power involves the commission of a tort, or is actuated by malice, or unless the authority knew that it did not possess the power which it purported to exercise. A Minister, in reaching his or her decision to grant a licence, and acting *bona fide*, in pursuance of advice which they had been given by a departmental senior legal advisor, could not be guilty of negligence or negligent misrepresentation"

I will return to *Cromane Seafoods Ltd* later when dealing with the issue of negligence.

52. On an application of *Glencar Exploration* and *Cromane Seafoods Ltd*, I am satisfied that the plaintiffs cannot succeed in their action for damages in respect of the unlawfulness of the State in allowing vessels registered in Northern Ireland to fish for mussel seed in the territorial waters. I am not satisfied that such involved the commission of a tort nor was there any evidence of malice or evidence that the first named defendant was aware that he did not have the legal power to permit vessels registered in Northern Ireland to fish for mussel seed in the territorial waters.

53. The plaintiff sought to rely on a number of decisions involving taxi licenses. These decisions were *Muldoon v Minister for Environment and Local Government* [2015] IEHC 649 and *Gorman v Minister for Environment and Local Government* [2001] 2 IR 414. I am satisfied that the principles set out in those decisions are not applicable in the instant case. I reach this conclusion on the basis that though a person may have a proprietary interest in a taxi license that he/she has purchased, the plaintiffs herein do not have a proprietary interest, for the reasons stated, in mussel seed.

Negligence/Negligent Misstatement

54. Again, the starting point is the decision of the Supreme Court in the *Barlow II* proceedings wherein it was decided that under Article 10 of the Constitution mussel seed is the property of the State. The plaintiffs relied on the alleged negligence of the defendant in the management of this resource.

55. A number of issues arise from this claim. Though there are recognised torts that make it unlawful to manage or use property in such a manner that injures others, I do not see that the tort of negligence arises in the instant case. As mussel seed is the property of the State, I cannot see that the State is under a duty of care to manage the mussel seed in such a way that protects the commercial interest of the plaintiffs. In the same way the owner of a gravel quarry is not under a duty to manage the gravel in order to protect the commercial interest of persons engaged in road building. Though it is clearly desirable to manage mussel seed appropriately, I cannot see that failing to do so amounts to negligence.

56. In taking this restrictive view of negligence, I believe I am in accordance with the decision in *Cromane Seafoods* wherein MacMenamin J. at p. 191 stated:

> "[198] I do not believe a duty of care existed between the appellants and these respondents in 2008. The Department was undoubtedly aware of the Castlemaine situation, but it was also in the context of an awareness regarding all the other operations of a similar nature within the State. In the years 2008 to 2010 some 150 Natura 2000 surveys had to be carried out by the State. The question of where national priorities lay, or who should receive resources, or where surveys should be carried out first; all were preeminently questions for the executive, even accepting meetings actually took place between representatives of the respondents and the Department between 2008 and 2010. But it is difficult to find that anywhere in the relationship there could be said to be a 'duty of care' or 'proximity', even if loss might have been foreseeable"

57. Further, if there is a duty of care on the first named defendant concerning the management of mussel seed, the appropriate standard has to be identified. Is the standard of care similar to that which applies to professionals, i.e. that the professional in question by act or omission has acted in a way which no other similarly qualified professional would have done if taking reasonable care? I refer again to *Cromane Seafoods Limited* where, at p. 192, MacMenamin J. stated:

> "[199] In fact, the closely connected issue of standard of care presents as great a challenge as that of duty of care. It impacts on the entire timespan encompassed. First, it is questionable whether the law can comfortably accommodate a situation where operational negligence would involve a *Donoghue v. Stevenson* [1932] A.C. 562 test. That threshold is a low one based, as Lord Atkins put it, on knowledge of the effect of actions or omissions on one's neighbour. But, to cite inaction between 2000 and 2008 raises an entire range of issues already touched on in this judgment, again including proximity and whether there was a duty of care at all. It is unclear if the actions of a Minister in an area of discretion are to be considered on the basis of the standards applicable in a professional negligence action, or, alternatively perhaps, on *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 standards. All of these questions seem to me to present insuperable difficulties, at least in the instant case. As to a 'professional negligence' standard, there was no concrete evidence about what would have been the normally accepted procedure by a person in the position of the Minister. Were a *The State (Keegan) v. Stardust Compensation Tribunal* test adopted, a court would have to hold that a Minister acted, or omitted to act, in a way no Minister could reasonably act. In short, applying a higher standard implies evidential deficits, and a misapplication of the law; applying a lower standard far too easily places a court in a position of being a surrogate decision maker in this area, an issue further explored below, especially bearing in mind the fact that, *prima facie*, the Minister was acting *ultra vires*."

58. In the instant case, there was a dispute between two qualified and experienced experts, Dr. Julie Maguire and Dr. Terence O'Carroll, as to the appropriate way for the first named defendant to manage the mussel seed resource. In my view, were there to be a duty of care on the first named defendant, the appropriate standard would be that which applies in professional negligence actions.

I say this as it is clear from the evidence that managing a natural resource like mussel seed involves exercising judgment in areas such as natural science, biology and economics. I would characterise the differences between the experts in the instant case as being an honest difference of opinion which, of itself, does not amount to negligence.

59. Insofar as the plaintiffs are making a claim for negligent misstatement, the findings set out in the previous paragraphs also apply.

Breach of statutory duty
60. The plaintiffs have identified a number of statutes and statutory instruments, which I have set out at para. 23 above, which they claim the defendants have been in breach of:

> (i) Section 10 of the Act of 2006;
>
> (ii) Section 13 of the Act of 2006;
>
> (iii) Molluscan Shellfish (Conservation of Stock) Order 1987 (S.I. No. 118 of 1987);
>
> (iv) Mussel seed (Conservation and Rational Exploitation) Order 2003 (S.I. No. 241 of 2003);
>
> (v) Mussel seed (Fishing) Regulations 2006 (S.I. No. 311 of 2006)

61. As a general principle, if the statutory duty in question is owed to the public at large then no action for damages for breach of statutory duty arises (see *Glencar Exploration*). An application of this principle was seen in *Atlantic Marine Supplies Limited v. Minister for Transport* [2016] 1 I.R. 605. In this case the plaintiff was a company specialising in the supply of safety equipment for fishing boats. It was alleged that the first named defendant had failed to enforce requirements contained in a code of practice in respect of specifications for life rafts which vessels of a particular length were required to carry. The plaintiffs alleged that, as a result of this, a large number of such vessels did not have the appropriate life rafts and the plaintiffs thereby lost business. In the High Court, Clarke J. (as he then was) held at p. 625:

> "[52] In relation to statutory duty *per se* it is clear from cases such as *Moyne v. Londonderry Port and Harbour Commissioners* [1986] I.R. 299 and *Sweeney v. Duggan* [1991] 2 I.R. 274 that the question of whether a plaintiff is entitled to claim damages for breach of statutory duty must start with the consideration of whether, taking the relevant statutory regime as a whole, it can be said that it was 'intended by the legislature that an aggrieved plaintiff would be entitled to damages'".

and,

> "[55] … I am prepared to accept, for the purposes of argument, that there may be circumstances in which a failure of regulation can give rise to a breach of statutory duty. However, for such to be the case, it seems to me that the relevant legislation would need to provide in express or necessarily implied terms for a specific duty of a particular type on the relevant regulator, from which the court might conclude that the proper construction of the relevant statute was such as imposed a statutory duty on the regulator concerned to act in a particular way or to refrain from acting in a particular way."

62. In this case the High Court refused to award damages, a decision which was ultimately upheld by the Supreme Court.

63. The wording of s. 10 of the Act of 2006 (see para. 23 above), in my view, does not establish that the plaintiffs, while clearly aggrieved that persons on board vessels registered in Northern Ireland fished in the territorial waters, would be entitled to damages when this occurred. The wording of s. 13 is couched in discretionary terms so it is difficult to see how an aggrieved plaintiff would be entitled to claim damages.

64. Turning to the statutory instruments, S.I. No. 241/2003 concerns, *inter alia*, allocation of mussel seed by the first named defendant. It seems to me that any remedy for a breach would lie in an application for judicial review rather than in a claim for damages. The other statutory instruments relied upon by the plaintiff concern the conservation of shellfish, including mussel seed, and could not be said, in my view, to confer on the plaintiffs an entitlement to damages in the event of the relevant provisions not being applied by the first named defendant.

Legitimate expectation
65. Once again, I refer to *Glencar Exploration* where Fennelly J. at p. 162 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 actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. 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."

66. In *Atlantic Marine Supplies Limited*, O'Donnell J., in the Supreme Court, stated at p. 653:

> "… The obligation on the executive to enforce the law enacted by the Oireachtas is derived from the Constitution, and is not dependent on any concept of legitimate expectation which could be relied upon by a more limited group of citizens, to found a claim for damages. I also agree that it is, at a minimum, unlikely that the enactment of legislation which itself does not give rise to a right to sue for breach of statutory duty, could nevertheless give rise to a legitimate expectation sounding in damages in the same group. On similar reasoning it might indeed be said that if this is possible then at the level of principle, it would follow that all legislation was capable of giving rise to some such legitimate expectation on the part of interested parties, or indeed quite possibly any citizen, with a corresponding right to enforce such an expectation and to claim damages if it is possible to advance a claim in relation to them. It is not necessary to analyse the matter further: it is sufficient to conclude that the finding of legitimate expectation in this case cannot be upheld."

67. The plaintiffs' claim that they had a legitimate expectation that the defendants would act in accordance with the law and, in particular, concerning the allocation of mussel seed in that the mussel seed would be allocated taking into account the various significant financial investments which they had made. It should be noted, however, that in respect of grant aid for new fishing vessels the following was stated:

> "the offer of grant aid, if accepted, does not imply any right whatsoever to future allocation of mussel seed. The seed mussel allocation procedure is separate and distinct from the process of approval for grant aid."

One of the conditions of the fishing boat licences which the plaintiffs held was:

> "Aquaculture mussel seed restriction: this licence does not confer any entitlement in relation to the allocation of mussel seed by the Department. Approval of proposed aquaculture activities specified in an aquaculture plan and/or on the basis of other information provided, solely relates to sea fishing boat licencing and should not be construed as conferring in anyway, entitlement to mussel seed in any allocations made by the Department.".

68. It seems to me that the statements made in respect of grant aid and the fishing boat licence could not amount to a promise or representation required for the first of the tests identified by Fennelly J. as necessary to succeed in a claim for legitimate expectation. I have already reached the conclusion that the statutory provisions that provide for the allocation of mussel seed do not confer on the plaintiffs a right to claim damages. So, as per O'Donnell J., at para. 66 above, this cannot support a claim for legitimate expectation. Further, I adopt the restriction referred to by Clarke J. in *Lett & Co. Limited v. the Wexford Borough Council*, in the High Court, of the need to preserve the discretion of the first named defendant in making allocations of mussel seed. In *Lett,* Clarke J. stated at p. 212:

> "[29] 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 p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, 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 v. The Revenue Commissioners* [1994] 2 I.R. 160, 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"

69. Finally, the plaintiffs made numerous references to the National Development Plan which set out ambitious targets for the mussel industry. These targets were never reached. A National Development Plan is, by its nature, ambitious and aspirational. I do not think it could be seriously contended that a target or aim set out in a National Development Plan would amount to a promise or representation to act in a particular way.

Unlawful delegation

70. The plaintiffs allege that the discretion provided for in s. 13 of the Act of 2006 (and related statutory instruments) was unlawfully delegated to SMAC. They allege that it was SMAC which evaluated the applications for mussel seed and determined the amount to be allocated.

71. It was the case that in a number of years after 2000 allocations for mussel seed were simply rolled over from year to year. This would indicate that the various criteria were not being applied. However, any remedy in respect of this would lie in judicial review proceedings. In any event, as has been referred to earlier, for the most part, the amount of mussel seed fished by the plaintiffs fell short of the amount that was allocated.

72. In my view, the first named defendant was entitled to delegate to SMAC an advisory role in the allocation of mussel seed. It could hardly be suggested that the Minister himself was legally obliged to consider, determine and award allocations of mussel seed without the involvement of officials with more professional knowledge (see *Tang v. the Minister for Justice, Equality & Law Reform* [1996] 2 IRLM 46).

73. The Minister still retained legal responsibility for the allocations and had there been judicial review proceedings initiated by the plaintiffs in respect of the allocations then the Minister would have been the respondent.

European Convention on Human Rights

74. The ECtHR, on 7 June 2018, delivered judgment in *O'Sullivan McCarthy Mussel Development Limited v. Ireland*. This judgment arose from an application to the ECtHR by the unsuccessful plaintiffs in *Cronane Seafoods Ltd*. This case was based on established property rights in the aquaculture business, property rights which would engage the provisions of Article 1 of Protocol 1 of the ECHR. As I have referred to earlier in this judgment, however, the instant case does not concern the plaintiffs' property rights in their own aquaculture business but rather they are seeking to establish property rights in mussel seed. The decision of the Supreme Court in the *Barlow II* proceedings established that mussel seed is the property of the State and thus it cannot be the property of the plaintiffs. I have also rejected the contention that the plaintiffs constitutional right to earn a livelihood extends to a property right over mussel seed. Thus, in my view, this decision of the ECtHR is of no assistance to the plaintiffs.

Conclusion

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