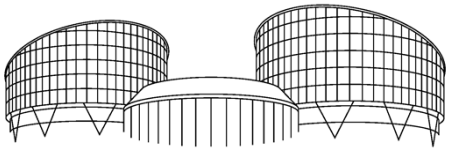

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF O'SULLIVAN McCARTHY MUSSEL DEVELOPMENT LTD v. IRELAND

(Application no. 44460/16)

JUDGMENT

STRASBOURG

7 June 2018

FINAL

08/10/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of O'Sullivan McCarthy Mussel Development Ltd v. Ireland,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Erik Møse,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 7 May 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44460/16) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish company, O'Sullivan McCarthy Mussel Development Ltd ("the applicant company"), on 25 July 2016.

2. The applicant was represented by Mr P. Whelehan, a solicitor practising in Tralee, County Kerry. The Irish Government ("the Government") were represented by their Agent, Mr P. White of the Department of Foreign Affairs.

3. The applicant company alleged in particular that there had been a violation of its rights under Article 1 of Protocol No. 1 due to economic loss for which it held the domestic authorities responsible and for which it had received no compensation. It raised the same complaint under Article 8. It further alleged a violation of its right to an effective remedy under Article 13, and, under Article 6, that the duration of the domestic proceedings had been excessive.

4. On 23 November 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is engaged in the cultivation of mussels in Castlemaine harbour in Co. Kerry, one of several sites in Ireland where this commercial activity is exercised. Its business involves fishing for mussel seed (i.e. immature mussels) within the harbour each year and transporting them for cultivation in another part of the harbour. It has conducted this activity at Castlemaine harbour since the late 1970s.

6. In Ireland, mussel seed fishing takes place during the summer period, the exact dates being determined each year by statutory instrument. This activity is subject to obtaining the relevant leases, licences, authorisations and permits (see under "Relevant domestic law" below). The competent authority in this respect is the Minister for Agriculture, Food and the Marine (hereinafter "the Minister", and "the Department" for the corresponding Government Department). In order to engage in this activity, operators must be in possession of an aquaculture licence, which has a validity of ten years. A sea-fishing boat licence is required, and the boat used must be entered in the Register of Fishing Boats. Operators must also hold an authorisation to fish for mussel seed, issued annually by the Minister (see under "Relevant domestic law" below).

7. Subsequent to the facts giving rise to this application, an additional requirement was introduced pursuant to EU law. Where mussel fishing is carried out in an environmentally protected area, a "Natura permit" must also be obtained (see paragraph 20 below).

8. According to the Government, a total of 41 authorisations were issued in 2008 to Irish sea-fishing boats to fish for mussel seed, four of which operated in Castlemaine harbour on behalf of six mussel aquaculture operators.

9. In 1993, the competent authorities published a notice in the national press announcing the intention to classify twelve sites, including Castlemaine harbour, as a special protection area (SPA) within the meaning of the domestic legislation transposing Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds ("the Birds Directive", OJ 1979 L 103, p. 1). The notice indicated that it was not envisaged that this would change the usage of the sites concerned. The harbour's SPA classification took effect in 1994. The applicant company continued its activities each year, obtaining the necessary licences and permits.

10. In 2000, the domestic authorities designated Castlemaine harbour a special area of conservation (SAC) within the meaning of the domestic legislation transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats

Directive", OJ 1992 L 206, p. 7). As it was now subject to the two EU directives, it had the status of a "Natura 2000" site.

A. Infringement proceedings against the respondent and several other EU Member States

11. Dating back to the late 1990s, the European Commission was of the view that Ireland and several other then EC Member States were not fulfilling their obligations under EC environmental law, and specifically in relation to the two directives referred to above (references hereafter will generally be to EU and not EC law). Between 11 November 1998 and 18 April 2002, it addressed to the Irish authorities four letters of formal notice warning that Ireland had failed to correctly transpose and apply those two directives. Following three reasoned opinions issued in October 2001 and July 2003, the Commission brought infringement proceedings against Ireland in September 2004, pursuant to Article 226 EC (now Article 258 TFEU). It sought a declaration that Ireland had failed to fulfil its obligations under several provisions of the directives, namely Articles 4(1), (2) and (4), and 10 of the Birds Directive, and Article 6(2) to (4) of the Habitats Directive. One specific aspect of these proceedings concerned the authorisation of aquaculture in protected areas without the requisite prior assessment of the environmental impact of such activities.

12. On 13 December 2007 the Court of Justice of the European Union (hereinafter "the CJEU") delivered its judgment in *Commission v. Ireland* (C-418/04, EU:C:2007:780), declaring that Ireland had failed to fulfil its obligations under the aforementioned directives in a number of respects. It held, insofar as relevant to the present case:

> "236. ... [R]egarding the aquaculture programmes, the Commission relies, essentially, on the *Review of the Aquaculture Licensing System in Ireland* carried out in 2000 by BirdWatch Ireland as the basis for its view that Ireland has systematically failed to carry out a proper assessment of those projects situated in SPAs or likely to have effects on SPAs, contrary to Article 6(3) and (4) of the Habitats Directive. In that context, it emphasises the importance of a prior assessment for the purpose of weighing the implications of a project with the conservation objectives fixed for the SPA concerned.
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> 237. The Court notes that that study covered 271 authorisations for aquaculture programmes issued by the Department of Communications, Marine and Natural Resources during the period from June 1998 to December 1999 and 46 applications yet to be decided on. Moreover, 72 licences and nine pending applications concerned aquaculture programmes situated inside or near an SPA. The authorisations issued concern, in 84% of the activities authorised in SPAs, oyster and clam farms.
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> 238. It should also be borne in mind that, under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site is to be made subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on

that site, either individually or in combination with other plans or projects (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 45).

239. The study carried out by BirdWatch Ireland refers to a number of potential negative effects of shellfish farming, including the loss of feeding areas and disturbances caused by increased human activity and states that, even when an aquaculture programme is inside an SPA, very little protection is provided for bird habitats. Ireland, for its part, does not allege that no aquaculture programmes have any effects on SPAs.

240. It follows that the authorisation procedure ought to have included an appropriate assessment of the implications of each specific project. It is clear that Ireland merely stated, without offering further explanation, that the Irish scheme for authorising mollusc farms, including the provisions on consultation, does in fact provide for detailed consideration of all aspects of an aquaculture development project before a decision is taken on authorisation.

241. Accordingly, the Court finds that Ireland fails to ensure systematically that aquaculture programmes likely to have a significant effect on SPAs, either individually or in combination with other projects, are made subject to an appropriate prior assessment.

242. This finding is supported by the fact that Ireland has not put forward any specific scientific studies showing that a prior, detailed ornithological study was carried out, in order to challenge the failure to fulfil obligations alleged by the Commission.

243. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see *Waddenvereniging and Vogelbeschermingsvereniging,* paragraph 61)."

13. At or around the same time, the CJEU found that the Netherlands, France, Finland, Italy, Spain, Greece and Portugal had similarly violated their EU obligations.

B. Measures adopted by the respondent State following the CJEU judgment

14. In view of the judgment, the Minister considered that it was not legally possible to permit commercial activity in the sites concerned until the necessary assessments had been completed. Accordingly, when granting authorisation for mussel seed fishing for the period 9 June to 1 July 2008, he prohibited it in 24 locations around the Irish coast, including Castlemaine harbour (Statutory Instrument No. 176 of 2008, adopted on 6 June 2008). The applicant company was informed of the situation by an official of the Department on 6 June 2008. It wrote to the *Taoiseach* (Prime Minister) that

same day to underline the threat to the livelihood of those affected. It recalled the terms of the notice published in 1993 (see paragraph 9 above), and explained that it had just purchased a new boat at a cost of 1 million euros. The applicant company received a reply from the Department dated 2 July 2008. This explained that baseline data for the area had to be gathered in order to perform the assessment required by the Habitats Directive, as interpreted by the CJEU. It indicated that Castlemaine harbour had been given priority for the exercise and that work had already begun to collect the necessary data. It added that the authorities would be seeking the agreement of the European Commission to allow aquaculture to resume on an interim basis.

15. The following month the applicant company was issued an authorisation to fish for mussel seed in the harbour, with a starting date of 23 August 2008. The authorisation was subject to a number of conditions, including that it did not allow the holder to fish for mussel seed in an area or areas where this activity had been prohibited. On that same date, the temporary prohibition on mussel seed fishing at Castlemaine harbour, and at 21 other locations around the State, was maintained in force by Statutory Instrument No. 347 of 2008. The temporary prohibition only applied to mussel seed fishing; it did not prevent the harvesting of mussels previously fished and laid on farms for cultivation.

16. The applicant company wrote to the Department on 28 August 2008, warning that the supply of mussel seed in the harbour was being consumed by predators and that it would hold the Department responsible for all losses incurred. It requested a satisfactory resolution within ten days, failing which it would take advice about legal action.

17. On 3 October 2008, following successful negotiations between the Department and the Commission (see further below), the Minister issued Statutory Instrument No. 395 of 2008 removing Castlemaine harbour from the list of locations where mussel seed fishing was prohibited. The applicant company was therefore able to commence mussel seed fishing on the date the instrument came into operation, namely 5 October 2008. By that stage, however, natural predators had decimated the mussel seed. Since mussels need two years to grow to maturity, the financial consequences of the temporary prohibition on mussel seed fishing in Castlemaine harbour in 2008 were only felt in 2010. That year, the applicant had no mussels for sale, representing a loss of profit that it estimated at 289,599 euros.

18. According to the applicant company, there was no viable replacement for local mussel seed. Previous attempts to bring in mussel seed from other sites had not proved successful due to the high mortality of the seed and to the transport costs involved. It argued that it was therefore wholly dependent on the use of local resources. The applicant company further explained that if there had been any forewarning of the restriction on

mussel seed fishing in 2008, it would not have made such a major investment in a new boat purchased in May of that year.

19. In 2009, the harbour was opened for mussel seed fishing from 30 April to 14 May, and from 15 September to 23 December. The applicant company was able to gather the usual amount of mussel seed.

20. In August 2009, in accordance with EU law, the Minister introduced an additional requirement for fishing in SACs or SPAs, a fisheries Natura permit.

21. In 2010, the periods authorised for mussel seed fishing in the harbour were from 29 April to 25 May, and from 30 August to 2 December. The applicant company was not able to operate during the first period, as it had not yet obtained such a fisheries Natura permit. When it eventually recommenced fishing at the end of August, the mussel seed had once again been depleted by predators, although the applicant company acquired some tonnage. It estimated its loss of profits for that year at 119,941 euros.

22. The Government provided the following explanations of the action taken following the CJEU judgment, which the applicant company did not dispute. They indicated that even before the delivery of the CJEU's judgment they had commenced a process to determine how fisheries should be assessed in compliance with the relevant EU directives. Following that judgment, the Department immediately began the process of ensuring compliance with EU law in the fisheries sector. This process involved the domestic bodies with responsibilities for fisheries (*Bord Iascaigh Mhara* – BIM), marine research (Marine Institute) and nature conservation (National Parks and Wildlife Service – NPWS). Within one month of the judgment being handed down, BIM prepared a paper in January 2008 on the distribution of bi-valve (dredge) fisheries with the potential to lead to disturbance or significant disturbance of habitat, including the fishing of mussels.

23. At a meeting in February 2008 between the NPWS and the EU Commission, the latter underlined the need to comply with the judgment by conducting the requisite assessments for aquaculture, and in so doing addressing the cumulative effects of other activities that could adversely affect Natura 2000 sites. While the Commission recognised the need for some flexibility, and the small scale of much of Irish aquaculture, it considered that the onus was on Ireland to initiate a robust, proportionate and scientific process.

24. In April 2008, the relevant domestic bodies agreed on the need for an alternative approach to assess inshore fisheries on an interim basis, pending the collection of baseline data allowing the appropriate assessment required by EU law. To this end, a series of steps was proposed. The following month, BIM prepared a working document on fisheries in Natura 2000 sites, which included a case study of Castlemaine harbour. The study considered that the consequences of mussel seed fishing on the site were

negligible. According to the applicant company, this assessment was consistent with that set out in a draft consultation document which had previously been prepared in 2000 by the Government Department with responsibility for heritage, of which the NPWS was then part.

25. On 30 July 2008 Ireland sent to the Commission its official response to the CJEU judgment. It acknowledged that assessments were required in relation to fisheries, and that the necessary baseline data had to be collected at the sites in question. The response also indicated that the Irish authorities would seek the Commission's approval for an interim approach.

26. In early September 2008, the Marine Institute submitted to the Department a finalised study entitled "Fisheries in Natura 2000". The Department was hopeful that the Commission would tolerate an interim approach to the activities in Castlemaine harbour, where the situation was time critical. The same month, the NPWS warned that in the absence of sufficient funding and staff it could not provide the necessary assurances to the Commission. It informed the Department that the assessments available to date were not adequate, and that the Commission shared this view. Additional studies were needed. The Commission's stance was that it was prepared to give its temporary agreement to fishing at Castlemaine harbour if the additional studies were submitted and if Ireland gave an undertaking to meet the terms of the judgment over a three-year period.

27. On 2 October 2008 the NPWS sent to the Commission an interim assessment of mussel seed fishing in Castlemaine harbour, indicating that on the basis of its assessment this activity was not likely to have a significant impact on the site. The Commission agreed that, on the basis of this interim assessment, fishing could be allowed in the harbour for 2008 only, on condition that Ireland submit more detailed assessment procedures with a view to allowing fishing there in future. The Commission sought confirmation that there was an adequate basis in domestic law to ensure fishing activities remained in compliance with the directives. It requested amendments to certain aspects of the assessment, and it also requested a monitoring report. From that point it was considered legally possible to open Castlemaine harbour. The Minister signed the Statutory Instrument (No. 395 of 2009) the next day, 3 October 2008, allowing mussel seed fishing to recommence on 5 October 2008 (see paragraph 17 above).

28. In late 2008 and early 2009 the Commission maintained its robust stance, requiring a long-term plan to achieve compliance in order for the interim approach to continue. The NPWS indicated the likelihood of a negative assessment due to a decline in several bird populations, and pointed to the need for additional surveys of the site.

29. In January 2009 the Irish authorities assured the Commission of its commitment to a verifiable three-year plan to achieve compliance with the directives as regards fisheries and aquaculture. They indicated an allocation of 2 million euros over the period 2009-2010 for a wide-ranging exercise to

collect baseline data. In March 2009, Ireland submitted its "roadmap to compliance" with the judgment to the Commission. The latter approved an interim approach to assessment, based on best available data and the collection of limited additional data in the time available, and subject to stringent management and control arrangements.

30. There was further engagement between the Irish authorities and the Commission during 2009 and 2010 regarding compliance with the CJEU judgment and the relevant directives. Public consultation was also required in relation to the regulatory changes that had to be made.

31. The appropriate assessment of Castlemaine harbour was completed in April 2011 by the Marine Institute. Running to over 130 pages, it assessed the effects on the site of the different types of aquaculture carried out there and concluded that there was no reason to anticipate any environmental disturbance from mussel fishing. This was one of multiple assessments which the respondent State had to undertake in light of the CJEU judgment.

C. Domestic proceedings

1. High Court

32. Along with another local company, which was not directly involved in the cultivation of mussels but was a downstream retailer and exporter, the applicant company instituted proceedings in the High Court in February 2009 against the State. It relied on a series of grounds, notably breach of legitimate expectation, operational negligence and breach of the constitutional right to earn a livelihood.

33. In view of the State's delay in delivering a defence to the claim, the applicant company brought a motion for judgment in default of defence, which was heard and concluded on 13 July 2009. The State delivered its defence on 6 August 2009.

34. In October 2009 the applicant company sought discovery of documents on a voluntary basis. It then applied to the Master of the High Court, on 14 December 2009, for an order of discovery, pursuing the matter before him in April, May and July 2010. The Master gave his ruling on 7 July 2010, which the applicant company appealed against to the High Court. It was granted an order of discovery on 18 October 2010, directing the State to provide a variety of documents within eight weeks. The State swore an affidavit of discovery on 7 January 2011. It swore a supplemental affidavit of discovery the following year, on 17 October 2012.

35. The applicant company issued an amended statement of claim on 19 August 2011, which referred to the restrictions applied in 2009 and 2010 as well.

36. On 1 September 2011 the applicant company set the action down for trial and certified it ready for hearing. Over the following months there were some exchanges of correspondence between the applicant company's solicitor and the Chief State Solicitor in relation to the hearing of the action. On 9 May 2012 the applicant company requested a hearing date.

37. The hearing took place over eight days in November 2012. Judgment was given on 31 May 2013.

38. The High Court ruled in favour of the plaintiffs. The trial judge accepted their evidence that it would not have been viable for the applicant company to purchase mussel seed from operators based in other locations. He first found that there had been a breach of legitimate expectation, stating:

> "[T]here was a representation made to the plaintiffs in both the government notice and the newspaper notice of 1993. There was comfort given. What happened from then onwards, the annual allocation of seed collection authorisations and the constant refurbishing of the plaintiffs business gave rise to a pattern of events where the plaintiffs had good reason to rely upon the comfort given to them that there would not be a summary closure of their business without some good scientific reasons or without some consultation process before doing so."

39. The High Court also found that there had been "operational negligence" due to the failure of the authorities to carry out the necessary scientific tests or monitoring that would have provided the data required by EU law. It considered that the failure to undertake these steps was a mistake of law by the Minister, which led to the denial of the applicant company's access to the harbour for a period in 2008, causing financial loss. The trial judge accepted the evidence presented by the applicant company that it would have been possible to conduct the requisite analysis within two months. Had that been done, there would not have been any disruption of the applicant company's activities.

40. The applicant company claimed compensation for lost profits caused by the restrictions in 2008 and 2010, which it estimated at 289,599 euros and 119,941 euros respectively, making a total claim of 409,450 euros. The State challenged both the basis for the applicant company's calculations and the quantum of damages sought. The High Court decided that the applicant company's claim should be reduced by roughly one third. This resulted in an award of 275,000 euros for its losses over the two years in question. It awarded the other local company 125,000 euros.

2. Supreme Court

41. The State appealed both on the issues of liability and the quantum of damages awarded. It filed its notice of appeal with the Supreme Court on 16 July 2013. The applicant company brought a cross appeal in relation to the estimation of damages. A stay issue was ultimately resolved by the Supreme Court on 4 October 2013. On 21 July 2014 the State certified that

the appeal was ready for hearing. The appeal was granted priority by the Chief Justice on 31 July 2014. The hearing took place on 29-30 April 2015, and judgment was given on 22 February 2016.

42. The Supreme Court was unanimous in overturning the High Court's ruling on legitimate expectation. Addressing this issue, Clarke J, with whom the other members of the court agreed, stated:

> "10.7 ... [T]he only representation which it can be said was expressly made by the Minister ... was to the effect that "it is not envisaged" that there would be any restriction on traditional activities. That statement was made in April 1993, and was in the context both of developing European environmental legislation and also in the context of the process leading to the identification of areas within Ireland which would be designated for the purposes of that European legislation. It could not be said to amount to a clear commitment on the part of the Minister that there could never be any adverse consequences. What the consequences were going to be of the designation of an area for European environmental purposes was a matter of European law.
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> 10.8 As events unfolded, it became clear that the Minister did not have the legal authority, as a matter of European law, to allow for the uninterrupted continuance of traditional activities in protected areas unless and until an appropriate assessment had been carried out. ... The Minister could give no greater assurance than that, in the then view of the Minister, it was not envisaged that there would be problems for traditional activities.
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> ...
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> 10.10 Next, reliance is placed on the fact that, as found by the trial judge, the ongoing activities of [the applicant company] were carried out to the knowledge of the Minister and on the basis of annual legal measures put in place by the Minister which facilitated the so-called opening of the harbour. However ... the fact that there may have been an error in the past cannot create a legitimate expectation that that error will be continued into the future. The fact that the Minister was mistaken in his view that traditional activities, of which the Minister undoubtedly knew, could continue provided that the Minister put in place the appropriate legal measures, and was also in error about the fact that those legal measures could be put in place in conformity with European law without carrying out an appropriate assessment, cannot create a legitimate expectation to the effect that that situation would continue.
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> 10.11 While there undoubtedly was significant expenditure, and while the incurrence of expenditure on foot of a representation may form part of the Court's assessment in determining whether it would be appropriate to allow a public authority to resile from a representation made, expenditure will not be relevant if there was no legitimate expectation in the first place.
>
> 10.12 ... As interpreted by the [CJEU], a permission for activity in a protected area can only be given when there is an appropriate assessment. An appropriate assessment requires that, on a scientific assessment, risk be excluded. The Minister was required, therefore, as a matter of European law, to be concerned not with unproven risk but rather with proven absence of risk."

43. On the issue of operational negligence, three of the five judges upheld the State's appeal. Two members of the majority gave judgment.

44. MacMenamin J observed that strong policy considerations arose in the case. The question of how to afford redress to individuals who had suffered the detrimental effects of wrongful actions by the executive was a legitimate concern. Yet changes in the law of negligence and reformulations of State liability must be carefully and incrementally approached with a clear view as to their long-term consequences. While there undoubtedly was a strong public interest in ensuring a proper balance between private and public rights and duties, there was a stronger public interest in ensuring that government can actually function, and that administrators were not impeded in making decisions through fear of a morass of litigation. The courts should not become a form of surrogate unelected government, second guessing *prima facie* lawful government actions in areas of discretion that did not raise questions of exceeding statutory powers. Reviewing the established domestic jurisprudence, he concluded that operational negligence had not been accepted in Irish law. He considered that in the present case the High Court had identified a tort with such broad headings lasting over so many years that it was questionable whether there was a justiciable controversy at all. It was impossible to say whether it was a tort committed by act or by omission. It was unclear at what point in time the Minister had acted wrongfully in relation to the plaintiffs. It might be said that, by allowing aquaculture to continue prior to 2008, the Minister had actually had regard to the applicant company's interests, even at the cost of failed adherence to EU law. He further observed:

> "36. There then arises a further unavoidable question, that is, whether, if the Minister had, in fact, acted between 2000 and 2008, the respondents would inevitably have incurred significant losses, by a similar necessary suspension of activity in Castlemaine Harbour, as occurred from 2008 onwards, in order to obtain appropriate baseline data? If the detailed surveys complained of were necessary to establish the baseline, one is only left to speculate as to how these surveys could have been carried out without exactly the same or similar cessation of activity in the harbour, albeit in earlier years."

45. He then referred to the legislative complexity of the situation, which involved provisions of EU law, as well as primary and secondary domestic legislation, and to the complexity of the situation that the State faced in the aftermath of the infringement judgment of the CJEU. It was not just and reasonable to impose liability in the circumstances of the case. He did not consider that the Minister had owed a duty of care to the plaintiffs in 2008. The Minister had been aware of their situation, but also of the situation of other businesses in other parts of the country which had been placed in the same predicament. Nearly 150 Natura 2000 surveys had to be carried out in the period 2008-2010. It could not be said that the duty to the plaintiffs outweighed the duty to comply with EU law. Identifying the appropriate standard of care was problematic too. A further conceptual difficulty lay in the idea of imposing liability on the State for acts that were carried out by

valid legal instruments for the purpose of implementing a legal duty. MacMenamin J also pointed out that the tort as found in the judgment under appeal did not derive from a *Francovich* breach of EU law (C-6/90 and C-9/90, EU:C:1991:428) but rather from the damage allegedly caused by the implementation of EU law after a breach thereof was identified by the CJEU. The fallacy in the case was to seek to isolate some private duty owed to the plaintiffs by the Minister from his overarching public duty to comply with and implement EU environmental law.

46. Charleton J, concurring, noted that under Article 6 of the Habitats Directive, the Minister had no discretion at all. He underlined three salient facts. First, many of the approximately 140 sites designated under the Habitats and Birds Directives were places of commercial activity of some sort. Following the ruling of the CJEU, emergency measures had to be taken to allow economic operators some latitude for the continuation of even limited business activity within the sites. This was done essentially by Irish public servants negotiating with the Commission. There were about forty sea-based sites, including Castlemaine harbour. Second, the State had not given a firm undertaking that the new environmental classification of Castlemaine harbour would not affect the applicant company's activities. Third, the closing and opening of the harbour was done by valid statutory instruments. He considered that this ruled out any question of liability in negligence.

47. He then referred to the primary legislation governing fishing, the main objective of which was the conservation and rational management of the national fish reserves. This point was central to where any duty of care might lie. The starting point in the tort analysis had to be whether the Minister had owed a duty of care to the applicant company. There was a need for caution in holding that the public authorities owed a duty of care in particular circumstances, since it could greatly hinder their normal functioning. There were other means to deal with improper conduct by a public body, such as judicial review and the tort of misfeasance in public office. He reiterated that the authorities had not had any choice; the Minister had acted as prescribed by EU law. At most, it might be said that there was some choice to be made about whether to give priority to some of the affected sites over the others. Yet it was hard to argue that Castlemaine harbour was more deserving than the other locations. Concentrating resources on some sites would have left operators in other sites waiting longer. The State had instead adopted a strategy of vigorous negotiation with the Commission to attempt to salvage whatever could be recovered for the benefit of users of all of the sites concerned.

48. The concept of operational negligence had not yet been accepted as part of domestic law. It would mean a lack of certainty in the law, and make public decision-making subsidiary to the views of experts at several removes from the pressures of government. It would mean arrogating

broader functions to the courts than provided for in the Constitution. The Minister had exercised powers based on statute and each decision had been correctly expressed through a statutory instrument. Given the general conservationist aims of the primary legislation, there was no statutory duty in favour of the applicant company. There was no discretion vested in the Minister to exempt any economic actor from EU rules. There was no duty of care towards the applicant company that could found an action in negligence. Instead, the duty of care was towards the wider community, expressed as the protection of the environment.

49. Writing for the minority, Clarke J considered that the High Court judgment, insofar as it concerned negligence, should be upheld as regards the events of 2008. Concerning the events of 2010, he noted that the applicant company had not provided evidence allowing a causal link to be established between the alleged failure on the part of the Minister and its inability to conduct its business that year. It therefore had no cause of action against the State in this respect.

50. Applying the relevant principles to the case, Clarke J clarified that there could not have been a duty on the Minister in 2008 to refrain from closing the harbour until an appropriate assessment had been carried out, as this would have been contrary to EU law. To the extent the harbour could be opened, this was only permissible in accordance with the interim measures agreed with the Commission. The real question was therefore:

> "15.4 ... In the light of developments in European law, did the Minister owe a duty of care to those who, to his knowledge (and up to then with his permission), were carrying out activities in protected areas, to ensure that he had appropriate survey(s) and other scientific evidence available to enable a decision to be made for the purposes of considering whether to permit the continuance of traditional activities and, should appropriate evidence be found to be present, to allow those activities to be authorised?"

51. He considered that on the facts of the case the necessary elements of foreseeability and proximity were present. The Minister was well aware of the activities taking place in Castlemaine harbour. He was also aware, in light of the statement published in 1993, that there was a potential issue that might arise in relation to such activities. Therefore, the Minister had been fully aware that any failure to place himself in a position to make a sustainable decision about the continuance of traditional activities in the sites concerned could have a significant effect on those involved in them. A private party in an analogous position would undoubtedly have been held to have a duty of care towards such persons. He further noted that it must have been clear to the Minister for some time prior to the CJEU judgment that there was a risk that the position taken by the Commission would be upheld over that of the State. In that eventuality, there would be an immediate problem due to the absence of the necessary scientific data for the appropriate assessment to be made, leading to at least the temporary

interruption of the activities of the applicant company and others operating in protected areas. These formed a small and defined group of persons that, to a large extent, were actually known to the Minister and the Department.

52. As to the presence of any countervailing policy factor, he reiterated that the case did not concern matters of policy, discretion or adjudication. It did not touch upon the allocation of resources or the making of statutory decisions. It was about the purported duty of the Minister to take reasonable steps to ensure that he would be in a proper position to make a decision under European law and any relevant Irish measures. He clarified that he did not necessarily disagree with the view of MacMenamin J that no specific duty of care on the Minister had arisen in the period after the CJEU judgment. At that stage, the authorities had found themselves on the back foot, with many decisions to be made about the allocation of the resources needed to conduct appropriate assessments at the sites concerned. But the actions and decisions in 2008 and later were not relevant to the duty of care as he had defined it:

> "15.31 ... [T]he Minister got it wrong by failing to put in place measures to secure the appropriate scientific data to enable an appropriate assessment to be carried out long after it had become clear, by reason of the position adopted by the Commission, that there was, to put it at its mildest, a significant doubt as to whether the Minister's position was correct.
>
> ...
>
> 15.33 ... [I]t seems to me that the duty of care which I suggest should be held to lie on the Minister does not derive from any balancing exercise at all and does not involve any aspect of the undoubted over-arching public duty which the Minister was obliged to perform. Against what can it be said that the Minister was balancing when he decided not to assemble the necessary scientific information and data (despite the Commission's reasoned opinion) prior to the decision of the ECJ? What over-arching public duty would have been in any way impaired by the collection of such data? There is no evidence to suggest that the failure to assemble the necessary data was based on any decision involving policy, discretion or adjudication."

53. Finally, he did not agree with the majority that the applicant company's business would have been interrupted in any event if the Habitats Directive had been correctly implemented at an earlier point in time. According to Clarke J, the evidence accepted by the High Court was that the necessary data could have been collected and analysed in a relatively short period of time, avoiding any interruption of the applicant company's usual activities. There was thus a causal link between the failure to assemble the relevant data and conduct the assessment at an earlier point in time, and the interruption of the applicant company's activities in 2008.

54. In relation to damages, Clarke J noted that there were many points of disagreement between the applicant company and the State over the manner in which the former's losses should be properly assessed. He considered that the difficulties with the evidence and the figures would have made it impossible for the Supreme Court to conduct a fair and just calculation. Had

the State's appeal been rejected, the proper course would have been to remit the question of damages to the High Court for reassessment.

II. RELEVANT DOMESTIC LAW

55. The complex statutory regime governing the activity of mussel cultivation is set out in the unanimous Supreme Court judgment on the question of legitimate expectation.

56. In brief, the requirement to hold a sea-fishing boat licence is set out in Section 4 of the Fisheries (Amendment) Act 2003, as inserted by Section 97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006. The entry of such boats in the Register of Fishing Boats is required by the Merchant Shipping (Registry, Lettering and Numbering of Fishing Boats) Regulations 2005.

57. Section 13 of the Sea-Fishing and Maritime Jurisdiction Act 2006 confers on the Minister the power to manage and regulate sea fishing under the EU's Common Fisheries Policy through a system of authorisations. This applies to mussel seed fishing. An authorisation specifies, among other things, the quantity of mussel seed allocated to the holder, the permitted times and dates for fishing, and the aquaculture site where the seed is to be re-laid. Under Section 15 of the Act, the Minister is empowered to supplement the Common Fisheries Policy by regulations laying down restrictive or regulatory measures to protect, conserve or allow the sustainable exploitation of fish or the rational management of fisheries. Such measures may include, *inter alia*, prohibitions of or restrictions on areas or times of fishing.

58. Section 6 of the Fisheries (Amendment) Act 1997 requires aquaculture operators to hold a licence for their activity. In addition, under the Foreshore Acts 1933-2011, they must also hold a lease or licence from the Minister.

59. The Habitats Directive was transposed into Irish law by the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997). These included the possibility that any person to whom notice is given regarding classification of a site may object to its inclusion in the candidate list of sites (Regulation 5), and provision for the payment of compensation, under certain conditions, in case of refusal by the Minister to consent to an operation or activity following an appropriate assessment of the impact of such operation or activity on a listed site (Regulation 20).

60. The above regulations have since been replaced by the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011). In accordance with the requirements of EU law, each public authority is required to exercise its functions so as not to affect the integrity of Natura 2000 sites.

61. Section 3 of the European Convention on Human Rights Act 2003 provides, in so far as relevant:

> "3(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.
>
> ..."

III. RELEVANT EU LAW

A. Treaty establishing the European Community

62. The infringement proceedings against the respondent State were brought under Article 226 EC (now Article 258 TFEU), providing as follows:

> "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

63. In the event of failure to comply with an infringement judgment, the Commission may introduce a second infringement action before the CJEU, which may specify the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances (Article 228 EC, now Article 260 TFEU).

64. Pursuant to EU law, failure by an EU Member State to implement a directive, or partial, incorrect or inadequate implementation, may give rise to state liability. The establishment of such state liability, often referred to as *Francovich* liability, is dependent on several conditions developed in the case-law of the CJEU being fulfilled, namely: the rule of law which has been infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (see *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428; *Brasserie du Pêcheur and Factortame*, joined Cases C-46/93 and C-48/93, EU:C:1996:79; and *Dillenkofer and others*, joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, EU:C:1996:375).

B. Birds Directive

65. Reference is made to the judgment in Case C-418/04 for a detailed exposé of the content and operation of the Birds Directive. In particular, Member States were obliged to classify the most suitable territories in number and size as special protection areas for the conservation of the species mentioned in Annex I of the directive. Pursuant to the Birds Directive, as interpreted by the CJEU, it became clear that if species mentioned in that annex occur on the territory of a Member State, it is obliged to define SPAs for them, that that classification obligation did not necessarily cease to apply if the area in question is no longer suitable, and that a genuine chance that a species may resettle in an area is also a basis for the aforementioned classification obligation (see, *inter alia*, Case C-418/04, paragraphs 36, 39, 83 and 88).

C. Habitats Directive

66. Article 6 of the Habitats Directive provides:

"Article 6

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human

health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

67. The applicant company complained under Article 8 of the Convention and Article 1 of Protocol No. 1 of the impact on its right to earn a livelihood arising out of the temporary prohibition on mussel seed fishing imposed in 2008.

68. The Government contested that argument.

69. The Court, being master of the characterisation to be given in law to the facts of the case, considers that this complaint should be examined under Article 1 of Protocol No. 1 only, this being the article with reference to which it was communicated to the Government.

70. Article 1 of Protocol No. 1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. The parties' submissions

(a) The Government

71. In response to a question communicated by the Court, the Government considered that the complaint should be declared inadmissible for failure to exhaust domestic remedies. They pointed out that Section 3 of the European Convention on Human Rights Act 2003 (hereinafter "the 2003 Act") required all organs of State – including Government Departments – to perform their functions in a manner compatible with the State's obligations under the Convention. Where they failed in this duty, and if no other remedy in damages was available, a person who suffered injury, loss or damage could seek damages in the High Court. It was clear from a number of cases decided domestically that this remedy was available in practice. Yet the applicant company had ignored this means of obtaining redress for its

complaint under Article 1 of Protocol No. 1. The Government further argued that the applicant company had failed to invoke its analogous rights under the Constitution, which explicitly recognised the right to respect for private property (Article 40.3.2º) and, implicitly, the right to earn a livelihood (Article 40.3.1º). The applicant company had failed to litigate these issues before the domestic courts.

72. The Government submitted that there was no engagement at all of Article 1 of Protocol No. 1, as the facts of the case did not disclose any existing entitlement of the applicant company to a "possession". It had simply enjoyed permission, granted under a particularly complex regulatory framework and subject to strict conditions, to fish for a natural resource that was also a national asset. While an administrative authorisation could in principle be treated as a "possession" for the purposes of Article 1 of Protocol No. 1, this was only where it gave rise to a legitimate expectation of achieving or obtaining an interest. That was not the situation in the present case. The applicant company could not have legitimately expected to be allowed to fish in the harbour at the time of its choosing, without regard to environmental imperatives and in breach of the State's obligations pursuant to EU law.

73. The Government further considered that the complaint was manifestly ill-founded, given the limited character of the prohibition and its limited impact on the applicant company's activities. It was only the fishing of mussel seed that had been affected, and only for a brief period of time while the State negotiated with the Commission. Other aspects of the applicant company's business – growing transplanted mussels and harvesting them at maturity – had not been interrupted. There had been no impact on the applicant company's boat licence and boat registration, meaning that it would have been able to gather mussel seed at other locations. It had also had the option of purchasing the raw material it required from other operators. The real cause of the applicant's loss in 2008 was not the closure of the harbour, but the action of predators, a natural risk that was always present.

(b) The applicant company

74. The applicant company maintained that it had exhausted domestic remedies. As expressly noted in the High Court judgment, its statement of claim included an argument based on the constitutional right to earn a livelihood. Since the High Court had upheld the claim on two other grounds, it had not been necessary to also rule on the constitutional aspect. In its submissions to the Supreme Court it had continued to rely on the right to earn a livelihood. Therefore it had given the domestic courts the opportunity to address the substance of this complaint. As for relying on the 2003 Act, the remedy under Section 3 was relevant only where no other remedy was available. It had pursued other suitable remedies, giving

priority to the common law right of action in negligence. The complaint it was now seeking to raise before the Court had been raised at the domestic level.

75. The applicant company denied that its complaint was manifestly ill-founded. While its operations had not been completely suspended, the impugned prohibition on fishing mussel seed between 9 June and 1 July, and again from 23 August until 5 October 2008 had rendered its authorisation worthless for that year. It pointed out that its boat was licensed for use for aquaculture only. It could not have been put to other uses instead, as stated by the Government. It was not realistic to suggest that the applicant company could have simply fished for mussel seed in other unrestricted locations, as this would be limited by the availability of seed settlements, the existence of other operators and commercial imperatives known to the State. Furthermore, the boat was not suited to other types of sea fishing as it was designed for use in calm estuary waters. As a result of the temporary prohibition on fishing in the harbour, its costly new vessel could not be used for its intended purpose that year. Furthermore, the option of purchasing mussel seed from other sources was commercially unviable due to high transport costs and the high mortality rate of the seed. This, according to the applicant company, had been acknowledged by the High Court. In sum, there had been no real possibility for the applicant company to maintain its usual level of business activities in 2008.

76. The applicant company pointed out that the State had not previously suggested, either in 2008 or during the domestic proceedings, that it could or should have changed its business model. It was no answer to a claim of loss of livelihood or interference with possessions to say that the operator should have altered an important aspect of its business. It was even an implicit admission that its rights had been impacted.

77. The Government's attempt to avoid responsibility for the loss of the mussel seed by blaming it on natural causes could not be accepted. The authorities had been warned in good time of the signs of predators on the sea bed, and so had been aware of the consequences of the continuing closure of the harbour. While natural predators were always present, it was because of the belated opening of the harbour that they had entirely eliminated that year's growth of mussel seed.

78. As regards the scope of Article 1 of Protocol No. 1, the applicant company recalled that the concept of "possessions" was very broad. It considered that its licences and permits were of a commercial nature, and that the interests related to them should have had a sufficient likelihood of being realised. This gave rise to a legitimate expectation of effectively enjoying the rights associated with ownership. The licences were therefore to be regarded as possessions. Admittedly, the mussel seed authorisation stated that it did not allow the holder to fish in a prohibited area. Yet prior to 2008 there had never been a prohibition in Castlemaine harbour, and there

had been no reason for the applicant company to anticipate such a development. The effect of the temporary prohibition had been to deprive the applicant company of the use of its various licences, and the intended use of its new boat, in 2008, leading to the loss of its supply of marketable mussels in 2010, and the consequent loss of markets and clientele after that.

2. The Court's assessment

(a) Exhaustion of domestic remedies

79. On the requirement to exhaust domestic remedies, the Court refers to the well-established principles of its case-law (as reiterated notably in *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 83-89, 9 July 2015, and *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014).

80. In particular, it recalls that States are exempted from answering before an international body for their acts until they have had an opportunity to put matters right through their own legal system. Those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system. The obligation to exhaust domestic remedies therefore requires applicants to make normal use of remedies which are available and sufficient in respect of their Convention grievances.

81. In the domestic proceedings in this case, the applicant company relied on a series of grounds before the High Court (see paragraph 32 above), which noted that the claim was "multi-faceted", with the claim in negligence being "the foremost plank of the case". The Court considers that, in view of the applicant company's core grievance against the State, it is not for it to call into question the primary reliance on legitimate expectation and operational negligence. This appears not to have been an unreasonable choice, given the various judgments in the High and Supreme Courts, as it was capable, if successful, of remedying directly the impugned state of affairs (*Vučković*, cited above, § 74).

82. The Court would further note that while the applicant company did not expressly rely on Article 1 of Protocol No. 1, in its submissions to the High Court it relied on the constitutional right to earn a livelihood, arguing that the authorities had failed to conduct the necessary balancing exercise between this right and the need to protect the environment. The Government also referred to the constitutional right to earn a livelihood as being "analogous" to the relevant aspect of Article 1 of Protocol No. 1. The Court is therefore satisfied that in making this argument, the applicant raised its present complaint in substance during the domestic proceedings. In addition, at the request of the Court, the applicant company provided a copy of its written submissions to the Supreme Court. The Court notes that there too it reiterated its constitutional argument, expressly stating that it was not

abandoning any aspects of the case it had fully argued before the High Court.

83. As for the 2003 Act, the Court notes from the wording of Section 3(2) that redress may be sought under this provision if no other remedy in damages is available. Given the applicant company's pursuit of other compensatory remedies, the Government has not sufficiently explained how or why the 2003 Act would displace other potentially effective remedies in a case like this, or why, as stated previously, the Court should consider that the present complaint was not raised in substance before the domestic courts.

84. In light of the above, and in view of the material available to the Court, this complaint cannot be rejected for non-exhaustion of domestic remedies.

(b) Whether the complaint is within the scope of Article 1 of Protocol No. 1

85. The Court will next consider the Government's objection that the applicant company's complaint does not engage Article 1 of Protocol No. 1 at all, i.e. that it is incompatible *ratione materiae* with this provision.

86. It recalls in this respect that the concept of "possession" within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The issue that needs to be examined is normally whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by that provision (see, among many authorities, *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 65, 29 March 2010).

87. With respect to business activities subject to licensing requirements, the Court refers to the survey of the relevant case-law set out in *Malik v. the United Kingdom*, no. 23780/08, §§ 91-92, 94, 13 March 2012:

> "91. In cases concerning the grants of licences or permits to carry out a business, the Court has indicated that the revocation or withdrawal of a permit or licence interfered with the applicants' right to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business (see *Fredin v. Sweden (no. 1)*, 18 February 1991, § 40, Series A no. 192, in respect of an exploitation permit for a gravel pit; and *mutatis mutandis*, *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159, concerning a licence to serve alcoholic beverages in a restaurant. See also *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, no. 51728/99, § 49, 28 July 2005, which involved a licence to run a bonded warehouse). In this regard, the Court observed in particular in *Tre Traktörer AB* that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had had adverse effects on the goodwill and value of the restaurant (at §§ 43 and 53 of the Court's judgment).
>
> 92. While the Court has appeared to accept on some occasions that the licence itself constituted a "possession" for the purposes of Article 1 of Protocol No. 1 to the

> Convention, it is significant that on these occasions the question was not in dispute between the parties so the Court was not required to engage in an extensive analysis of the nature of the possession in the case. In any event, it went on to explain that, according to its case-law, the termination of a valid licence to run a business amounted to an interference with the right to the peaceful enjoyment of possessions (see *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007; and *Megadat.com SRL v. Moldova*, no. 21151/04, §§ 62-63, 8 April 2008). It is clear that in both cases, the licences were connected to the carrying out of an underlying business.
>
> ...
>
> 94. ... [I]in cases involving the suspension or revocation of licences and permits or the refusal to enrol a person on a list of individuals entitled to practise a particular profession, the Court has tended to regard as a "possession" the underlying business or professional practice in question. Restrictions placed on registration, licences or permits connected to the work carried out by the business or the practice of the profession are generally viewed by the Court as the means by which the interference with a business or professional practice has taken place."

88. In line with the above, the Court considers that the present case concerns a "possession", namely the underlying aquaculture business of the applicant company. It is true, as the Government pointed out, that all of the various licences and authorisations held by the applicant company retained their validity in 2008. In this respect, the case differs from cases previously decided by the Court, which involved the cancellation or revocation of a licence or permit, putting an end to a commercial activity (see among many others *Tre Traktörer AB*, cited above, where the applicant company's licence to serve alcoholic drinks was withdrawn leading to the closure of the establishment shortly afterwards; see also *Vékony v. Hungary*, no. 65681/13, § 29, 13 January 2015, involving the statutory cancellation of applicant's licence to sell tobacco, followed shortly afterwards by the closure of his business). The Court observes, however, that it has also found that Article 1 of Protocol No. 1 applied even where the licence in question was not actually withdrawn, but was considered to have been deprived of its substance (*Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, §§ 177-178, ECHR 2012).

89. Mindful of the need to look behind appearances and investigate the realities of the situation complained of in the present case, the Court considers that the temporary prohibition on mussel seed fishing that applied during the periods in question in 2008 is properly to be regarded as a restriction placed on a permit – the mussel seed authorisation issued to it for 2008 – connected to the usual conduct of its business.

90. For the Court, the facts of the case thus disclose an interference by the domestic authorities with the applicant company's right to the peaceful enjoyment of its possessions, including the economic interests connected with the underlying business. However, the fact that the impugned interference consisted of a temporary prohibition of part of the applicant company's activities under licence or permit, that the authorisation was not

withdrawn or revoked, and that in any event the authorisation by virtue of which the applicant company conducted its business was subject to conditions, will all form part of the Court's analysis of the nature and extent of that interference. It is within this limited and particular context that the Court's analysis must be understood (see, *mutatis mutandis*, *Malik*, cited above, § 95 and further below).

91. It follows that this complaint is not incompatible *ratione materiae* with Article 1 of Protocol No. 1. Nor can it be considered manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

92. The applicant company submitted that there had been an unjustified interference on the part of the domestic authorities with the peaceful enjoyment of its possessions. Given that, in its view, it had been entirely deprived of the use of its licences during the period in question, it considered that this represented a *de facto* expropriation of its possessions. Alternatively, the inability to exploit the authorisation to fish for mussel seed could be regarded, as recognised in the Court's case-law, as a deprivation of the applicant company's means of earning a living in 2008.

93. The interference had been caused by the initial failure of the domestic authorities to understand the requirements of EU law, followed by the inadequate or incorrect action taken in response to the CJEU judgment. In both respects it considered that the State had been negligent. In relation to the period before the CJEU judgment, it considered that the domestic authorities should already have recognised by the time of the last of the Commission's reasoned opinions in July 2003 that the State was not in compliance with its EU obligations. By failing to realise this, the State had lost the opportunity to achieve compliance with EU law in a planned and timely way, avoiding disruption to the applicant company's normal activities. Although the authorities had, admittedly, found themselves in a difficult position in 2008, following the CJEU judgment, they were solely responsible for this state of affairs.

94. The applicant company also criticised the manner in which the State reacted to the CJEU judgment. It considered that in the months following the judgment the domestic authorities could have negotiated interim measures with the Commission so as to allow the opening of the harbour on 23 August 2008. It further criticised the lack of information and consultation during this time. The companies affected were only informed at a very late stage that the harbour would not be opened for mussel seed

fishing on 9 June 2008, and they were not afforded any opportunity to make representations regarding the maintenance of their livelihoods. Referring to the various interactions in 2008 between Irish and European officials, the applicant company noted that this was not matched by action on the ground to make concrete progress towards meeting the requirements of EU law, a point that had been noted by the High Court. The State's response had therefore not been an adequate one in the circumstances.

95. As for the lawfulness of the interference, the applicant company was critical in several respects of the secondary legislation adopted in 2008 (see paragraphs 15-17 above). It argued that these instruments were deficient in terms of clarity and accessibility. Regarding Statutory Instrument No. 347 of 2008, which maintained the temporary prohibition until 5 October 2008, it argued that the wording employed was imprecise and ambiguous. It was not certain that the prohibition only concerned mussel seed fishing and that other aspects of aquaculture could continue. While this instrument entered into force on 23 August 2008, it was not published in the official gazette until 5 September 2008. It considered that Statutory Instrument No. 395 of 2008, permitting mussel seed fishing in the harbour, also displayed a lack of clarity.

96. The applicant company accepted that environmental protection was a legitimate objective for the State to pursue, but emphasised that its complaint did not relate to this objective *per se*, but to the manner in which the State had pursued it, and to the consequences of the errors that it had made in so doing.

97. Addressing the proportionality of the interference, the applicant company submitted that although Castlemaine harbour was not the only site affected, the companies based there had been placed in a uniquely difficult situation. This was due to the fact, accepted by the High Court, that there were no viable alternative means of obtaining mussel seed. Operators based in other SPA sites had not been confronted with this particular difficulty. For example, it would have been possible for those based on the east coast to seek mussel seed elsewhere in the Irish Sea. While the harbour had been closed for a limited period, this had led directly to a complete loss of the applicant company's profits in 2010, with continuing consequences after that in terms of loss of markets and clientele. With no compensation available for these substantial losses, the applicant company had been left with an individual and excessive burden. There had thus been a failure to strike a fair balance between the general interests of the community and the protection of the applicant company's fundamental rights.

98. Finally, the applicant company rejected the Government's argument that this was a situation in which the Court's *Bosphorus* jurisprudence should apply (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI). The presumption that the respondent State had complied with the requirements of the Convention

could not properly arise in the particular circumstances of the case. Even if it did arise, it must be rebutted since the protection of the applicant company's rights had been "manifestly deficient". The Government could not be permitted to now make a virtue what was the State's original failure to comply with its legal obligations under EU law. The applicant company did not dispute that the State was under an obligation to comply with EU law. The crucial point was that the State could well have done so in a reasonable and organised way, both before and after the CJEU judgment. Yet it had failed to do so due to its own long-standing errors of law and its inappropriate attempts to remedy them after the infringement judgment. The consequences of these errors had fallen on the applicant company.

(b) The Government

99. The Government submitted that the actions of the authorities in this case had been undertaken in order to comply with the State's strict obligations under EU law, as confirmed by the judgment of the CJEU. As there had been no discretion or margin of appreciation at all, the situation must be regarded as coming within the *Bosphorus* case-law. Bearing in mind the equivalent level of protection of fundamental rights under EU law, it should be presumed that the domestic authorities had not departed from the requirements of the Convention in this case.

100. The Government also argued that any interference with the applicant company's rights could only be regarded as a "control of use" of possessions, that had been applied in the general interest. In the present case, the general interest was clear, namely the protection of the environment in accordance with the requirements of EU law. As the Court had repeatedly recognised in its case-law, this was a weighty consideration, which was of growing importance for contemporary society. In support of their argument the Government referred to a series of cases decided by this Court, notably: *Depalle v. France* [GC], no. 34044/02, ECHR 2010; *Malfatto and Mieille v. France*, nos. 40886/06 and 51946/07, 6 October 2016; *Matczyński v. Poland*, no. 32794/07, 15 December 2015; *Alatulkkila and Others v. Finland*, no. 33538/96, 28 July 2005; and *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII. The pursuit of this aim was not confined to the applicant company's particular circumstances, but extended to all aquaculture operators based in designated locations around the coastline.

101. Furthermore, where the general interest of the community in environmental conservation was pre-eminent, it was justified to allow a wide margin of appreciation to the domestic authorities. This encompassed both the means of enforcement and ascertaining whether the consequences of enforcement were justified. Even severe interferences with the right to property could be justified by considerations of environmental protection.

Compensation could be excluded in certain situations involving the control of property.

102. The Government rejected the applicant company's characterisation of the impugned interference as a blanket ban. As a matter of EU law, and in relation to twenty-four (later twenty-two) coastal sites in the respondent State, the authorities were temporarily prevented from granting consent to an activity that had the potential to affect the features of a nature conservation site in the absence of the requisite appropriate assessment. The authorities had made every effort to ensure that the restriction at Castlemaine could be lifted at the earliest opportunity, and the site had been given priority treatment in this context. This included an interim assessment conducted as expeditiously as possible and submitted to the Commission on 2 October 2008. This led to the lifting of the prohibition at Castlemaine harbour three days later. The Government reiterated that the applicant company's mussel seed authorisation had retained its validity during this period, and that it had been entitled to continue to operate its boat, within the confines of the relevant licences.

103. In sum, the Government considered that the facts of the case did not disclose any lack of a reasonable relationship of proportionality between the means employed and the aim sought to be realised. A fair balance had been struck between the demands of the general interest of the community and the requirements of the protection of the applicant company's rights. It could not be said that the applicant company had had to bear an individual and excessive burden.

2. The Court's assessment

(a) Interference

104. As previously stated, the impugned activities of the respondent State disclose an interference with the applicant company's right to the peaceful enjoyment of its possessions (see paragraph 90 above). As to the nature of that interference, the nature of the applicant company's possession being very particular, the Court does not agree with the applicant company's argument that it was akin to a *de facto* expropriation. Rather, the interference must be considered a "control of the use of property", which falls under the second paragraph of Article 1 of Protocol No. 1 (see for example *Werra Naturstein GmbH & Co KG v. Germany*, no. 32377/12, § 41, 19 January 2017). As stated above (see paragraph 90), in assessing that interference the Court will bear in mind that the applicant company's activities were conducted subject to the conditions stipulated by the Minister each year when issuing the mussel seed authorisation, and that in 2008 the authorisation was not withdrawn or revoked but subject to temporary restriction.

(b) Compliance with the requirements of the second paragraph

(i) Lawfulness and purpose of the interference

105. Concerning the lawfulness of the interference, the Court refers to the findings of the majority of the Supreme Court according to which the temporary closure of the harbour for the purpose of mussel seed fishing was effected by valid secondary legislation, in order to comply with the State's obligations under EU law (see paragraphs 45 and 46 above).

106. However, the applicant company argued that Statutory Instruments Nos. 347 and 395 of 2008 failed to comply with the principle of legal certainty inasmuch as they were not, in its view, sufficiently clear in their wording. It also pointed to the fact that the official publication of the first of these instruments came about two weeks after it entered into force.

107. As the Court has often stated, when speaking of "law", Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention. It follows that, in addition to being in accordance with the domestic law of the Contracting State, the legal norms upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application. As to the notion of "foreseeability", its scope depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see generally *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, §§ 95-99, 25 October 2012, with further references).

108. Notwithstanding the applicant company's criticisms, it does not appear to the Court that it was in fact left in any uncertainty about the nature and scope of the restrictions that were applied to the harbour in 2008, nor about their legal basis. As already noted (see paragraph 14 above), the applicant company was in direct contact with the Department, and was immediately informed of the Minister's decision that it was not possible to open the harbour for mussel seed fishing from 9 June onwards. As for the other aspects of its activities that were not covered by the restriction, the applicant company did not suggest that these were in fact hindered by any legal uncertainty. On the contrary, it can be inferred from the information in the case-file about the applicant company's income in 2008 that it continued to operate normally that year. As for the fact that Statutory Instrument No. 347 was formally published in the official gazette about two weeks after it entered into force, the Court also infers from the information in the case file that the applicant company was fully aware of the continuing closure of the harbour, given that it protested the situation to the Department by letter dated 28 August 2008. Moreover, having regard to the general legal context of the case, including secondary legislation, primary legislation, the EU directives and the CJEU judgment, the Court does not consider that a relatively short delay in publishing Statutory Instrument No. 347 is sufficient reason to call the "lawfulness" of the interference in this case into

question. As indicated previously, it is not contested that the applicant company had continuing contact with the Department and that it was informed of all relevant developments. As an economic operator active for many years in the aquaculture sector, it has not been claimed that the applicant company was not aware of the protracted pre-contentious phase of the legal proceedings involving the European Commission and the respondent State, or of the infringement judgment of 13 December 2007, which specifically addressed aquaculture.

109. Regarding the purpose of the interference, it is clear that its aim was the protection of the environment. As the Court has often stated, this is an increasingly important consideration in today's society, having become a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities (see for example *Depalle*, cited above, § 81; also *Matczyński*, cited above, § 101). Public authorities assume a responsibility which should in practice result in their intervention at the appropriate time to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective (see, for example, *S.C. Fiercolect Impex S.R.L. v. Romania*, no. 26429/07, § 65, 13 December 2016). In addition, in the instant case the impugned measures taken were adopted to ensure the respondent State's compliance with its obligations under EU law, which the Court has also recognised as a legitimate general-interest objective of considerable weight (see *Bosphorus*, cited above, § 150; *Lohuis and Others v. the Netherlands*, no. 37265/10, § 54, 30 April 2013; *Michaud v. France*, no. 12323/11, § 100, ECHR 2012; and *Coopérative des agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v. France* (dec.), no. 16931/04, ECHR 2006-XV).

(ii) Proportionality of the interference

(α) Applicability of the *Bosphorus* presumption

110. The Court must first consider whether, as argued by the Government, it should be presumed that the respondent State respected the requirements of Article 1 of Protocol No. 1, i.e. whether the *Bosphorus* case-law should apply in the circumstances of the present case. It reiterates that the application of the presumption of equivalent protection in the legal system of the EU is subject to two conditions. The first is that the impugned interference must have been a matter of strict international legal obligation for the respondent State, to the exclusion of any margin of manoeuvre on the part of the domestic authorities. The second condition is the deployment of the full potential of the supervisory mechanism provided for by EU law, which the Court has recognised as affording equivalent protection to that provided by the Convention (see most recently *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 101-105, ECHR 2016, with further references).

111. Regarding the first condition, the Court recalls that it has, in its case-law, adverted to the difference in the EU legal system between a Regulation, binding in its entirety on and directly applicable in all the Member States, and a Directive, binding as to the result to be achieved while leaving to the Member States the choice of form and methods (see *Avotiņš*, cited above, § 106, and *Michaud*, cited above, § 113, noting the difference between that case and the *Bosphorus* case).

112. In the present case, the obligation on the respondent State derived principally from Article 6(3) of the Habitats Directive. Ireland's failure to fulfil its obligation thereunder was established in infringement proceedings, entailing a duty on the State to comply with the CJEU's judgment and the secondary legislation examined in the context of those proceedings. While it was therefore clear that the respondent State had to comply with the directive and, with immediacy, the CJEU judgment, both were results to be achieved and neither mandated how compliance was to be effected. The respondent State was therefore not wholly deprived of a margin of manoeuvre in this respect. On the contrary, the domestic authorities retained some scope to negotiate with the Commission regarding the steps to be taken (see paragraphs 22-27 above). This included, at the proposal of the respondent State, both priority treatment and particular interim measures for Castlemaine harbour that were implemented with the agreement of the Commission. As the Court has previously stated, the presence of some margin of manoeuvre is capable of obstructing the application of the presumption of equivalent protection (see *Michaud*, cited above, § 113; see also *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 338, ECHR 2011). The Court leaves open the question whether a CJEU judgment under Article 258 TFEU could in other circumstances be regarded as leaving no margin of manoeuvre to the Member State in question, but finds in the circumstances of the present case in relation to the need to comply with the relevant EU directive that the *Bosphorus* presumption did not apply.

113. Moreover, when referring to the legitimate need in this case to fulfil environmental objectives and comply, in this regard, with EU law, the respondent Government itself referred to its wide margin of appreciation.

114. The Court is therefore required to determine whether the interference with the applicant company's right to the peaceful enjoyment of its possessions was justified under Article 1 of Protocol No. 1.

(β) Justification of the interference

115. According to well-established case-law, the second paragraph of Article 1 of Protocol No. 1 is to be read in the light of the principle enunciated in the first sentence of this provision. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of

the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden (see, among many others, *Depalle*, cited above, § 83).

116. The Court will first have regard to the consequences for the applicant company of the temporary restrictions applied to the harbour in 2008. In this regard, it must be borne in mind that the applicant company is engaged in a commercial activity that is subject to strict and detailed regulation by the domestic authorities, and, as regards the fishing of mussel seed, operates in accordance with the conditions stipulated in the authorisations granted to it from year to year. This includes the condition, expressly stated in the authorisation granted to it in August 2008, that it was not permitted to fish for mussel seed in an area where such activity had been prohibited by the Minister. Furthermore, it is not without relevance to the Court's assessment that the Supreme Court was unanimous in finding that there was no legal basis for the applicant company to entertain a legitimate expectation of being permitted to operate as usual in 2008, following the finding by the CJEU that Ireland had failed to fulfil its relevant obligations under EU law (see paragraph 42 above). In the words of that court, as events unfolded, it became clear that the Minister did not have the legal authority, as a matter of EU law, to allow for the uninterrupted continuance of traditional activities in protected areas.

117. The Court would further observe that while the applicant company argued that it had had virtually no notice of the closure of the harbour for mussel seed fishing in June 2008, it is a commercial operator and therefore cannot disclaim all knowledge of relevant legal provisions and developments. Rather, it can be expected to display a high degree of caution in the pursuit of its activities, and to take special care in assessing the risks that may attach to those activities (see *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 59, Series A no. 222; also, *mutatis mutandis*, *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 65, 9 October 2008). As stated previously, at least from the date of the CJEU judgment in this case (13 December 2007) – and arguably from the bringing of the infringement proceedings by the Commission in 2004 – making express reference to the aquaculture sector, the Court considers that the applicant company should have been aware of a possible risk of interruption of, or at least some consequences for, its usual

commercial activities. The extent and consequences of any infringement judgment could not be foreseen (see paragraph 125 below), but the risk of some interruption could clearly not be excluded. This factor cannot be disregarded when assessing the burden on the applicant company. In this respect, the Court notes that the applicant company purchased its new boat in May 2008, notwithstanding the risk referred to above. While neither party addressed the point before this Court, the applicant company indicated to the High Court that had it known that there would be restrictions on fishing for mussel seed in 2008 it would have considered other options, such as renting a vessel that year.

118. As for the applicant company's loss of profits, the parties disagreed over whether that loss could have been avoided or at least mitigated. The Government maintained throughout that the applicant company could have purchased mussel seed from other operators. The applicant company disputed this. It pointed to the acceptance by the High Court that the purchase of mussel seed had been previously attempted and proven to be unviable, not least due to the additional cost involved, and submitted that this finding had not been overturned in the Supreme Court. For its part, the Court has noted the finding of the High Court on this particular point. As for the Supreme Court, while it is true that that finding was not expressly reversed, it lost its legal significance in light of the reasoning of the majority. The Court further notes that while the minority Supreme Court judgment adverted to the High Court's finding in this respect, it also referred to difficulties with the evidence and figures, and referred to the fact that the applicant company's 2008 accounts recorded significant expenditure on mussel seed, for which different and contrasting explanations were given in the High Court. The minority therefore conceded that, had liability been established, it would have been impossible for the Supreme Court to assess the damages properly attributable to the applicant company.

119. There was further disagreement between the parties over whether it would have been feasible for the applicant company to fish mussel seed at some other location, as its authorisation would have allowed it to do. The respondent State pointed to authorisations received by other Castlemaine operators to fish seed outside the harbour. It appears that this particular point was not raised before the domestic courts, which did not consider it in their reasoning.

120. In light of the above, while the impugned interference had an appreciable adverse impact on the applicant company's business, the Court is not in a position to find, as an established fact, that the applicant company's loss of profits in 2010 was the inevitable and immitigable consequence of the temporary closure of the harbour in 2008.

121. It must also be recalled that the applicant company's activities were not completely interrupted in 2008. The transplanting and harvesting of

mussels within the harbour were permitted to continue, with the result that the applicant company's profits in 2008 were not affected.

122. The Court further observes that while it appears that the State did not bring the situation at Castlemaine harbour fully into compliance with the Directive until at least 2011, when the appropriate assessment for the site was completed, it succeeded, following sustained negotiations, in obtaining the agreement of the Commission to allow mussel seed fishing to resume at a much earlier stage, namely from 5 October 2008. While this did not avoid the delayed loss in relation to 2008, the following year the applicant company was able to resume its usual activities, and, as shown in the accounts submitted as part of its claim for just satisfaction, to earn a normal level of profit in 2011. As already noted, the difficulties with mussel seed fishing that it encountered in 2010 had another cause, namely the failure to acquire the necessary permit on time (see paragraphs 21 and 49 above). They do not form part of the present complaint.

123. The burden borne by the applicant company must be weighed against the general interest of the community.

124. The Court has already accepted that the aims pursued by the impugned interference were legitimate (see paragraph 109 above). As it has often stated in its case-law, environmental protection policies, where the community's general interest is pre-eminent, confer on the State a margin of appreciation that is greater than when exclusively civil rights are at stake (see *Depalle*, cited above, §§ 83-84, with further references). In implementing such policies, the State may, in particular, have to intervene in the sphere of public property and even, in certain circumstances, foresee a lack of compensation in a number of situations falling within the control of the use of property (*Antunes Rodrigues v. Portugal*, no. 18070/08, § 32, 26 April 2011). As the Court has held, where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation of Article 1 of Protocol No. 1 (*Depalle*, cited above, § 91).

125. The applicant company blamed the domestic authorities for not having correctly apprehended their obligations under Article 6(3) of the Habitats Directive. In the Court's view, however, the fact that the respondent State was found not to have fulfilled its obligations under EU law should not be taken, for the purposes of Article 1 of Protocol No. 1, as diminishing the importance of the aims of the impugned interference, or as lessening the weight to be attributed to them. The Court refers in this respect to the remarks made in the two majority judgments of the Supreme Court underlining that the Minister had an overarching legal duty to comply with EU law, and that the Minister's duty of care was owed to the wider community to protect the environment (see paragraphs 45 and 48 above). Furthermore, while the introduction of infringement actions against several

EU Member States by the European Commission in its capacity as guardian of the EU Treaties might have been a sign that the finding of some form of infringement might have been expected in relation to the respondent State, the fact remains that the burden of proof lay with the Commission, that in several respects the infringement alleged was highly contested, with two other Member States intervening in support of the respondent State, and that as regards certain allegations the Commission did not succeed. Until the CJEU handed down its judgment it is difficult to see how the respondent State could have known of the extent and consequences of the infringement thereby established. It also emerges from the infringement judgment that as from the pre-contentious phase of the proceedings the respondent State had sought to embark upon an SPA classification and reclassification programme (see case C-418/04, paragraphs 71 and 76).

126. Although the applicant company maintained that it should have been possible to secure permission to open the harbour in August 2008, the Court points out that in September 2008 both the Commission and the NPWS still considered that additional studies and clarifications were needed (see paragraph 26 above). It can therefore be inferred that, contrary to the view of the applicant company, the studies and documents in existence at that point in time were not sufficient to allay concerns. The Court sees no basis to second-guess the technical assessment of these qualified authorities. Nor does it see how the possibility of making representations, which the applicant company complained had been denied to it, could have led to a more favourable or speedier outcome. As indicated by the Government, the domestic authorities, who were aware of the particular difficulties at Castlemaine harbour, prioritised that site, using it as a pilot to develop interim procedures that were accepted by the Commission and then applied more widely. Thus it was the only affected sea-based site that was permitted to open for mussel seed fishing in 2008. Due to the continuing efforts of the domestic authorities towards the end of 2008 and in 2009, and to the commitments given about further steps towards compliance, the Commission agreed to the opening of the harbour in that second year, which, as noted above, enabled the applicant company to operate at its normal level.

127. The applicant company also contended that the environmental assessments eventually carried out in compliance with the respondent State's EU obligations demonstrated that the type of blanket ban that was imposed in the summer of 2008 was not necessary. However, as the unanimous Supreme Court judgment on the absence of legitimate expectation found, the Minister was required, as a matter of EU law, to be concerned not with unproven risk but rather with proven absence of risk (see paragraph 42 above).

128. While the applicant company was thus critical of the compliance strategy pursued by the domestic authorities, it must also be recalled that the

repercussions of the CJEU judgment were not limited to the applicant company and to Castlemaine harbour. One of the Supreme Court judges in the majority on the question of operational negligence referred to approximately 150 Natura surveys that needed to be carried out in the period 2008-2010. Another mentioned 140 sites around the State where traditional activities of different kinds were being carried out in breach of EU law, including about forty sea-based sites. In June 2008, Castlemaine was one of twenty-four sites where mussel seed fishing was temporarily prohibited. The situation, affecting a State with a 7,100 km coastline (see case C-418/04, at paragraph 68) was thus national in dimension, and needed to be addressed at that level. Achieving compliance on this wide scale, and within an acceptable timeframe, with the respondent State's obligations under EU environmental law can certainly be regarded as a matter of general interest of the community, attracting a wide margin of appreciation for the domestic authorities.

129. Although the applicant company saw an anomaly, and even arbitrariness, in the fact that one type of activity (mussel seed fishing) was prohibited while another similar activity (the harvesting of mature mussels) was not, the Court considers that it was first and foremost for the domestic authorities, within their margin of appreciation, to decide the nature and extent of the measures required. It was clear from the CJEU judgment that the previous practice in the aquaculture sector was not, without the appropriate assessments which the CJEU had decided had to be prior assessments, in compliance with EU law. The Court would add that the fact that a partial restriction was applied to commercial activities in the harbour, as opposed to a total one, was to the benefit rather than the detriment of the applicant company.

(iii) Conclusion

130. The essential grievance in this case is that the loss of profit incurred by the applicant company in 2010 went uncompensated. As pointed out by the Supreme Court, the alleged tort the applicant complained of did not derive from a *Francovich* breach of EU law. Before this Court, however, it sought to establish via Article 1 of Protocol No. 1 State liability for damage allegedly caused by measures adopted to correctly, albeit belatedly, implement EU law. The Court has taken into consideration the fact that the applicant company was not required to cease all of its operations in 2008, and that in 2009 it was able to resume its usual level of business activity, thanks to the concessions that the authorities had obtained from the Commission by that stage. It has recognised the weight of the objectives pursued, and the strength of the general interest in the respondent State in achieving full and general compliance with its obligations under EU environmental law. It is not persuaded that the impugned interference in this case constituted an individual and excessive burden for the applicant

company, or that the respondent State failed in its efforts to find a fair balance between the general interest of the community and the protection of individual rights.

131. Consequently, there has not been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

132. The applicant complained that the domestic proceedings had not been completed within a reasonable time.

133. Article 6 § 1 of the Convention reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by a ... tribunal ..."

A. Admissibility

134. In their observations on the admissibility and the merits of this application, the Government concentrated on the question of the exhaustion of domestic remedies in relation to the complaint considered above. However, they also referred very briefly to the right in Irish constitutional law to a "fair and expeditious trial", but without further developing the point.

135. The applicant company did not address this point.

136. The Court recalls that, in relation to the time at which the domestic proceedings in this case took place and previously, it has consistently found the domestic legal system to lack an effective remedy for complaints of excessive length of proceedings (see the authorities referred to in *Healy v. Ireland* [Committee] no. 27291/16, § 69, 18 January 2018). Inasmuch as the Government's remark can be understood as referring to recent developments in domestic case-law, in particular the decision of the Supreme Court in *Nash v. D.P.P.* ([2016] IESC 60), the Court refers to its judgment in *Healy* (cited above, §§ 69-73). As recalled there, according to the Court's well-established case-law the effectiveness of a remedy is normally assessed with reference to the date on which the application was lodged. Where the change in domestic law comes about through case-law, the Court's approach has been, for reasons of fairness, to allow a certain time for applicants to familiarise themselves with the new jurisprudence, the exact period depending on the circumstances of each case, especially the publicity given to the decision in question.

137. The present application was introduced on 25 July 2016, that is to say almost three months before the Supreme Court's decision in the *Nash* case. The Court considers that, consistently with its approach in the *Healy* case, the subsequent development in domestic case-law should not be taken

into account in relation to this complaint. It follows that this part of the application cannot be rejected for non-exhaustion of domestic remedies.

138. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor it is inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

139. The applicant company argued that its case had not been decided within a reasonable time. It maintained that it acted diligently at all stages of the proceedings.

140. By contrast, it considered that the respondent State as defendant was responsible for two significant delays at the pre-trial stage. In 2009 it had taken almost six months, and a motion for judgment in default of defence, for the State to deliver its defence. There had also been considerable delay in complying with the discovery order granted on 18 October 2010. The deadline set by the High Court of eight weeks had not been respected by the State. While an affidavit of discovery had been sworn on 7 January 2011, a supplemental affidavit of discovery was sworn on 17 October 2012, almost one year and ten months after the date set by the High Court.

141. The applicant company noted that the High Court had taken six months to deliver its judgment. As for the appellate stage, it indicated that it had supported the State in seeking priority consideration of the case. It considered that the duration of this stage of the proceedings was excessive. The hearing in the Supreme Court took place almost two years after the High Court hearing and the Supreme Court's judgment came two years and nine months after that of the High Court.

(b) The Government

142. The Government denied that there had been a failure in this case to respect the right to trial within a reasonable time. They underlined the complexity of the case, both in terms of the legal issues involved and of its factual history. The duration of the proceedings could not be regarded as inordinate or unreasonable having regard to the wide nature of the claims raised. There had been no significant time periods where the State had failed to act in a timely manner. The application for priority consideration by the Supreme Court had been made by the State. Even if it might appear that some stages of the proceedings were lengthy, the Government considered that the applicant company had failed to explain delays that were within its control. They referred specifically to the fact that the applicant company's

final statement of claim was not delivered until August 2011. They also pointed out that although the applicant company had set the action down for trial and certified it ready for hearing at the beginning of September 2011, it did not actually request a trial date until the following May, a delay of eight months.

2. The Court's assessment

143. The Court notes that the overall period to be taken into consideration began on 12 February 2009, when the applicant company instituted proceedings before the High Court, and ended with the decision of the Supreme Court, given on 26 February 2016. The proceedings thus lasted for seven years.

(a) General principles

144. Firstly, the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case, which call for an overall assessment, and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute. Secondly, it is for the Contracting States to organise their judicial systems in such a way that their courts are able to guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII, and *Superwood Holdings Plc and Others v. Ireland*, no. 7812/04, § 34, 8 September 2011). Finally, procedural rights usually go hand in hand with procedural obligations, with the Court stressing that litigants are required to show diligence in complying with the procedural steps relating to their case (see *Zubac v. Croatia* [GC], no. 40160/12, § 93, 5 April 2018 and *Healy*, cited above, § 55, 18 January 2018.

(b) Application to the present case

(i) Complexity of the case

145. The Court considers that the case was factually complex, involving expert scientific evidence that was heard during the eight-day trial in the High Court. The case was legally complex as well, raising significant issues for domestic tort law, as shown by the divergent and extensively-reasoned decisions given by the Supreme Court. Moreover, it also involved relatively complex questions relating to compliance by an EU Member State with an infringement judgment of the CJEU, and with EU environmental law more generally.

(ii) Conduct of the applicant company

146. The Court recalls that the right under Article 6 to have one's case decided within a reasonable time implies a duty on the individual to carry out all relevant procedural steps in a diligent manner (see *Healy*, cited above, § 55). It observes that following the institution of proceedings in February 2009 the applicant company responded to the initial lack of response on the part of the State defendants by applying for a judgment in default of defence some months later, denoting a certain diligence on its part.

147. The applicant company then sought discovery from the State, initially on a voluntary basis in October 2009, followed by an application to the Master of the High Court in December 2009, with hearings in April and May 2010 that led to the Master's refusal of the application in July 2010. On appeal to the High Court, the applicant company was granted the order it sought on 18 October 2010. The Court considers that in this respect the applicant company cannot be reproached for any obvious lack of diligence in pursuing its case.

148. As pointed out by the Government, however, following the affidavit of discovery in January 2011, it took the applicant company more than seven months to file its amended statement of claim in August 2011. The applicant company did not provide any explanation for this.

149. The Government further pointed to the period of eight months that elapsed between the applicant company certifying, at the beginning of September 2011, that the case was ready for trial, and 9 May 2012, the date on which it actually requested a date for the hearing of the case. The applicant company denied that it had caused any delay at this stage, explaining that between October 2011 and March 2012 there had been several exchanges of correspondence between its solicitor and the Chief State Solicitor's Office about possible trial dates, the parties finally agreeing to request a date for the following October. However, given the information available to the Court, three e-mail exchanges sent over a five-month period cannot be regarded as a sufficient basis to conclude that the applicant company fulfilled its duty of diligence under Article 6.

150. As regards the trial of the case and the appeal, there is nothing in the case-file to suggest that the applicant company contributed to the duration of the proceedings.

(iii) Conduct of the authorities

151. The Court will first consider the conduct of the State as the defendant in the proceedings. It notes that the Government have not replied to the applicant company's criticism of the time taken by the State defendants to deliver their defence to the claim on 6 August 2009.

152. As for the discovery procedure, the Court notes that the deadline set by the High Court was not respected, with a delay of some weeks before the

affidavit of discovery was sworn on 7 January 2011. Concerning the supplemental affidavit of discovery sworn on 17 October 2012, the Court notes that this does not appear to have caused any delay, given that the trial of the action commenced in the High Court the following month.

153. As for the conduct of the judicial authorities, the Court notes that once the applicant company had requested, in May 2012, a date for the trial, the case was heard six months later, and judgment was given six months after that. While the applicant company appeared to imply that the period between the trial and the delivery of the judgment was over long, the Court observes that the High Court arranged a trial date, conducted a lengthy hearing on complex factual and legal issues, and gave its decision on the case in little more than a year, which cannot be regarded as excessive.

154. Turning to the appellate stage of the proceedings, the Court notes that while the State's appeal was registered on 16 July 2013, it was not certified as ready for hearing until a year later, on 21 July 2014, a lapse of time that neither party sought to explain. Thereafter, at the request of the State supported by the applicant company, the appeal was promptly granted priority by the Chief Justice. While the applicant company commented critically on the fact that the hearing before the Supreme Court came almost two years after the hearing at first instance, the Court observes that the Supreme Court heard the case within nine months of it being granted priority, and delivered its ruling, comprising four extensively reasoned judgments, ten months later.

(iv) What was at stake for the applicant company

155. The Court considers that while the subject-matter of the proceedings – the loss of profits in 2010 – was of importance for the applicant company, by the time the case was ready for hearing in the High Court this was a past event, and the applicant company had managed to return to its usual level of commercial activity. The proceedings therefore cannot be regarded as having a degree of urgency that called for special diligence on the part of the authorities (see, *a contrario*, proceedings concerning parental responsibility and contact rights – *Tsikakis v. Germany*, no. 1521/06, § 64, 10 February 2011).

(v) Conclusion

156. In light of the considerations set out above, the Court finds that, there is no sign of any substantial delay on the part of the judicial authorities. On the contrary, in view of the importance of the legal issues it raised, the case was granted priority consideration by the Supreme Court. Regarding the State defendant to the proceedings, the Court has identified a delay of some months at the initial stage of the litigation, and a relatively minor delay in relation to the discovery of documents. It has also identified periods, still at the pre-trial stage, during which the applicant company's

diligence may be doubted. Having regard as well to the undoubted legal and factual complexity of the case, the Court concludes that, while the overall duration of the proceedings in this case was lengthy, it cannot be regarded as excessive in light of all the circumstances of the case.

157. There has therefore been no violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1

158. The applicant company complained that it had no effective remedy available to it for its complaint relating to the restriction of its activities, in violation of Article 13 of the Convention which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

159. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII, and *Bazjaks v. Latvia*, no. 71572/01, § 127, 19 October 2010, with further references). The remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII). The term "effective" is also considered to mean that the remedy must be adequate and accessible (see *Asproftas v. Turkey*, no. 16079/90, § 120, 27 May 2010).

160. The Court notes that the applicant company not only could but did raise the substance of its complaint before the domestic courts in terms principally of breach of legitimate expectation and operational negligence. While its claims were ultimately rejected, the Court recalls that the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see *Sürmeli v. Germany* [GC], no. 75529/01, § 98, ECHR 2006-VII; also *Pine Valley Developments Ltd and Others*, cited above, § 66) and the mere fact that an applicant's claim fails is not in itself sufficient to render the remedy ineffective (*Amann v. Switzerland* [GC], no. 27798/95, § 89, ECHR 2000-II).

161. Furthermore, the loss of profits of which the applicant company complains stemmed from the temporary restrictions on mussel seed fishing resulting from a series of statutory instruments adopted by the competent Minister. The possibility of challenging the validity of those measures by way of judicial review was specifically mentioned in the Supreme Court. The applicant company did not refer to this possible remedy in its submissions to this Court, arguing in very simple terms that it had chosen a real cause of action and a real remedy to no avail. Furthermore, in its consideration of the exhaustion of domestic remedies (see paragraphs 79-84 above), the Court has already made reference to two other domestic remedies, one based on the constitutional right to earn a livelihood and the other on the possibility to institute proceedings for damages under the 2003 Act. While it has held that the applicant company was not required, in order to comply with Article 35 § 1, to make full use of these remedies in addition to its claim in negligence and its reliance on legitimate expectation, the Court is satisfied that these remedies were relevant to the complaint raised under Article 1 of Protocol No. 1, and were in principle available to the applicant company. However, at no stage has the applicant company explained why these remedies should not be considered as being effective for the purposes of Article 13, preferring instead to concentrate exclusively on the Supreme Court's decision to exclude operational negligence. Finally, the applicant company could and did claim that there had been a breach of legitimate expectation, a claim which failed because the requisite conditions were not fulfilled in the circumstances of this case.

162. It follows, on the basis of the information available to the Court, that this part of the application must be deemed manifestly ill‑founded and be rejected, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 1 of Protocol No. 1 and Article 6 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1;

3. *Holds* that there has been no violation of Article 6 of the Convention.

Done in English, and notified in writing on 7 June 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Angelika Nußberger
Deputy Registrar	President