THE HIGH COURT

2008 1320 JR

Skellig Fish Limited and

Pesquerias Alonso Sociedad Anonima

Applicants

And

The Minister for Transport, Ireland and Attorney General

Respondents

JUDGMENT of O'Neill J. delivered on the 20th day of May 2010.

1. Reliefs Sought

1. Leave was granted to the applicants by this Court (Peart J.) on the 24th November, 2008, to seek the following reliefs by way of judicial review:-

> 1. An order of *certiorari* quashing the advice of the first named respondent contained in a letter dated the 30th June, 2008, that a certificate of equivalent competency issued by the competent authority within the United Kingdom of Great Britain and Northern Ireland is not mentioned as being recognised in The Merchant Shipping (Recognition of British Certificates of Competency) Order, 1995.
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> 2. A declaration that the Spanish certificates of competency of the first named applicant's deck officers and engineer officers used for the purposes of manning the first named applicant's sea fishing boats and accepted by the first named respondent for a period in excess of twenty five years shall be treated as evidence of the attainment of a standard of competency equivalent to the standard required for the issue of an Irish certificate of competency under the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1988 (S.I. No. 289 of 1988) ("the manning regulations of 1988").
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> 3. A declaration that the Spanish certificates of competency of the first named applicant's deck officers and engineer officers accepted by the first named respondent for the purposes of surveys on the first named applicant's sea fishing boats by the first named respondent for the purposes of Council Directive 97/70/EC setting up a harmonised safety regime for fishing vessels of 24 meters in length and over, the adapted provisions of the regulations annexed to the Torremolinas International Convention for the Safety of Fishing Vessels, 1977, as modified by the Torremolinas Protocol of 1993 relating thereto, and the Fishing Vessels (Safety Provisions) Regulations 1998 now replaced by the Fishing Vessels (Safety Provisions) Regulations 2002 satisfies the aforesaid statutory and Treaty requirements.
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> 4. A declaration that the Spanish certificates of competency of the first named applicant's deck officers and engineer officers relied upon in exercise of fundamental freedoms guaranteed by Community law including freedom to provide services, freedom of establishment and the free movement of workers and accepted by the first named respondent for a period in excess of 25 years for the purposes of surveys carried out by the first named respondent on the first applicant's sea fishing boats entitles deck officers and engineer officers similarly qualified to man and crew the first named applicant's said sea fishing boats.
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> 5. A declaration that the *modus operandi* of the applicants' fishing joint venture to increase and maintain the historic catch of the State for valuable species of fish not caught in sufficient volume in the past in waters otherwise relevant for the purposes of historic catch records prior to and subsequent to the introduction of national quotas and total allowable catches under the common fisheries policy entitles the first named respondent to grant the applicants an exemption from the manning regulations of 1988.
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> 6. A declaration that the granting of a United Kingdom certificate of equivalent competency for the purposes of providing services as a deck officer or engineer on a British sea fishing boat otherwise entitled to fish against British quotas under the common fisheries policy entitles the holders of such certificates to special consideration (including exemption) from the manning regulations of 1988.
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> 7. If necessary, a declaration that the applicants are entitled to an exemption from the manning regulations of 1988 in respect of the matters complained of in these proceedings.
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> 8. A declaration that the first applicant's deck officers and engineer officers holding certificates of competency, issued by the competent authority in the Kingdom of Spain, and certificates of equivalent competency, issued by the competent authority in the United Kingdom of Great Britain and Northern Ireland, are qualified to man and crew the fist named applicant's sea fishing boats registered on the Irish register for the purposes of the applicants' Hiberno/Iberian fishing undertaking in the south west of the State and the north west of Spain.
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> 9. A stay or in the alternative an interim or interlocutory injunction restraining the respondents from treating the first named applicant's deck officers and engineer officers holding certificates of competency issued by the Kingdom of Spain and certificates of equivalent competency issued by the competent authority in the United Kingdom of Great Britain and Northern Ireland as not qualified to man and crew the first named applicant's sea fishing boats.
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> 10. If necessary, a stay or in the alternative an interim or interlocutory injunction restraining the respondents from taking manning requirements into account in the survey due to be carried out on the first named applicant's sea fishing boats.
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> 11. Damages (including aggravated and exemplary damages).
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> 12. Damages for breach of directly applicable provisions of EC law.

1.2 The applicants applied at the hearing of this matter to rely upon an amended statement of grounds which contained additional reliefs, as follows:-

> 13. If necessary, an order quashing the first named respondent's notices of prohibition dated the 7th January, 2009, directed to the Master of the MFV *Skellig Light II* and the Master of the *Myrodoma F* then lying at the port of La Coruna, Spain prohibiting the said fishing vessels from sailing until compliance with Irish national maritime legislation relating to officer qualifications (the manning regulations of 1988) and basic crew training (S.I. 587 of 2001 – Fishing Vessels (Basic Safety Training) Regulations 2001) referred to in correspondence dated the 19th January, 2009, addressed to the first named applicant concerning the notices of prohibition dated the 7th January, 2009, concerning the MFV *Skellig Light* II and the MFV *Myrdoma F* both detained at La Coruna, Spain.
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> 14. If necessary, an order quashing the decision of the first named respondent referred to in correspondence dated the 19th January, 2009, addressed to the first named applicant concerning the notices of prohibition dated the 7th January, 2009, regarding the MFV *Skellig Light II* and MFV *Myrdoma F* both detained at La Coruna, Spain.

1.3 At the hearing of these proceedings the respondents indicated their opposition to the amendment of the statement of grounds on the basis of delay.

2. The Facts

2.1 The first named applicant is a limited liability company incorporated in Ireland in 1979 and is engaged, chiefly, in fishing. Its two sea-fishing boats are the MFV Skellig Light II and the MFV Myrdoma F. The second named applicant is a Spanish registered company and also engages in fishing. The two companies commenced a joint venture in 1981, pursuant to Part III of the Sea Fisheries Act 1952, as amended, with the assistance of Bord Iascaigh Mhara and the then Department of the Marine. One of the objectives of the joint venture was to increase Irish historic fishing quotas in the species of hake and monkfish before the determination of the total allowable catches and quotas under expected changes to the common fisheries policy.

2.2 The first named applicant employs Spanish skippers and crew, all of whom are qualified in Spain for the functions they perform on board. Two senior officers swore affidavits in these proceedings (Carlos Belarmino Millan Oujo, who swore three affidavits and Lutz Carlos Moartinos Meissner, who swore one affidavit). They averred that in addition to their Spanish certificates of competency that they also hold U.K. certificates of equivalent competency, which entitle them to perform their duties on vessels registered on the U.K. register. In order to obtain the latter certificate they undertook an English language examination (the U.K. Legal and Administrative Processes and English Language exam). Prior to obtaining the certificates of competency granted by the U.K. competent authority they only held Spanish certificates of competency.

2.3 The relevant standard applied by the Maritime and Coastguard Agency ("the MCA"), the competent authority in the U.K., in respect of certificates of equivalent competency for use on fishing vessels registered on the British register, is contained in an Information Note issued by the MCA entitled "Certificates of Equivalent Competency – Amendment of Procedures", which was published in July 2006. This note makes it clear that not all, but at least one officer on board a vessel on the British register must hold a U.K. certificate of equivalent competency. One of the acceptable ways of demonstrating evidence of competency in English is by passing the Marlins English language test. Marlins is a provider of English language tests to the maritime industry. The required pass mark for the purpose of obtaining a MCA certificate of equivalent competency for a senior deck or engineer officer is 70%.

2.4 The required level of competency in the English language in this jurisdiction for the purposes of the manning regulations of 1988, as amended by the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 2000 (S.I. No. 192 of 2000) was set out by Captain Paul Miley at para. 26 of his affidavit, sworn on the 2nd July, 2009. He averred as follows:-

> *"… In this jurisdiction, knowledge of the English language for the purposes of the 1988 Regulations is assessed by reference to an objective test known as the ISF Marlin's English Language Test. The minimal acceptable Marlin's pass is set at various levels. For senior deck officers, a 90% score is required. For junior deck officers, an 80% score is required. For senior engineering officers, 80% is required and for junior engineering officers, 70% is required. Knowledge of English is considered to be a vital safety issue."*

Therefore, a 90% pass mark is required for senior deck officers in Ireland, as opposed to a 70% pass mark for senior deck officers in the U.K.

2.5 In their report on the inspection of the MFV Skellig II dated the 27th October, 2004, the first named respondent's Marine Survey Office ("the MSO") made a finding that the vessel was not manned in accordance with the manning regulations of 1988.The first named applicant was directed that the vessel was not permitted to leave port until this was rectified. The next day the applicants applied to the MSO for an exemption pursuant to Article 3 of those regulations from the application of its provisions to them, in reliance on the Spanish certificates of competency held by its deck officers and engineers. The MSO rejected this application by letter dated the 21st December, 2004, and also pointed out also that applications could be made by the crew under the E.C. (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (S.I. No. 135 of 1996). No such applications have, at any time, been made by the applicants' deck officers or skippers.

2.6 A certificate of compliance was, however, issued in respect of the MFV Skellig Light II pursuant to the Fishing Vessels (Safety Provisions) Regulations 2002 (S.I. No. 418 of 2002) ("the regulations of 2002") on the 15th December, 2004, by the predecessor of the first named respondent, which was valid until the 2nd December, 2008, subject to surveys. These latter regulations transpose Council Directive 97/70/EC setting up a harmonised safety regime for fishing vessels of 24 metres in length and over and give effect to the Torremolinas Protocol of 1993, relating to the Torremolinas International Convention for the Safety of Fishing Vessels, 1977. The MFV Myrdoma F, obtained its certificate of compliance pursuant to the regulations of 2002 on the 7th November, 2006, valid until the 19th April, 2010, subject to surveys.

2.7 The first named applicant was informed by its solicitors that the MSO had changed its practice in respect of the manning requirements for fishing vessels on the Irish register. By letter dated the 13th May, 2008, the first named applicant sought confirmation that its ship officers' qualifications were sufficient for the purposes of the upcoming surveys on the MFV Skellig Light II and the MFV Myrdoma F. By letter dated the 30th June, 2008, the MSO replied as follows:-

> *"We would advise that the appropriate legislation is the Fishing Vessels (Certification of Deck Officers and Engineer Officers) Regulations 1988 as amended and the Merchant Shipping (Recognition of British Certificates of Competency) Order 1995.*

The latter legislation allows skippers, second hands or engineer officers in possession of UK fishing vessel certificates of competency to serve on Irish fishing vessels.

UK Fishing Vessel Certificate of Equivalent Competency is not mentioned as being recognised in the above Order."

2.8 The first named respondent served notices of prohibition both dated the 7th January, 2009, one in respect of the MFV Skellig Light II and the other in respect of the MFV Myrdoma F on the basis that the vessels had no valid certificates of compliance under Council Directive 97/70/EC. The notices had the effect, inter alia, of authorising the detention of the vessels. On the 18th January, 2009, a survey was carried out by the MSO on both of the vessels in La Coruna, Spain, for the purposes of assessing compliance with the Torremolinas Protocol and Council Directive 97/70/EC and also a Flag State inspection. The outcome of the survey is summarised in a letter to the first named applicant from Mr. Kieran Golding, Engineer and Ship Surveyor of the MSO, dated the 19th January, 2009, as follows:-

"I have visited the above vessels at La Coruna yesterday. The purpose of the visit was to complete

• an inspection of outstanding survey items relating to renewal of their EU Directive 97/70 CoC's [Certificates of Compliance for the Purposes of the Torremolinas Protocol and Council Directive 97/70/EC], Fishing Vessels (Safety Provisions) Regulations 2002.

• a Flag State Inspection of both vessels, following the detention of Skellig Light II, including investigation of the events in the loss overboard of crew member Alvero Paz Portas on December 28th December 2008.

In regard to the EU 97/70 CoC [Certificates of Compliance for the Purposes of the Torremolinas Protocol and Council Directive 97/70/EC], all outstanding items have been attended to, and I attach the necessary declarations for your attention, please sign both declarations and return them to me at our Cork office.

However, I must advise you, that neither vessels complies with Irish National Maritime legislation relating to Officer Qualifications (SI 289 of 1988) and Basic Crew Training (SI 587 of 2001).

Until such time as the vessels are in compliance, the prohibition will not be lifted on Skellig Light II, and CoC's will not be issued to either vessel."

2.9 On the 26th February, 2009, Mr. Snelgrove, the Deputy Chief Surveyor of the MSO sent a letter by fax to the applicants confirming that certificates of compliance would issue as soon as the applicants would satisfy the manning regulations of 1988 and outlining the rationale for the enforcement of the said regulations in the following terms:-

"The MSO is aware of two recent incidents where the competency of the crew's employed on board may have been a factor:-

• Skellig Light II – 28/12/08

Fatality of a member of the crew following a man overboard incident. The vessel should not have been at sea at this time as the Certificate of Compliance had expired.

• Myrdoma F – 08/11/08

Vessel ran aground in Dingle 08/11/08. The vessel did not have a valid Certificate of Compliance at the time of this incident and should not have been operating, as the required surveys to ensure the continuing validity of the certificate had not been carried out.

The Marine Survey Office takes a holistic approach to maritime safety and the manning of the vessels in accordance with the applicable regulations is linked to the issue of the Certificate of Compliance, as a vessel must be operated by competent crewmembers. In addition, Article 3 of the Directive 97/70/EC requires that Member States shall ensure that the provisions of the Annex to the Torremolinas Protocol are applied to fishing vessels. Chapter VIII, Regulation 2 of the Protocol contains requirements for muster lists onboard fishing vessels. These vessels do not currently have muster lists that contain the names of appropriately qualified officers and crews. Furthermore, Regulation 4 requires the administration to take such measures as it may deem necessary to ensure that crews are adequately trained in their duties in the event of emergencies. Consequently it is the view of the MSO that the vessels are not currently fit to proceed to sea without danger to the vessel or persons onboard and in accordance with Chapter I, Regulation 6(2)(c) the certificates have been withdrawn, as corrective action has not been carried out."

2.10 In his affidavit sworn on the 2nd July, 2009, Captain Miley highlighted the link between safety and knowledge of the English language on board Irish registered vessels. He exhibited the report carried out by the Marine Casualty Investigation Board ("the MCIB") into the death of a Spanish national who was lost overboard the MFV Castletown on the 5th August, 2004, in which report it was recommended, inter alia, that the manning regulations of 1988 be strictly enforced. He also exhibited the report of the MCIB into the sinking of the Pere Charles off the South Wexford Coast on the 10th January, 2007, where it was recommended that a marine notice should be issued stating that all fishing vessels must be manned as required by the regulations. He also exhibited the report into the capsizing and the sinking of the MFV Dinish off the Scilly Isles on the 24th May, 2006, where it was found that there was a failure by Castletown Fisheries, the owners, to comply with the manning regulations of 1988 by ensuring that all the officers had certificates of competency or certificates of equivalent competency. Although the MCIB acknowledged that it would be unlikely that a failure to comply with these regulations affected the cause or outcome of the incident it stated that *"Irish Certificates of Competency are conducted through the English language and competency in English would have helped communications with the rescuers."*

2.11 The applicants' crew members subsequently completed a course on basic safety training with Bord Iascaigh Mhara. No issue now arises as to compliance with the Fishing Vessels (Basic Safety Training) Regulations 2001 (S.I. 587 of 2001).

2.12 These judicial review proceedings were instituted on the 26th November, 2008.

3. The Law

3.1 Council Directive 97/70/EC established a harmonised safety regime for vessels of over 24 metres and, as such, applies to the applicants' vessels. The directive gives effect to the Torremolinas Protocol of 1993 relating to the Torremolinas International Convention for the Safety of Fishing Vessels, 1977. The Torremolinas Protocol was adopted in 1993. The Convention itself has yet to enter into force. Article 6 of the directive provides that Member States must issue to fishing vessels flying their flag, a "certificate of compliance" within the terms of the directive. The issuance of such a certificate indicates that the vessel and its equipment comply with the stipulated safety standards. The E.C. (Safety of Fishing Vessels) Regulations 2002 (S.I. No. 417 of 2002), as amended by the European Communities (Safety of Fishing Vessels) (Amendment) Regulations 2003 (S.I. No. 72 of 2003), and the Fishing Vessels (Safety Provisions) Regulations 2002 (S.I. No. 418 of 2002) transposed this directive into Irish law.

3.2 The International Maritime Organisations' ("the IMO") International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel 1995 ("STCW-F Convention"), though not in force, provides inter alia, for knowledge of the English language. Paragraph 15 states the required standard as follows:-

> *"Adequate knowledge of the English language enabling the skipper to use charts and other nautical publications, to understand meteorological information and measures concerning the vessel's safety and operation, and to communicate with other ships or coast stations. Ability to understand and use the IMO Standard Marine Communication Phrases."*

3.3 In the absence of an international framework regulating the matter, the manning regulations of 1988, made pursuant to ss.3 and 8 of the Merchant Shipping (Certification of Seamen) Act 1979 govern the requisite qualifications for crew on Irish registered fishing vessels. Those regulations require that a specified number of deck and engineer officers must be carried by each fishing vessel registered in the State and that those officers must hold a certificate of competency issued under the regulations or a certificate of equivalent competency. The Department of the Marine issued a publication pursuant to the manning regulations of 1988 specifying the standards of competency and the conditions to be satisfied before a certificate of competency can be issued entitled "*Examinations for Certificates of Competency for Fishing Vessels Deck Officer Requirements, Syllabuses and Specimen Papers*". Paragraph 2.15 is headed "Knowledge of English" and states as follows:-

> *"Each candidate must prove to the satisfaction of the Examiner that he is sufficiently conversant with the English language to perform the duties required of him in a ship registered in the State."*

3.4 Certificates of competency issued by the U.K. competent authority are automatically recognised in this State by virtue of the Merchant Shipping (Recognition of British Certificates of Competency) Order 1995 (S.I. No. 228 of 1995) ("the Order of 1995"). Certificates of competency granted by other Member States of the European Union may be considered under the "mutual recognition regime" pursuant to Council Directive 2005/36/EC, as transposed into Irish law by S.I. No. 139 of 2008, which replaced S.I. No. 135 of 1996. There is also provision in Article 10(1) of the manning regulations of 1988 for the recognition of the qualifications of other states.

3.5 The IMO International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 ("STCW Convention"), which applies to merchant vessels, has, entered into force. Each contracting party certifies their seafarers to an agreed standard and issues them with a certificate of competency. Provision is made for a second contracting party to recognise the certificate of competency granted by the first contracting party in certain circumstances but there is no provision made for "knock-on" recognition. This type of mutual recognition regime is also envisaged for fishing vessels, in the, not yet in force STCW-F Convention.

4. The Castletown case

4.1 This Court, in the recent case of *Castletown Fisheries Limited and Anor. v. Minister for Transport and Marine and Others* [2009] I.E.H.C. 240 encountered similar facts and issues to the ones raised in the present case. There, the two applicant fishing companies challenged the decision of the first named respondent to the effect that a certificate of equivalent competency issued by the competent authority in the U.K. did not come within the provisions of Article 2 of the Order of 1995, which expressly provides for recognition in this jurisdiction of certificates of competency issued in the U.K. The grounds relied on by the applicants in this case at paras. 27 to 29 inclusive of the amended statement of grounds have been considered in the *Castletown* case. These grounds relate to the conduct of the first named respondent for a 25 year period which was said to amount to an acceptance by the Minister that Spanish certificates of competency satisfied the requirements of the manning regulations of 1988 and/or that the applicant had a legitimate expectation that the Minister had "specified" under Article 10(1)(a) of the manning regulations of 1988, by virtue of his conduct, that the standard of competence to be attained by deck officers and engineer officers is the standard required by Spain and by the U.K. Also at paras. 32 to 35 inclusive of the amended statement of grounds matters similar those considered in *Castletown* are raised, namely, the status of a certificate of competency under the Order of 1995 and whether a legitimate expectation arose to the effect that the Minister had recognised U.K. certificates of equivalent competency.

4.2 This Court was satisfied in *Castletown* that there was no "knock on" consequence from obtaining a U.K. certificate of equivalent competency that would entitle the holder of such a certificate to recognition under Article 2 of the Order of 1995. As to the applicants' argument that the non-recognition of the certificate of equivalent competency failed to respect the principle of effectiveness in Community law, in that, the first named respondent was making it excessively difficult for the applicants' skippers to satisfy its requirements, this contention was rejected in *Castletown,* because of the existence of the mutual recognition regime, under which the applicants in that case had submitted applications which they did not, ultimately, pursue. As noted above, at para. 2.5 of this judgment, the applicants in the present proceedings did not avail of the mutual recognition regime at all.

4.3 In *Castletown*, an issue also arose as to whether Article 10(1) (a) of the manning regulations of 1988 required an express specification by the Minister as to the standard of competence required for the issue of a foreign certificate of competency. It was held that it did and no such express specification had occurred in respect of certificates of competency from Spain.

4.4 Another issue considered in *Castletown* was that of legitimate expectation. The applicants there made the case that the fact that no difficulty was raised in respect of the manning of its vessel for a period of some twenty seven years, during which period the crew and officers held Spanish qualifications, conferred a legitimate expectation on the applicants that their qualifications would not later be called into question. However, it was held that the doctrine of legitimate expectations could not operate to prevent the first named respondent, a public authority, from exercising his statutory powers and discharging his statutory function and that there could not be a legitimate expectation to the continuation of a lax or non-enforcement of this statutory regulatory regime.

4.5 Similarly, in this case it was submitted that the course of dealings between the applicants and the first named respondent, for a period of twenty eight years, meant that the first named respondent and his predecessors had accepted that the certificates of competency issued by Spain to its deck officers and engineers satisfied the requirements of the manning regulations of 1988. The

applicants submitted that the issue of whether a legitimate expectation existed was not explored by reference to E.U. law in *Castletown* and that it remained to be decided in this case.

4.6 No issue arose in *Castletown* as to compliance with the provisions of the Torremolinas Protocol. Also in that case, there was no specific complaint concerning the precise standard of English language competency required and, in particular, the 90% score in the Marlins English test, for senior deck officers and skippers.

4.7 The applicants contend that the facts of *Castletown* may be distinguished from those in this case on the basis that this State encouraged the joint venture between the first and second named applicants for the purpose of "quota-making", the applicants being the "quota makers", which did not arise in *Castletown.* They noted that at all times the applicants always had Irish nationality by invitation from the fishing authorities in this State and did not acquire their rights and entitlements through the courts like Spanish fishing vessels on the U.K. register, the "quota hoppers".

4.8 In summary in *Castletown*, this Court decided that:-

1. The Order of 1995 did not extend to recognition of U.K. certificates of equivalent competency.

2. That Spanish qualifications were not recognised under Article 10(1) of the manning regulations of 1988, no application having ever been made to the first named respondent in that regard.

3. That the STCW Convention expressly excludes "knock-on" recognition, for obvious reasons, namely, that such a knock-on process would lead to a lowest regulatory standard having universal application. Although the STCW-F Convention has not yet entered into force, it too excludes a "knock-on" recognition. Hence, it was held in *Castletown* that U.K. Certificates of Equivalent Competency were not entitled to recognition either under the Order of 1995 or the manning regulations of 1988.

4. There could be no legitimate expectation under Irish law to the non or lax enforcement of the manning regulations of 1988.

5. There was no breach of E.U. Treaty rights or E.U. principles of equivalence or effectiveness because the applicants in that case did not pursue their applications under the E.U. regime for recognition of their professional qualifications.

5. How much of the applicants' case remains undecided after* Castletown*?

5.1 The *ultra vires* issue concerning the notice of prohibition and compliance with the Torremolinos Protocol is clearly a new issue.

5.2 The question of whether the pass mark of 90% in the Marlins Test infringes E.U. Treaty rights or E.U. principles of equivalence or effectiveness as amounting to an insuperable barrier resulting in the applicants being driven out of the Irish fishing industry is also, clearly, an issue which was not considered in the *Castletown* case. The proportionality of the 90% pass mark was likewise not considered in *Castletown.*

6. Ultra Vires

6.1 The first issue which falls to be determined in these proceedings is whether the terms of the letter of the 19th January, 2009, which informed the first named applicant that the notices of prohibition would not be lifted from the first named applicant's vessels until such time as the vessels were in compliance with *inter alia,* the manning regulations of 1988 was ultra vires, the regulations of 2002, implementing Council Directive 97/70 and the Torremolinas Protocol.

Counsels' Submissions

6.2 Mr. O'Reilly S.C., for the applicants, submitted that the Torremolinos Protocol is concerned solely with the safety of fishing vessels, specifically, the hull, machinery and equipment on board and that there were no provisions in it dealing with officer qualifications or crew training. As a result, it was his contention that the State had acted ultra vires to the extent that the first named respondent had retrospectively purported to raise the issue of manning when no provision was made for a manning requirement in the Protocol or Directive.

6.3 In addition, he argued that the standard of knowledge of the English language required by the respondents was *ultra vires* s.3 of the Merchant Shipping (Certification of Seamen) Act 1979 and the manning regulations of 1988. He pointed out that the STCW-F Convention, though not yet in force, only required "adequate knowledge" of the English language, in contrast to "thorough knowledge", "general knowledge" and "knowledge" of other requirements and was therefore of a lesser standard than that required by the respondents.

6.4 Mr. Collins S.C., for the respondents, submitted that the Torremolinas Protocol was premised on the assumption that the crew were properly qualified and that regulation 4 of Chapter VIII set forth the training requirements for emergency situations on board a ship, containing aspects of training which related to the competence of the crew and specifically required the respondent to take such measures as it deemed necessary to ensure that crews were adequately trained in their duties in the event of emergencies. Furthermore he submitted regulation 2 of Chapter 2 required that muster lists be maintained in various parts of the vessel which, inter alia, detailed the duties assigned to specific crew members in an emergency and the muster list had to specify which officers were assigned to ensure that life saving and fire appliances were maintained in good condition and ready for immediate use. In circumstances where none of the applicant's officers had the qualifications which satisfied the requirements of Irish law, he submitted that there could not be compliance with regulation 2 of Chapter 8 of the Torremolinas Protocol. He drew attention to ss. 5 and 6 of the Merchant Shipping (Certification of Seamen) Act 1979 which make it a criminal offence for a ship owner to send to sea and for a seaman to go to sea without the requisite certificates of competency. Although there was no specific language requirement enunciated in the Torremolinas Protocol, Mr. Collins contended that regulation 4 of Chapter 8 encapsulated a series of requirements which clearly intersected with those of the manning regulations of 1988.

6.5 As to the argument made by the applicants with regard to the standard of English required by the STCW-F Convention, Mr. Collins noted that Chapter II, Regulation 1 (for skippers) and 2 (for officers) to the Annex set out mandatory minimum requirements for certification and that every candidate for certification was required to have passed *"an appropriate examination or examinations for assessment of competency to the satisfaction of the Party"*, thereby leaving it to the contracting parties to formulate the content of the examination for the assessment of competency. He further noted that the minimum knowledge for certification of skippers, as per the appendix to Regulation 1, included*"[a]dequate knowledge of the English language enabling the skipper to use charts and other nautical publications, to understand meteorological information and measures concerning the vessel's safety and operation, and to*

communicate with other ships or coast stations. Ability to understand and use the IMO standard Marine Communication Phrases" which, he submitted, demonstrated that the requirement of adequate knowledge was a functional test, to be assessed by reference to the performance of a skipper's or officer's functions on board.

Decision

6.6 In January 2009, while the two boats were in La Coruna in Spain, an inspection was carried out under the Torremolinos Protocol. Some deficiencies were found and a list of these was furnished to the applicants. A further inspection was done shortly thereafter, when the deficiencies were found to have been rectified. However, because the crews did not have qualifications which satisfied the manning regulations of 1988, on this occasion, a notice of prohibition dated the 7th February, 2009, was served in respect of both vessels. This was copied to the relevant port authorities, the net effect being that the applicants' boats could not be put to sea. The applicants challenged these notices of prohibition on a number of grounds. They say that the notice of provision and/or refusal to give a certificate of compliance for the purposes of the regulations of 2002, is *ultra vires* the Protocol and the regulations on the basis that the Protocol and regulations are concerned only with the vessels and equipment and had nothing to do with manning arrangements.

6.7 The respondents said that the second inspection was a Flag State inspection and dealt with all regulatory matters, including compliance with the manning regulations of 1988, and that the non-compliance of the crew with the requirements of the manning regulations of 1988 gave rise to a valid exercise of the power, to prohibit the vessels going to sea by the service of a notice of prohibition.

6.8 Apart from this, there is an express provision in the chapter of the Protocol i.e. Chapter VIII, Regulation 2, for the mandatory establishment and display in certain parts of the vessel of muster lists, the function of which is to assign to specific officers or crew specific duties in the event of an emergency, and by virtue of the fact that there were no officers in the crew who complied with the manning regulations of 1988, there was, necessarily, a failure to comply with the requirements of the Torremolinos Protocol and the regulations of 2002.

6.9 The answer to the question depends upon whether there is an adequate power given in the Merchant Shipping Acts 1894 to 2005 to prohibit a vessel sailing because of a breach of the manning regulations of 1988. Insofar as the Torremolinos Protocol is concerned, the Court must decide if the chapter relied on, properly construed, does encompass manning deficiencies, by reference to the manning regulations of 1988, or is what has been done an attempt by the respondents to shoehorn the manning requirements into the Torremolinas Protocol because of the absence of an adequate power of prohibition and detention in the Merchant Shipping Acts.

6.10 The respondents did not advance any provision of the Merchant Shipping Code as furnishing a power to prohibit the applicants' fishing vessels from sailing and detaining them in the port of La Coruna. Section 459(1) of the Merchant Shipping Act 1894 ("the Act of 1894") does provide a power of detention, but only where the ship is unsafe by reason of the defective condition of her hull equipment or machinery, or by reason of overloading or improper loading such that it is unfit to proceed to sea without danger to human life.

6.11 Section 26 of the Merchant Shipping Act 1992 expands the power to detain in s.459 of the Act of 1894 where the Minister or his detaining officer is of opinion that owing to a contravention of the Act of 1992, or of a regulation thereunder, a vessel is unfit to proceed on any voyage or excursion because of the danger to human life that the voyage or excursion would entail. These provisions would appear not to provide a power to detain in respect of a deficiency in manning, contrary to the manning regulations of 1998 and, as said earlier, the respondents do not rely on any such powers of detention.

6.12 The respondents are, therefore, obliged to fall back on the Protocol to the Torremolinos Convention, the directive implementing it, and the regulations of 2002, which transpose the directive into Irish law as the source of its power to prohibit the applicants' boats from sailing and detaining them, as aforesaid.

6.13 Particular reliance was placed by Mr. Collins on the content of the certificate of compliance as prescribed in Council directive 97/70/EC, which, he argued, encompassed provisions related to the competency of officers and crew and not just the seaworthiness of the vessel. I cannot agree with this submission. A comparison between the certificate of compliance prescribed in the Protocol and the certificate in the directive, in my view, does not reveal any difference of any substance.

6.14 The relevant text in the certificate, in the appendix to the Protocol, reads as follows:-

> *"THIS IS TO CERTIFY:*
>
> *1. That the vessel has been surveyed in accordance with the requirements of Regulation 1/6.*
>
> *2. That the survey showed that:*
>
> *1 the condition of the hull, machinery and equipment, as defined in the above regulation was in all respects satisfactory and that the vessel complied with the applicable requirements;*
>
> *2 the maximum permissible operating draft associated with each operating condition for the vessel is contained in the approved stability booklet dated . . .*
>
> *3. That an Exemption Certificate has/has not been issued.*

.."

The relevant text in the certificate attached to the directive reads as follows:-

> *"THIS IS TO CERTIFY:*
>
> *1. that the ship has been surveyed in accordance with Regulation 1/6(1)(a) of the Annex to the Torremolinos Protocol of 1993;*
>
> *2. that the survey showed that:*

1. the ship fully complies with the requirements of Council Directive 97/70/EC; and

2. the maximum permissible operating draft associated with each operating condition for the vessel is contained in the approved stability booklet dated . . . ;

3. that an Exemption Certificate has/has not been issued.

...”

Article 3 of the directive under the title of “General Requirements’” sets out, as the title indicates, in general, what has to be complied with for the purposes for the certificate under the directive. Article 3 reads as follows: -

“General Requirements

1. Member States shall ensure that the provisions of the Annex to the Torremolinos Protocol are applied to fishing vessels concerned flying their flag, unless Annex I to this Directive provides otherwise.

Unless provided otherwise in this Directive, existing fishing vessels shall comply with the relevant requirements of the Annex to the Torremolinos Protocol not later than 1 July, 1999.

2. Member States shall ensure that those requirements in Chapters IV, VI, VIII and IX of the Annex to the Torremolinos Protocol which apply to vessels of 45 metres in length and over are also applied to new fishing vessels of 24 metres in length and over, flying their flag, unless Annex II to this Directive provides otherwise.

3. However, Member States shall ensure that vessels flying their flag operating in specific areas shall comply with the provisions for the relevant areas, as defined in Annex III.

4. Member States shall ensure that vessels flying their flag shall comply with the specific safety requirements laid down in Annex IV.

5. Member States shall prohibit fishing vessels flying the flag of a third country from operating in their internal waters or territorial sea or landing their catch in their port unless they are certified by the flag State administration to comply with the requirements referred to in paragraphs 1, 2, 3 and 4 and in Article 5.

6. Marine equipment listed in Annex A.1 to Directive 96/98/EC and complying requirements of the latter, when placed on board a fishing vessels, to comply with the provisions of this Directive, shall be automatically considered to be in conformity with such provisions, whether or not these provisions require that the equipment must be approved and subjected to tests to the satisfaction of the administration of the flag State.”

6.15 Of the foregoing provisions, Article 3(2) of the directive, which requires compliance with Chapter VIII of the Torremolinos Protocol, is of relevance to the issue under consideration. Article 5 of the Directive, under the heading “Standards for design, construction and maintenance” is relevant in the light of the certificate prescribed in the directive and Article 6. It reads as follows: -

“Standards for design, construction and maintenance

The standards for the design, construction and maintenance of hull, main and auxiliary machinery, electrical and automatic plants of a fishing vessel shall be the rules in force at the date of its construction, specified for classification by a recognised organisation or used by an administration.

For new vessels, these rules shall be in accordance with the procedure and subject to the conditions laid down in Article 14(2) of Directive 94/57/EC.”

Article 6, under the heading “Surveys and certificates”’, reads as follows:-

“Surveys and certificates

1. Member States shall issue to fishing vessels flying their flag and complying with Articles 3 and 5, a Certificate of Compliance with the terms of this Directive, supplemented by a record of equipment and, where appropriate, exemption certificates. The certificate of compliance, record of equipment and exemption certificate shall have a format as laid down in Annex V . . .”

Article 6(3) of the regulations of 2002, provides as follows:-

“(3) On receiving a report under paragraph (2), the Minister may, if satisfied that the fishing vessel concerned complies with Articles 3 and 5 of the Council Directive, issue to the owner thereof a certificate of compliance in respect of such vessel in the form set out in Annex V of the Council Directive.”

6.16 It is clear, in my view, that the form of certification, as set out in Annex V of the directive, requires certification of compliance with Articles 3 and 5 of the directive, notwithstanding the apparently more expansive text employed, namely, “the *ship fully complies with the* requirements of Council Directive 97/70/EC”. This is mirrored in Article 6(3) of the regulations of 2002.

6.17 There is no doubt, as was submitted by Mr. O’Reilly, that the primary focus of the Protocol and the directive and the transposing regulations is the vessel itself and its equipment. The only provision of these instruments that could possibly touch on the manning component or the competency of the crew or its officers is contained in Chapter VIII of the Protocol, which deals with muster lists. Of this chapter, only regulations 2 and 4 could have any relevance to the matter under consideration.

6.18 Regulation 2 of Chapter VIII deals with “General emergency alarm system, muster list and emergency instructions”. Paragraphs 3 to 8 inclusive, of regulation 2, which deal specifically with the muster list, are as follows:-

“(3) The muster list shall be posted up in several parts of a vessel and, in particular, in the wheelhouse, the engine room and in the crew accommodation and shall include the information specified in the following paragraphs.

(4) The muster list shall specify details of the general alarm signal prescribed by paragraph (1) and also the action to be taken by the crew when this alarm sounds. The muster list shall also specify how the order to abandon ship would be given.

(5) The muster list shall show the duties assigned to the different members of the crew including:

(a) closing of watertight doors, fire doors, valves, scupper, overboard shoots, side scuttles, skylights, portholes and other similar openings in the vessel;

(b) equipping the survival craft and other life-saving appliances;

(c) preparation and launching of survival craft;

(d) general preparation of other life-saving appliances;

(e) use of communication equipment; and

(f) manning of fire parties assigned to deal with fires.

(6) In vessels of less than 45 m in length, the Administration may permit relaxation of the requirements at paragraph (5) if satisfied that, due to the small number of crew members, no muster list is necessary.

(7) The muster list shall specify which offices are assigned to ensure that the life-saving and fire appliances are maintained in good condition and are ready for immediate use.

(8) The muster list shall specify substitutes for key persons who may become disabled, taking into account that different emergencies may call for different actions.

(9) The muster list shall be prepared before the vessel proceeds to sea. After the muster list has been prepared, if any change takes place in the crew which necessitates an alteration in the muster list, the skipper shall either revise the list or prepare a new list."

6.19 Regulation 4 of Chapter VIII deals with "Training in emergency procedures". The Regulation begins as follows: -

"The Administration shall take such measures as it may deem necessary to ensure that crews are adequately trained in their duties in the event of emergencies. Such training shall include, as appropriate . . ."

There follows a long list of items in respect of which training is required.

6.20 I am asked by the respondents to accept that Regulations 2 and 4 of Chapter VIII encompass the manning provision of a vessel and the competency of its crew and officers. This submission is based upon the undoubted, and indeed, inextricable connection between the appropriate manning of a vessel and the competence of its crew and the achievement of an appropriate standard of safety at sea which, it was submitted, was the fundamental objective of the Protocol, the directive and the regulations of 2002.

6.21 Thus, it was submitted that where, as in the case of the two vessels of the applicants, the crew did not have qualifications which satisfy the requirements of the manning regulations of 1988, there could not be compliance with the requirements of Regulation 2, in that, a valid muster list could not be provided as the crew, and specifically, the officers, did not have the requisite qualifications. Furthermore, there could not be compliance with Regulation 4, where the officers lacked the appropriate qualifications.

6.22 It is clear that there is no express reference whatsoever in either the Protocol or the directive or the regulations of 2002 to manning requirements.

6.23 In my opinion, these two Regulations in Chapter VIII of the Protocol, properly construed, do not address or encompass manning requirements such as are provided for in s. 3 of the Merchant Shipping Act 1979, and the manning regulations of 1988. I am quite satisfied that it was never intended that Chapter VIII of the Protocol would regulate those matters.

6.24 Issues relating to training, manning and competence have, in part, been the subject matter, under the aegis of the IMO, of entirely separate international agreements. Insofar as merchant vessels are concerned, the STCW Convention has now entered into force in our domestic law in the form of the Merchant Shipping (Training and Certification) (STCW Convention States) Order 1998 (S.I. No. 555 of 1988). The corresponding STCW-F Convention, in respect of fishing vessels, has not yet been brought into force.

6.25 The question of whether these matters should be subject to international regulation under the aegis of the IMO or the E.U., or otherwise, is purely a political matter, and in my opinion, it would not be right to make these matters the subject of international regulation by way of judicial decision. This is, in effect, what would happen if I were to accept the respondents' submission to the effect that compliance with another international instrument, namely, the Torremolinos Protocol, as enforced through the E.U. directive and the regulations of 2002, required compliance with the manning regulations of 1988. The following averment at para. 27 of the affidavit of Paul Miley sworn on the 2nd July, 2009, on behalf of the respondent seems to unequivocally accept the disconnect between the manning issue and the operation of the Torremolinos Prototocol:-

"At paragraph 7 onwards Mr. Quinlan suggests that because previously,

Certificates of Compliance have issued for the purposes of the Council Directive 97/70/EC in respect of Skellig II and Myrdoma F, the Respondents are not now entitled to insist on compliance with the 1988 Regulations. ***First, I believe it should be noted that Directive 97/70/EC does not purport to govern manning levels*** *…" [emphasis added]*

6.26 Until the achievement of international agreement politically and the bringing into force of such agreement by way of appropriate E.U. Directives and domestic laws, manning matters remain regulated solely by domestic law, i.e. the manning regulations of 1988. If the powers provided for the enforcement of those regulations are inadequate, that is a matter that can and should be rectified as a matter of domestic law.

6.27 The fact that ss. 5 and 6 of the Merchant Shipping Act 1979 make it a criminal offence for both the applicants and ships' officers

to put to sea where the qualifications of the ships' officers breached the manning regulations of 1988 could not give the respondent the requisite power to detain the vessels. The applicants and the relevant seamen would, of course, be liable to prosecution by the appropriate authorities for these offences, i.e. the gardaí and the Director of Public Prosecutions.

6.28 Thus, I have come to the conclusion that the respondents did not have a legal power to prohibit the applicants' vessels from sailing and to detain these vessels in La Coruna, because of breaches of the manning regulations of 1988.

6.29 It was argued that the language test provided for by the respondents was ultra vires their powers. I cannot accept this argument. Section 3 of the Merchant Shipping (Certification of Seamen) Act 1979, provides as follows:-

> *"(1) The Minister may make regulations requiring ships to which this Act applies to carry such numbers and such categories of personnel as he may specify in the regulations and are the holders of valid certificates of competency duly issued by the Minister under this Act.*
>
> *(2) For the purpose of giving effect to subsection (1) of this section, the Minister may by regulations -*
>
> *(a) prescribe standards of competence to be attained by personnel of ships to which this Act applies,*
>
> *(b) provide for the conduct of examinations (including the charging of fees in relation to such examinations) and, with the consent of the Minister for the Public Service, the appointment and remuneration of examiners for such examinations, and*
>
> *(c) provide for the issue, form and recording of certificates and other documents.*
>
> *…"*

The Manning Regulations of 1988 were made, pursuant to this section and s. 8 of the Act of 1979. Article 9(1) of those regulations provides:-

> *"9. (1) Subject to paragraph 3 of this Regulation-*
>
> *(a) the standards of competency to be attained and the conditions to be satisfied by a person before he may be issued with a certificate of competency under these Regulations, including any exceptions applicable with respect to any such standards or conditions,*
>
> *(b) the manner in which the attainment of any such standards or the satisfaction of any such conditions is to be evidenced, and*
>
> *(c) the conduct of any examination for that purpose and the conditions of admission thereto*
>
> *shall be such as may be specified by the Minister either in relation to certificates of competency in general or to a particular class as may be so specified."*

The phrase "*specified by the Minister*" is defined in the Article 2 of the regulations as meaning:-

> *"…means specified in the Department of the Marine's merchant shipping publications entitled 'Examinations for Certificates of Competency for Fishing Vessels: Deck officer Requirements Syllabuses and Specimen Papers' and Examinations for Certificates of Competency for Fishing Vessels: Marine Engineer Officer Requirements, Syllabuses and Specimen Papers', both to be published by the Departments of the Marine, or in any documents amending or replacing those publications which is specified in a Marine Notice;"*

6.30 In 1988 the Department of the Marine published Syllabuses and Specimen Papers for Examination for Certificates of Competency for Fishing Vessels. In the chapter dealing with "General Conditions", para. 2.15 states:-

> *"Knowledge of English*
>
> *Each candidate much prove to the satisfaction of the Examiner that he is sufficiently conversant with the English language to perform the duties required of him in a ship registered in the State."*

6.31 The current requirements of the first named respondent on English language standard which are in controversy in this case i.e. the 90% pass mark in the Marlins test is the subject of a Marine Notice and has been in force, the Court was told, since 2002. A Marine Notice, namely No. 47 of 2008 in respect of Merchant Ships was furnished to the Court during the hearing. This prescribes a similar standard for merchant shipping. No issue was raised by the applicant as to the absence of an appropriate Marine Notice setting out the standard demanded. Manifestly, s.3 of the Act of 1979 and the manning regulations of 1988 provide a power to the first named respondent to set standards of competency to be attained, which clearly can include linguistic competence. Thus, the first named respondent's power to establish the English language standard complained of by the applicants is well grounded in s.3 of the Act of 1979 and the manning regulations of 1988.

6.32 The applicants also say that the standard of English required is ultra vires the powers of the first named respondent because it exceeds the standard set in the U.K. for the attainment of certificates of equivalent competency in that jurisdiction and also because it exceeds the standard required in the STCW-F Convention. I cannot accept that submission. As manning requirements, including standards of competence for deck officers and others on fishing vessels, are not regulated by international binding agreements (the STCW-F Convention not having been brought into force), these matters remain regulated by domestic law, subject to the due observance (as discussed later in this judgment) of E.U. treaty rights and the principles of equivalence and effectiveness and, in our domestic constitutional law context, the principle of proportionality. The mere fact that Ireland adopts a higher standard than another member state of the E.U. could not per se be invalid, where the matter in issue is not subject to any E.U. legal regulation, assuming the measure in question did not infringe any treaty rights or breach E.U. legal principles, as mentioned above. In such situations national sovereignty prevails leaving each State autonomous in what it does. To suggest otherwise would, obviously, impermissibly curtail the proper exercise of national sovereignty. The first named respondent is not obliged to defer to the corresponding regulatory authority in the U.K. in matters in which both of these authorities enjoy sovereign independence. Hence, in my view, it cannot be said that the simply because the Irish linguistic standard was higher than that set in the U.K., that the Irish standard is invalid as being

ultra vires the powers of the first named respondent.

6.33 The STCW-F Convention has not come into force yet. Therefore, adherence to any of its provisions could not determine the validity of actions taken by the first named respondent as in this case. In any event, the evidence in this case does not establish to my satisfaction that the English standard demanded by the first named respondent is either inconsistent with or exceeds the standard described in the Convention. The standard in the Convention is postulated in functional terms but, having regard to the range of functions including very technical material, in which competence in English is demanded, it would seem to me that a very high level of linguistic competence is sought, far beyond mere conversational or colloquial competence. I am not at all convinced that the 90% pass mark in the Marlins test is either inconsistent with or exceeds the Convention standard.

6.34 Thus, I am satisfied that the applicants have failed to demonstrate that the standard of English required by the first named respondent in any way is ultra vires his powers, as given in s.3 of the Act of 1979 and in the manning regulations of 1988.

7. Legitimate Expectation

7.1 The next aspect of this case is to examine the nature of the legitimate expectation the applicants say that they had by reference to E.U. law and/or under domestic law.

Counsel's Submissions

7.2 Mr. O'Reilly submitted that the doctrine of legitimate expectation in Community law could confer substantive rights and entitlements. He relied on Case 120/86 *Mulder v. Minister van Landbouw en Visserij* [1988] ECR 2321 and Case C/189/89 *Spagl v. Hauptzollamt Rosenheim* [1990] ECR I-4541 in this regard. He argued that the conduct of the respondents for a period of over twenty-eight years had conferred a legitimate expectation on the applicants that their "accommodation" by the State would not be withdrawn. The expectation the applicants had, he contended, was not an expectation that the respondents would not apply the law to them but, rather, that they had already been brought within the terms of the law and had been granted, in effect, an exemption from its application to them.

7.3 The applicants also relied on a legitimate expectation under national law, which, Mr. O'Reilly submitted, was founded on the request and representations made by the respondents in 1981 to the applicants and acted on by them afterwards, leading to the establishment of the joint venture. The requirements of the test enunciated by Fennelly J. in *Glencar Explorations plc. v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 were satisfied, he submitted. He further submitted that the manner in which a policy change was brought about could breach a legitimate expectation, such as occurred here. He cited the cases of R *(on the application of Niazi) v. Secretary of State for the Home Department* [2008] EWCA (Civ) 755 and *Lett & Co. Ltd. v. Wexford Borough Council* [2007] I.E.H.C. 195 in support of this proposition.

7.4 Mr. Collins submitted that this case did not raise any issue of legitimate expectation in an E.U. law context, given that no Community legislation or scheme was at issue in these proceedings. A case could only be made by the applicants, he submitted, by reference to domestic law i.e. to what extent the applicants are entitled to expect that the manning regulations of 1988 are not to be enforced against them.

7.5 Mr. Collins submitted that the finding of the Court in *Castletown,* with regard to the issue of legitimate expectation, applied equally to this case. He rejected any suggestion that a factual distinction could be drawn between the two cases based on the supposed invitation and encouragement by the respondents to the setting up of a joint venture between the applicants. He pointed out that none of the deponents who swore affidavits on behalf of the applicants stated that they had an expectation that the Irish certificate of competency regime, that is, the application of the provisions of the manning regulations of 1988 would not be enforced based on any representations by the respondents. He contended that a similar argument had been rejected by this Court (Keane J.) in *Pesca Valentia Ltd v. Minister for Fisheries and Forestry* (No. 2) [1990] 2 I.R. 305.

7.6 Mr. Collins submitted that it had long been the position that the exercise of a statutory power or duty could not be defeated by the principle of legitimate expectation and he referred to the decisions in *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160; *Tara Prospecting v. Minister for Energy* [1993] I.L.R.M. 771 and *Abrahamson v. Law Society of Ireland* [1996] 1 I.R. 403 in this regard. Similarly under E.U. law a legitimate expectation could not defeat the exercise of a statutory power or discretion. He argued that, in any event, the applicants could not meet any of the limbs of the test set forth by Fennelly J. in Glencar. He also referred to the line of authority which supported the view that a legitimate expectation could be disappointed for reasons of public policy, such as in *Curran & Others v. The Minister for Education and Scienc*e (Unreported, High Court, Dunne J., 31st July, 2009).

Decision

7.7 It would seem on the authorities that, there is no substantial difference between E.U. and Irish law on legitimate expectation, as the law in relation to the conferral of substantive legitimate expectations has developed in recent years in this jurisdiction. I am inclined to agree with the submission of the respondents that the law of legitimate expectation in an E.U. law context cannot apply at all, given that there is no E.U. law governing the manning of vessels. The issue of manning is clearly a matter for national authorities to regulate. Therefore, the applicants cannot have a legitimate expectation in respect of the application of the manning regulations to them based upon E.U. law.

7.8 The applicants' case based on legitimate expectation in Irish law is somewhat unclear. The applicants' case is that they were invited to participate in a joint venture in 1981 by Bord Iascaigh Mhara, the purpose of which joint venture was to build up the Irish quota for valuable pelagic fish. At the time, no Irish fishermen were fishing for this type of fish, and as a result, there was no historical catch at the time, and presently, Irish fishermen do not engage in this type of fishing which involves long fishing voyages of up to two to three weeks. Thus, since the early 1980s, all Irish registered boats, including the applicants', which have participated in this aspect of the fishing industry, are crewed by Spanish fisherman and, as such that it is now not possible to engage fishermen with Irish certificates of competency or U.K. certificates of competency to be officers or crew on fishing boats that engage in this type of fishing. Thus, the applicants say, that, having been invited in to participate in this joint venture, and having built up the Irish quota, they have a unique or special status from 1981 to 2004, when Spanish qualifications of crew and officers were accepted without challenge or query.

7.9 They argued that the manning regulations of 1998 could not be applied to them as their manning arrangements been "accommodated" here for the past twenty eight years and they also appeared to argue that they had a legitimate expectation not to

have a severe language test applied to them. It is clear that the applicants cannot have a legitimate expectation which would have the effect of precluding a statutory authority from exercising its discretion. Domestic and E.U. case law indicates that the existence of a legitimate expectation cannot fetter the exercise of a statutory power by a state authority.

7.10 At the end of his judgment in *Glencar Explorations plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84 Fennelly J. noted at p.163 that the three limbs of the test for the existence of a legitimate expectation he had enunciated could be refined or extended and that they "*are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected*."

7.11 The plaintiff company in *Pesca Valentia Ltd. v. Minister for Fisheries and Forestry* (No.2) [1990] 2 I.R. 305 was also a joint venture between an Irish and a Spanish company and its vessels had a Spanish crew and an argument was made by the plaintiff based on the doctrine of legitimate expectation or equitable estoppel that due to the conduct of semi-state agencies, Bord Iascaigh Mhara and the Industrial Development Authority, that if changes were to be made to the legal framework affecting the plaintiff's right to fish that such changes should be gradual; should not preclude the plaintiff from engaging Spanish fishermen to crew its vessels; should be reasonable; should take account of the special position of the plaintiff and should be preceded by consultations with the plaintiff. Keane J. examined the relevant jurisprudence and reached the following conclusion at p.323:-

> *"In the instant case, while the plaintiff was undoubtedly encouraged in its project by the semi-state bodies, it was not given any assurance that the law regulating fishing would never be altered so as adversely to affect it nor, if such an assurance had been given, could any legal rights have flowed from it. No such 'estoppel' could conceivably operate so as to prevent the Oireachtas from legislating or the executive from implementing the legislation when enacted."*

7.12 Similarly in *Duff v. Minister for Agriculture* (No.2) [1997] 2 I.R. 22 Barrington J. at p.81 remarked as follows:-

> *"After the decision of the Court of Justice one must accept that the community legislator has power to change European law and that people such as the plaintiffs whose activities are subject to European law can have no legitimate expectation that the law will not be changed."*

7.13 These *dicta* seem to me to be equally applicable to the facts of this case, and lead inexorably to a rejection of the applicants' submissions on legitimate expectation. Apart from this, insofar as domestic law is concerned there is, in my opinion, little or no material difference between this case and the *Castletown* case such as would warrant a different conclusion to that reached in *Castletown* on the legitimate expectation issue. The essential feature of both cases is that the applicants' fishing vessels, crewed by Spaniards had been fishing under the Irish flag against the Irish quotas for over a quarter of a century without having the full rigour of the manning regulations enforced against them.

8. E.U. Principles of equality and effectiveness

Counsels' Submissions

8.1 Mr. O'Reilly sought to rely on the E.U. principles of equality and effectiveness together with directly applicable E.U. rights. He submitted that the applicants had enjoyed rights under the following Articles of the E.U. Treaty since the establishment of their joint venture in 1981: Articles 10 (implementation of Community rights generally), 12 (prohibition on discrimination on grounds of nationality), 39 (free movement of workers), 43 (right of establishment), 49 (freedom to provide services) and Article 294 (participation in the capital of companies). He argued that the manner in which the applicants had sought to apply the regulations of 1988 to the applicants failed to respect those rights and the principles of equality and effectiveness.

8.2 Mr. Collins submitted that no E.U. Treaty right can be relied on by the applicants as applications had not been submitted by their crew members under the mutual recognition regime, which specifically upheld freedom of establishment and the free movement of workers.

Decision

8.3 The applicants' complaint concerning the 90% mark in the Marlins test required by the respondents seem to be threefold namely, that a higher standard is imposed in this jurisdiction vis-à-vis the U.K., or in the STCW-F Convention and that the standard imposed is one that the crew cannot meet. No evidence was put forward by the applicants in these proceedings to suggest that their crew would be unable to achieve the required standard of English. Their two crew members who swore affidavits did not attempt the test and fail and they do not aver that in their estimation the standard required was beyond their competence. Thus, the applicant has not established by way of evidence that the mark of 90% for senior crew members in an English language test is of such severity as to create an insuperable obstacle. This finding defeats the argument the applicants make with regard to the E.U. principles of equality and effectiveness. The complaint insofar as it relates to the comparable U.K. standard of 70% seems to be a challenge to the proportionality of the requirement for 90% pass mark in the Marlins test. All of this must be considered in the light of the actual complaint made which is quite simply that the pass mark of 90% in the Marlins English Language Test for the purpose of recognition of their Spanish qualifications is an insuperable obstacle for them, and in light of the English standard of 70%, offends the principle of proportionality.

8.4 There is no complaint about the fact that the MSO requires each skipper, first mate and engineer to pass an English test and achieve marks of 70%, 80% or 90%, depending on the rank and function of the individual. Thus, their case comes down to that simple complaint about the 90% mark for skippers, and no more, whereas a 70% pass mark would be unobjectionable.

8.5 In this case, the basis for rejecting any resort to the E.U. recognition regime appears to be simply inconvenience i.e. that it would take four months to complete the process. A timescale of four months does not, in my opinion, in itself, seem unreasonable and could not be a basis for suggesting that it breached E.U. rights and principles when its manifest objective was to provide machinery to give effect to those rights and principles. In the context of court proceedings, such as these proceedings, a timescale of four months to complete the recognition process does not seem at all excessive or unreasonable.

8.6 Once again, it is to be observed that the applicants' crew members have made no attempt to engage with the mutual recognition regime. In circumstances where there was a failure to make applications under this regime and where no evidence was adduced to the effect that the test was too severe leads inexorably to the conclusion that there is no breach of the E.U. law principles of equality and effectiveness.

8.7 There is no doubt that the applicants have a right to sail under the Irish flag, which they acquired at the invitation of State agencies in Ireland, unlike Spanish vessels on the U.K. register who had fight their way onto that register *via* the "Factortame" litigation However, this right does not involve immunity to local regulation. In this respect, they have no complaint about the requirement to comply with the Torremolinos Protocol and regulations of 2002, *inter alia*.

8.8 The manner of the acquirement of their rights is irrelevant to the complaints the applicants make, which is that the manning regulations were applied to them incorporating an impermissible requirement for a particular language competence. It is clear that the Oireachtas has the power and competence to impose or to devise a regime governing manning. There is no reason in law why they may not apply a standard higher than other national standards, such as in the U.K., subject to E.U. law. However, in principle, the pursuit of the higher standard cannot per se be objectionable.

8.9 The STCW-F Convention is not in force. Although the language requirement is cast in the general terms of "adequate knowledge", this term is nonetheless exacting, in that, it implies that a sufficient knowledge of the language is required to cover the performance of a broad range of technical functions on board vessels. When applying standards of that kind an objective standard must, inevitably, be adopted so that it is not left to the discretion of an individual examiner to decide what is or is not "adequate". There is no evidence that the required standard in this jurisdiction is arbitrary or excessive, ergo there is no inconsistency between the domestic standard applied and the standard in the STCW-F Convention. It is to be noted that the requirement for knowledge of the English language is not a parochial requirement, given its status as the language of international maritime life.

9. Proportionality

9.1 The applicants also say that the 90% mark infringes the principle of proportionality. In this respect, the objectives sought to be attained by the impugned measure was the securing of safety of seafarers on fishing vessels while at sea. The applicants stress that with an all-Spanish crew, the critical language from a safety point of view is Spanish, so that there would be effective communication between the crew and officers in the course of an emergency at sea.

9.2 The applicants, in my opinion, do not have adequate regard at all for the other critical dimension of communications in an emergency at sea, that is, effective communications with the rescue services and coastal authorities. It is common case that English is the international language of maritime life. Hence, communications with rescue services and coastal authorities will be in English, and, to be effective, requires that those communicating from the vessel in peril must have a standard of English which is good enough to ensure that those communications are effective.

9.3 Under the U.K. scheme, the requirement is that one officer only need have a certificate of equivalent competency. Therefore, the requisite English language standard in the U.K. is a 70% pass on the Marlins test. One cannot but wonder what would happen if the only person with competence in English becomes incapacitated. In my view, the Irish requirement for several officers to have the required language standard is apparently more rationally connected to the objective namely, safety of seafarers at sea, than the U.K. standard.

9.4 It should be said that the applicants do not take issue at all with this aspect of the Irish standard and, indeed, stress the fact that on both their vessels, there are three officers with U.K. certificates of equivalent competency. However, one cannot escape a sense of wariness as to the proportionality of the U.K. standard. By contrast, the robustness of the Irish standard in this respect induces a confidence that the standard is actually and rationally connected to the objective pursued.

9.5 Can it be said, in light of all this, that the 90% pass mark is an excessive standard and is not a proportionate measure in light of the objective sought in the sense of being more than is necessary to secure the objective sought? Clearly, ensuring the safety of seafarers at sea, particularly those plying their trade of fishing in the North Atlantic in the depths of winter, must require that those public authorities with statutory responsibility for regulating and expertise in this matter be given a margin of appreciation, encompassing, what may appear to some interests, a high degree of caution, on measures which may turn out to be critical to the saving of life in what is one of the world's most hazardous environments.

9.6 I am, therefore, unable to conclude that the 90% pass mark required, even if a very high standard (in itself, not objectionable) is disproportionate to the objective sought to be attained i.e. safety of seafarers at sea.

10. Delay

10.1 The respondents submit that the applicants were guilty of delay in instituting these proceedings. They pointed to the fact that as far back as 2004 the applicants were told that they were in breach of the manning regulations of 1988.

10.2 The applicants then applied for an exemption under the same regulations which was refused. After this it could be said that they moved into illegal territory. However, they were given certificates of compliance with the regulations of 2002 and were not otherwise prohibited from putting to sea because of the claimed deficiency in their manning arrangements. It could fairly be said that they assumed and had reasonable grounds for assuming that they were in the same position as they had been for twenty eight years. These proceeding were initially instituted to challenge and have quashed the advice given by the first named respondent in a letter of the 30th June, 2008. Leave was granted by Peart J. on the 24th November, 2008, in respect of that challenge. Manifestly, having regard to the complexity of the proceedings and the intervention of the long vacation, those proceedings were brought promptly and clearly within the 6 month time period prescribed.

10.3 Events moved on and in January 2009 both of the applicant's vessels were, by notices issued by the first named respondent on the 7th January, 2009, prohibited from sailing and were detained in the port of La Coruna in Spain. When the proceedings came on for hearing before me in October 2009 an application was made to amend the applicants' statement of grounds to permit the applicants to challenge the prohibition from sailing and the detention of the two vessels in La Coruna. The respondents opposed that application on the grounds of delay. I granted leave to the applicants for the amendment sought.

10.4 The issue of delay as a basis for the refusal of the relief sought on the amended grounds must now be decided. I am satisfied that time in respect of the amended grounds, for the purposes of O.84 r.21 of the Rules of the Superior Courts 1986, ran from the 26th February, 2009, when the first named respondent finalised its position in respect of both of the applicants' vessels, namely, that the prohibition on sailing imposed in January would not be lifted and the reasons for the retention of the prohibition, all of which was communicated to the applicants in a fax to the applicants' solicitor of that date. The application to amend the grounds was made at the hearing of the judicial review in October 2009, clearly outside the six-month time limit where orders of *certiorari* are sought. In the meantime, on the 15th May, 2009, judgment was delivered by this Court in the *Castletown* case. This judgment affected several of the reliefs sought in the original statement of grounds. Had that case been decided in a different way, the applicants in this case

would have been assured success on a number of the grounds in the original statement of grounds. To exclude the applicants amended ground *in limine* on the basis of delay would, in my view, be unduly harsh. I would readily accept that the judgment in *Castletown* caused a fundamental re-evaluation of the applicants' case and I would consider that it is right to regard time as running against the applicants in this regard from the end of May 2009. In this way the application to amend was made within the 6 month time limit and, in my view, having regard to the absence of any prejudice to the respondents, it was not unreasonable to have made that application at the hearing of the judicial review. Even if I am wrong in this, in the context of the overall ongoing dispute between the applicants, it would not be just to exclude a consideration of the amended grounds on the basis of a short period of delay, where the respondents have suffered no prejudice as a result of that delay. Accordingly, I would extend time to enable these amended grounds to be included in this judicial review hearing.

11. Conclusion

11.1 For the reasons set above, I have come to the conclusion that the first named respondent did not have a legal power to prohibit the applicants' two vessels from sailing and detaining them in the port of La Coruna in Spain and, therefore, the applicants are entitled to have those prohibitions quashed by an order of *certiorari*.