

APPROVED JUDGMENT
NO REDACTION NEEDED



THE COURT OF APPEAL

Edwards J.

Collins J.

Power J.

Neutral Citation Number [2022] IECA 179

Record No: 2019/345

High Court Record No:2006/2687P

**PAUL BARLOW, WOODSTOWN BAY SHELLFISH LIMITED,
MICHAEL CROWLEY, RIVERBANK MUSSELS LIMITED, GERARD KELLY,
FRESCO SEAFOODS LIMITED, TARDRUM FISHERIES LIMITED,
ALEX McCARTHY and HALCOME MERCHANTS (IRELAND) LIMITED
TRADING AS ALEX McCARTHY SHELLFISH**

Appellants

AND

**THE MINISTER FOR COMMUNICATIONS, MARINE & NATURAL RESOURCES,
THE REGISTRAR GENERAL OF FISHING BOATS, IRELAND AND THE
ATTORNEY GENERAL**

Respondents

JUDGMENT of Mr Justice John Edwards delivered on the 21st of July 2022.

Introduction

1. This is an appeal against a judgment of the High Court dated the 22nd of March 2019 (delivered by Meenan J), and the Order arising therefrom on the 31st of May 2019 (and perfected on the 26th of June 2019), on foot of which the appellants' claims were dismissed.
2. For convenience, and to maintain consistency with the High Court judgment, I will hereinafter refer to the appellants as "the plaintiffs" and to the respondents as "the defendants". When referring to the first defendant specifically, I shall refer to him as "the Minister".
3. The plaintiffs' claims (in their final form – the Statement of Claim was amended on no less than three occasions) had included claims for declaratory relief of various sorts, various directive orders (in effect claims for mandatory injunctive relief) and damages for alleged loss and damage, arising from claims of negligence/negligent misstatement; breach of duty (including statutory duty, constitutional duty, and duties arising under European Union law); alleged improper exercise of, and/or failure to exercise, discretionary powers; unlawful delegation of authority, breach of legitimate expectation; breach of Articles 40.3.1^o , 40.3.2^o , and Article 43.2.1^o of the Constitution of Ireland; and breach of Article 1 of Protocol 1 of the European Convention on Human Rights, in and about the management by the defendants, their servants or agents, of mussel seed fishing within the exclusive fishery limits of the State.
4. Although the Notice of Appeal filed on behalf of the plaintiffs indicates an intention on their part to appeal against the entirety of the High Court's said judgment and Order, it was made clear at the oral hearing of this appeal that the primary case being pressed on this appeal by the plaintiffs is a claim for damages for loss and damage allegedly caused to them through alleged negligence in the management of stocks of bottom mussel seed, a finite natural resource, within the territorial waters of the State, by the defendants, their servants or agents.

5. While I do not consider that very much turns on it in the context of the issues arising on this appeal, it does bear commenting upon that in so far as the complaint is now said to relate to stocks of bottom mussel seed “within the territorial waters of the State”, we are in consequence talking about a claim relating to activity within a much smaller geographical area than was originally pleaded. The claims pleaded in the Statement of Claim were framed as relating to the management of mussel fishing “within the exclusive fisheries limits of the State”, thereby potentially involving a very much larger area because the exclusive fishery limits of the State can extend out to 200 nautical miles from the nearest point of the baseline (see s. 87 & s.88 of the Sea Fisheries and Maritime Jurisdiction Act 2006 (“the Act of 2006”), whereas the territorial waters of the State only extend out to a maximum of 12 nautical miles from the nearest point baseline (see s.83 of the Act of 2006).

6. It was represented at the appeal hearing that in so far as the plaintiffs were placing reliance on alleged breaches of, or interferences with, various of the plaintiffs’ constitutional rights, and on specific guarantees under the Constitution, they accept that the so-called *Blehein* principles apply (i.e., as set out in seven points by McKechnie J in the Supreme Court in the case of *Blehein v The Minister for Health and others* [2018] IESC 40). Amongst the *Blehein* principles are the proposition that if the facts and circumstances of the case fall within a recognised category of action at common law, then the issues pleaded, always to be considered against the backdrop of constitutional violation, must be determined within those parameters. It is only in the rare and exceptional case of a remedy not being available within a recognised category of action at common law that a court, applying the principle of *ubi jus ibi remedium*, may be called upon to create and define a separate remedy.

7. Counsel for the plaintiffs maintains that his clients are entitled to recover damages for their loss and damage on the basis of well-recognised principles of the law of tort, and specifically the tort of negligence. That is their primary case. In that context, what is at issue

are decisions made by the Minister (and/or a body known as the Seed Mussel Advisory Committee, i.e., “SMAC”, and its successor) concerning the allocation of seed mussel, a limited resource, and the management of seed mussel stocks. The essential question for determination in these proceedings is therefore whether, in exercising those functions, the Minister and/or the SMAC owed a private law duty of care to the plaintiffs.

8. However, cognisant of, or anticipating, issues which might be hotly contested, particularly as to whether a duty of care existed by virtue of (a) the foreseeability of damage to the plaintiffs as a consequence of the defendants’ actions or omissions, (b) to the extent relevant, the general statutory framework within which ground mussel fishing, and the vessels used for such fishing, falls to be regulated in Ireland, (c) the relationship of proximity between the parties; and (d) the absence of any factors that would make it fair and reasonable to relieve the defendants from any duty of care, the plaintiffs maintain the fall-back position that if they cannot recover in negligence (or within some other recognised category of action at common law which they have pleaded) this court must vindicate their constitutional rights by fashioning a bespoke remedy, in effect declaring a constitutional tort on foot of which they can recover damages for infringement of their constitutional rights.

9. It was accepted at the appeal hearing that the plaintiffs were no longer advancing any claim based on breach of statutory duty or negligent misstatement; and further were not pressing a claim of legitimate expectation.

10. In their written submissions, the plaintiffs also contested the High Court’s finding that there was no unlawful delegation of authority to the SMAC as had been claimed in the court below, and/or that a remedy for this complaint would lie in judicial review proceedings. This aspect of the appeal was not addressed at all by counsel for the plaintiffs at the oral hearing. Moreover, during his oral submissions counsel for the defendants stated with respect to this aspect of the matter that *“I don’t understand Mr Cush to be making any issue in relation to*

that”; and there was neither objection to, nor demurral in respect of, that statement from counsel for the plaintiffs, either at that stage or when he came to address the court again in rejoinder. Accordingly, this aspect of the claim will be treated as having been in effect abandoned. It also requires to be emphasised that while the plaintiffs’ claims, as pleaded, were based in part on the Minister and/or SMAC permitting Northern Ireland registered vessels to fish for mussel seed in, and remove mussel seed from, Irish territorial waters “**without provision by law contrary to Article 10 of the Constitution**” (my emphasis), any reliance by plaintiffs on the constitutional invalidity of what was done was also effectively abandoned at the appeal hearing. That being so, ultimately, the only potential relevance of the Northern Ireland registered vessels to the plaintiffs’ claims, and the only reliance placed on them, was the fact of their presence in Irish territorial waters, whether lawfully there or not, as a competing source of demand for mussel seed, and in that regard the plaintiffs contended (*inter alia*) in the context of their mismanagement claims that there was a failure to take account of them in managing the resource, i.e., in terms of managing the supply of, and demand for, mussel seed.

Background to the action

11. The individual plaintiffs and their associated companies were involved in fishing, harvesting and the sale of ground mussels. Ground mussel fishing involves a dredging type operation whereby quantities of mussel seed are retrieved from the sea by vessels specifically designed for that purpose, and transported to aquaculture sites where they are re-laid. The re-laid mussel seed matures into fully grown mussels which are then harvested and sold for commercial gain. For those who may be interested, a somewhat more detailed description of the nature of the mussel and the features that allow it to seed and then attach itself to mussel beds capable of being exploited commercially, is to be found in paragraph 5 and in (part of)

paragraph 6 of the judgment of O'Donnell J in the (related) Supreme Court case of *Barlow v Minister for Agriculture, Food and the Marine* [2016] IESC 62, [2017] 2 I.R. 440 (otherwise known as the “*Barlow II*” case, to distinguish it from the present litigation in circumstances where the plaintiffs in both cases are the same.)

12. There was uncontroversial evidence at first instance that for many years the mussel industry was undeveloped, with those involved using methods and vessels that had not changed for generations. This was to change from the late 1990s when the economic potential of mussel harvesting became apparent.

13. For contextual purposes it requires to be noted that there was uncontroversial evidence that as part of the National Development Plan 2000 – 2006 (“the NDP”) development of the aquaculture industry was marked out as being of significant importance, with a specific “*Aquaculture Measure*” set out therein. Under the Aquaculture Measure grant aid was provided to support the development and enlargement of the aquaculture industry.

14. Further, intermeshed with that was the possibility for participants in the aquaculture industry to seek to avail of the benefit of financial support provided for in European Union legislative instruments. Chief amongst these was *Council Regulation (EC) No 1263/1999 of 21 June 1999 on the Financial Instrument for Fisheries Guidance* (otherwise known as “the FIFG Regulation”), which set out the policy priorities and the terms of assistance available for the fisheries and aquaculture sector for the period 2000 to 2006.

15. The FIFG Regulation was firmly linked both to EU structural policy (established by *Council Regulation (EC) No 1260/1999 laying down general provisions on the Structural Funds*), and to the EU’s common fisheries policy (provided for in *Council Regulation (EEC) No 3760/92*).

16. The High Court heard evidence that against that background, and in the context of the domestic policy and the EU legislative measures outlined, the Minister for Communications,

Marine and Natural Resources and first named respondent (“the Minister”) called upon potentially qualifying persons in the Irish bottom seed mussel fishing industry to apply for financial aid, to be provided by a combination of the Financial Instrument for Fisheries Guidance financial assistance (otherwise known as “FIFG assistance”) and the NDP 2000 - 2006 Aquaculture Measure grant aid, for the purchase or construction of more modern seed mussel dredging vessels.

17. In answer to a question posed to him by a member of the Court counsel for the plaintiffs explained that most of the available financial aid for boat purchase or construction was of EU origin, and that a boat owner, such as one of the plaintiffs, seeking to avail of such financial assistance/grant aid as was available at the time, could expect to receive 5% from the State funds, 40% from EU funds, and to have to finance the balance from their own resources.

18. The plaintiffs were amongst the potentially qualifying persons to whom the Minister’s call was addressed, and they made relevant applications for financial assistance/grant aid with a view to modernising their respective fleets. Their individual circumstances are rehearsed in paragraphs 9 to 20 inclusive of the High Court’s judgment, which should be read in conjunction with this judgment, and it is unnecessary to repeat them.

19. The means by which FIFG assistance could be availed of is described in a European Commission document entitled “*Financial Instrument for Fisheries Guidance*”, 2003 updated edition” - https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/ifop03_en.pdf. This guidance, of which we take judicial notice, indicates that applications for FIFG assistance would be administered in Ireland through the agency of the Department of Communications, Marine and Natural Resources (“DCMNR”) and the Irish Sea Fisheries Board/Bord Iascaigh Mhara, Marine Services Division (“BIM”). The guidance document stated that:

“These bodies will be able to state whether:

- a project falls within the scope of the FIFG;*
- a project is consistent with the priorities laid down jointly by the Commission and the UK/Irish authorities for 2000–06; and*
- inform the project leader about the procedure for submitting an aid application.”*

20. To qualify for FIFG assistance an applicant would have to demonstrate (*inter alia*) in his/her/it’s application that the project for which assistance was being sought was economically viable.

21. Another important contextual detail to be appreciated as part of the background to this case is that while an EU mandated general moratorium had been introduced around 1999 on capacity being added to the Irish fishing fleet, the relevant Irish authorities, being the Minister, his servants or agents (including BIM), were sympathetic to the idea that a limited exception to that moratorium should be allowed in the case of mussel seed dredging vessels in circumstances where the existing number of boat-owners was small and it was the State’s express policy to promote development of the aquaculture industry in the context of the FIFG Regulation and the NDP 2000 – 2006. However, approval for the proposed limited exception was required from the relevant EU authorities.

22. The High Court heard evidence that, to that end, there was lobbying of the relevant EU authorities at the highest level by the Minister , his servants or agents (including BIM), on behalf of the plaintiffs. While at the hearing of the appeal there was concentration on the evidence concerning representations made on behalf of Mr Barlow, and his company Woodstown Bay Shellfish Ltd, we were given to understand that the evidence before the High Court was that there had been similar lobbying on behalf of the other plaintiffs. The said lobbying for a limited exception to the moratorium was ultimately successful. A small number of exceptions were allowed, and the evidence was that the plaintiffs received four of

seven licenses granted exceptionally to mussel seed dredging vessels notwithstanding the general moratorium.

23. The evidence before the High Court was that the plaintiffs were actively encouraged to upgrade their seed mussel dredging vessels by the first named defendant, his servants or agents (including BIM), and received support and assistance from them in making their applications for FIFG financial assistance / NDP 2000-2006 Aquaculture measure grant aid. Crucially, say the plaintiffs, their applications contained production figures, based on mussel seed allocation requirements, necessary to provide the requisite guarantee of economic viability. These plans were approved by the Minister, by DCMNR and by BIM.

24. Although the evidence of the specifics of the engagement between the parties (e.g., in the case of Mr Barlow, his numerous meetings with, and correspondence with, the Minister personally, and with senior officials in the DCMNR and in BIM, concerning his application for financial assistance/grant aid; and their correspondence *inter se* and with EU officials arguing the case, *inter alia*, for a limited exception to the moratorium, and in respect of certain licensing issues) is not set out in any detail in the High Court's judgment, it does not appear to be controversial that the plaintiffs did receive considerable encouragement and support. However, in that regard the judgment of the High Court simply notes at paragraph 9 that, "[t]he plaintiffs were encouraged in their efforts by the defendant State agencies, in particular Bord Iascaigh Mhara (BIM)".

25. In circumstances where they were so encouraged and assisted, and were ultimately successful in their applications for FIFG assistance/NDP grant aid, the plaintiffs invested heavily in their businesses by building and seeking to operate new and more modern seed mussel dredging vessels. They did so in circumstances where, notwithstanding any financial assistance/grant aid received, they were required to fund a substantial proportion of the

required investment themselves, including through borrowings which in some instances were secured on family homes.

*General statutory framework within which ground mussel fishing,
and the vessels used for such fishing, is regulated.*

26. To fully appreciate the background to the disputes between the parties with which we are concerned on this appeal regard should be had to the general statutory framework within which ground mussel fishing, and the vessels used for such fishing, is partially regulated in Ireland. This is set out at paragraph 23 of the High Court's judgment, to which reference should be made. It is sufficient to state that while the relevant State authorities are conferred with certain statutory powers relevant to the management, conservation and rational exploitation of the ground mussel seed resource on behalf of the people of Ireland, there is no specific statutory scheme that seeks to comprehensively regulate how the State should manage the ground mussel seed resource. Rather, policy decisions concerning such management, and operational decisions for the day to day implementation of those policy decisions, are taken against the background of existence of a number of statutory powers which can be, and have been, called in aid by the Minister. I would observe that while these powers may not serve to comprehensively regulate the sector, they do constitute a regulatory structure in my view and they are reasonably far reaching in their scope. They include the power to licence sea fishing boats to operate within certain areas (see s.10 and s.13 of the Sea Fisheries and Maritime Jurisdiction Act 2006); the power to authorise the utilisation of such a sea fishing boat's fishing effort for the capture and retention on board of specified fish stocks including ground mussel seed; the licensing of specified vessels and a person on board such vessels to engage in dredging for, fishing for or taking molluscan shellfish, including ground mussel seed, in certain areas within the exclusive fishery limits of the State; the allocation in

the context of such licensing of permitted tonnages of ground mussel seed to be harvested; the imposition of specified obligations on the master of a vessel authorised to fish for mussel seed (see the Mussel Seed (Fishing) Regulations 2006, S.I. 311/2006); and the licencing and regulation of transhipment of molluscan shellfish within the exclusive fishery limits of the State. This does not purport to be an exhaustive list.

27. What is clear, however, is that the conservation of fish stocks and the rational exploitation of sea fisheries, including ground mussels and ground mussel fisheries, are doubly regulated in that there are separate licencing schemes both in respect of where sea fishing vessels may operate, and in respect of how, and by whom, and in what manner a sea fishing vessel's fishing efforts may be deployed. In that regard it may be useful in the context of issues raised in this appeal to refer in somewhat more detail to the regulatory measures that have been adopted for the conservation and rational exploitation of molluscan shellfish generally, and ground mussels in particular.

*Regulatory measures for the conservation and rational exploitation
of molluscan shellfish, and ground mussels in particular.*

28. A statutory power to prescribe measures for the conservation of fish stocks and the rational exploitation of fisheries was created by s.223A of the Fisheries Consolidation Act 1959 ("the Act of 1959") as inserted by s.9 of the Fisheries (Amendment) Act 1978 and then as substituted by s.4 of the Fisheries Amendment Act 1983. In exercise of his powers under s.223A of the Act of 1959 as substituted, and with particular reference to the conservation and rational exploitation of molluscan shellfish (including ground mussels), the Minister promulgated the Molluscan Shellfish (Conservation of Stocks) Order 1987, S.I. 188 of 1987, (regulations 4 and 6 of which are quoted by the High Court judge in his judgment); and later

the Mussel Seed (Conservation and Rational Exploitation) Order 2003, S.I. 241/2003 (sub articles 5(1),5(2) and 5(8) of which are quoted by the High Court judge).

29. The first of these statutory instruments, i.e., S.I. 118/1987, prohibits dredging for, fishing for or taking of molluscan shellfish within the exclusive fishery limits of the State, or having molluscan shellfish on board a vessel, save in accordance with a licence under that Order. Regulation 10 provides that the Minister may, upon the application of any person and upon being furnished by the person with any information which the Minister may reasonably require in relation to the application, grant to the person a licence authorising –

(a) the dredging for, fishing for or taking molluscan shellfish within the exclusive limits of the State,

(b) the relaying of molluscan shellfish from one part of the exclusive fishery limits of the State to another, either directly or overland, by any means.

30. The second mentioned statutory instrument, i.e., S.I. 241/2003, applies specifically to mussel seed collected or gathered by fishing from a specified vessel. Article 5 provides that the Minister may issue a mussel seed licence (to the owner, charter or hirer of a specified vessel, or to a person who intends to deploy a specified vessel) authorising, during such period as may be specified in the licence, any or all of the following activities:

(a) the fishing for mussel seed from a specified vessel in the specified area or such part thereof as may be identified in the licence, and

(b) the landing or transshipment of mussel seed taken in the specified area or such part thereof as may be identified in the licence.

31. The “specified area” referred to in S.I. 241/2003 is defined as the exclusive fishery limits of the State, while a “specified vessel” means an Irish sea-fishing boat or boat of any other class of description as may be approved by the Minister.

32. Article 5(8) of S.I. 241/2003 provides that in considering an application for such a licence the Minister shall have regard to such matters as:

“appear likely to him or her to assist in the rational exploitation of mussel seed in the specified area or any part of that area, including-

- (a) the experience of the applicant in relation to mussel seed fishing,
- (b) the proportion of permitted tonnages licensed to the applicant previously which was harvested,
- (c) the distance from the harvesting zone to the area where the mussel seed are to be relayed;
- (d) the economic benefits likely to follow from the grant of a licence to the applicant,
- (e) the extent to which the applicant has complied with conditions attached to a licence previously issued to that applicant.”

33. The Minister may also, under Article 5(6) require an applicant for such a licence “to furnish such further information or documentation as the Minister may require”.

34. Importantly, the instrument further provides, in Article 5(9), that such a licence will not operate to authorise any fishing for mussel seed in any part of the area to which it relates during any period prohibited by the Minister, and, in Article 5(10), that the Minister may, from time to time:

“restrict both the quantity and the species of mussel seed -

- (a) that may be taken on board a particular licensed vessel in the specified area or part thereof, or
- (b) in respect of mussel seed so taken, that may be landed or transhipped from or retained on board the vessel,

during such period as the Minister considers appropriate having regard to the need to conserve stocks of mussel seed in the specified area or part of the specified area.”

35. Further, Article 5(11) of S.I. 241/2003 goes on to provide that:

“Notification of any restriction made under paragraph (10) shall be made in writing to the holder of the licence or the master of the licensed vessel concerned and may be made by a sea fisheries protection officer and such restriction, upon notification, shall be deemed to be a condition of the licence and the licence holder or the master of the licensed vessel concerned shall comply with or ensure compliance with such condition.”

Accordingly, as I understand it, references in the evidence to “mussel seed allocations” refer to conditions attaching to mussel seed licences issued under Article 5 of S.I. 241/2003 restricting the quantity and species of mussel seed that may be taken on board, landed by or transhipped from, a particular licensed vessel by the licensee (who, as previously stated, may be the owner, charterer or hirer of a specified vessel, or a person who intends to deploy a specified vessel) in the specified area or part thereof during such period as the Minister has considered appropriate having regard to the need to conserve stocks of mussel seed in the specified area or part of the specified area.

The Voisinage Agreement and the Barlow II litigation

36. A further part of the background which requires to be appreciated in the context of the claims made in this case is the existence of a so-called *voisinage* arrangement between Ireland and the United Kingdom dating back to at least 1965, and litigation arising out of that, i.e., the *Barlow II* case previously alluded to. The *voisinage* arrangement is considered in detail in the judgment of O’Donnell J. in the *Barlow II* case, and it will suffice for present purposes to describe it in broad brush stroke terms.

37. A *voisinage* arrangement is an arrangement between neighbouring states under which the fishermen (there being no satisfactory non-gendered alternative word) of the states concerned are allowed to fish in each other's waters, with such arrangements often reflecting long standing fishing practices pre-dating the setting of national boundaries and limits, and recognising the mobility of fish stocks across political or administrative borders created by humans but which don't exist in the natural world. (As it happens, although nothing turns on it, the latter observation represents a generalisation which is not particularly apposite in the case of seed mussels which, as O'Donnell J points out at paragraph 5 of his judgment in the *Barlow II* case, do not travel far, indeed rarely more than 100 metres from their point of origin.)

38. An exchange of correspondence between civil servants in Dublin and Belfast dating from 1965 was accepted by the Supreme Court in the *Barlow II* case as representing a *voisinage* arrangement between Ireland and the United Kingdom on the basis of reciprocity in relation to sea fishing generally rather than in respect of fishing at sea for any specific species. The status of such an agreement in international law was accepted as being no more than a "gentleman's agreement". The issue in *Barlow II*, however, was its effect and status in domestic Irish law, as purporting to provide authorisation for fishing, and specifically in the instant case for bottom seed mussel dredging, by foreign sea fishing vessels in Irish territorial waters.

39. What had occurred, giving rise to the litigation, was that in or about 2002 – 2003, the Minister had determined that the mussel seed resource would be accessed on an all- island or "joint management" basis and that Northern Ireland registered operators ("NIRO") - being vessels registered in Northern Ireland or owned by Northern Ireland companies and operators of aquaculture sites in Northern Ireland - would be permitted to access Irish waters to fish for mussel seed. Joint management was to be conducted pursuant to the aforementioned

voisinage arrangement which provided for cross-border cooperation in the area of sea fishing in general. It was to be administered through a body set up for that purpose, i.e., the SMAC, comprised of representatives of the DCMNR, the Northern Ireland Department of Agriculture and Rural Development (“DARDNI”), BIM and some others, with the SMAC making recommendations to the Minister for mussel seed tonnage allocations.

40. This was a development greeted with alarm by the plaintiffs, who were concerned about its impact on their activities in circumstances where Northern Ireland vessels were generally more modern and efficient than those in the domestic bottom seed mussel dredging fleet, their fishing practices were more aggressive, invasive and impactful on stocks than those practiced by the operators in the domestic Irish fleet, and where traditional Northern Ireland mussel fisheries had been closed for some time because of an infestation by a predator limpet (*Crepidula sp*) thereby effectively forcing Northern Ireland vessels to fish further afield and particularly to seek to do so in the territorial waters of this State. As O’Donnell J. further explains in paragraph 6 of his judgment in *Barlow II* there was also concern expressed that the permitted fishing by Northern Ireland vessels was in some cases being used as a flag of convenience for access by large foreign businesses to mussel fisheries from which they could, and should, otherwise be lawfully excluded.

41. Against this background, the plaintiffs brought a challenge to the lawfulness of the practice whereby vessels registered in Northern Ireland, with the knowledge and approval of the State, were allowed to fish for mussel seed in Irish territorial waters. The plaintiffs successfully argued, *inter alia*, that mussel seed was a natural resource that belonged to the State and that, in accordance with Article 10 of the Constitution, it was necessary that the granting of permission to foreign registered fishing vessels to fish for mussel seed in Irish waters be provided for by law. In that regard, Article 10.3 of Constitution states:

“Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property.”

42. The plaintiffs argued that even if the exchange of correspondence referred to above constituted a *voisinage* arrangement between the State and Northern Ireland, it did not satisfy the requirements of Article 10. . The Supreme Court agreed, holding (*inter alia*) that while there was a *voisinage* arrangement in place that contemplated fishing in Irish waters by Northern Ireland vessels, that arrangement did not constitute provision made by law on any view of it. The *voisinage* arrangement had neither been considered nor approved by the Oireachtas and in any case was so uncertain that it was incapable of fulfilling the minimum requirement of any legislation proffered as complying with Article 10.3, that it must make the manner in which a natural resource was to be regulated known to, or at least capable of being known to, the members of the Oireachtas making the law and the persons affected by the legislation. The Supreme Court was prepared in the circumstances of the case to grant a declaration that the fishing by Northern Ireland vessels for mussel seed within the territorial waters of the State pursuant to the joint management arrangement then obtaining, and the subject of the plaintiffs’ complaints, was not permitted by law. However, it went on to hold that if the constitutional procedure was correctly followed, there was no reason why Northern Ireland vessels might not be permitted to fish for mussel seed in specified portions of the exclusive areas of the State's territorial waters.

43. Subsequent to the *Barlow II* case the State duly made proper legislative provision for Northern Ireland vessels to fish for mussel seed in Irish waters – see Sea Fisheries (Amendment) Act, 2019.

Circumstances giving rise to the present litigation.

44. In order for the new vessels purchased or constructed for the plaintiffs to be viable, the plaintiffs needed, following entry of those vessels into service, to be able to harvest and re-lay certain minimum quantities of mussel seed during each subsequent fishing season. The plaintiffs maintain that there had been significant focus on the viability issue in the course of their applications for FIG assistance/ NDP grant aid, as the need to satisfy the relevant authorities as to potential viability was an essential precondition to qualification for such financial assistance/grant aid. Moreover, in circumstances where it was known that the plaintiffs would themselves be assuming onerous private financial burdens and taking on significant borrowings, notwithstanding any financial assistance/grant aid that they might obtain, the plaintiffs contend that the defendants could not have failed to appreciate the importance of viability to them also.

45. The plaintiffs maintain that the applications that were submitted for FIG assistance/NDP grant aid to, or via, the defendants, and with the encouragement of the defendants, were predicated upon their reasonable belief, having regard to historical yields of bottom mussel seed fished in Irish waters up to that point, which belief was known to the defendants, and in respect of which there was neither demurral nor attempt at contradiction by the defendants, that the tonnages of seed mussels specified therein as being necessary for viability, and in respect of which appropriate allocations of quota would be sought, were at least in theory capable of being achieved.

46. The plaintiffs contend that the defendants were responsible for the proper management of mussel seed resources in Irish waters, and were required to engage in informed decision making with respect to mussel harvesting. The High Court judge accepted as being uncontroversial that:

“...mussel seed is a finite resource and so requires good management. This is probably best encapsulated by what is described as the “precautionary principle”, a

principle which recognises that the amount of mussel seed is limited and is subject to a number of factors both man-made and natural. Amongst the natural factors are the weather and the presence of starfish who appear to have a voracious appetite for consuming mussel seed. Indeed, the Court heard evidence that the mussel industry in Holland, which is considered to be the world leader, was almost destroyed not by human activity but rather by ducks. An application of the “precautionary principle” could have resulted in access to mussel seed areas being limited for specified time periods or, in some cases, being completely denied for significant lengths of time.”

47. The plaintiffs claim that had the defendants, their servants or agents, been doing their job properly, including utilising mussel seed survey strategies to obtain scientific data to inform their decision making about mussel seed harvesting, they would have been uniquely placed to know how much seed mussel would potentially be available for sustainable harvesting.

48. Moreover, it is said, it must have been foreseeable to the defendants that if the seed mussel resource was not properly managed, such that the plaintiffs’ expectations, as encouraged by the defendants, their servants or agents, both in terms of potential allocations of quota, and of tonnages of seed mussel available to be harvested, could never in fact realistically be achieved, the plaintiffs would likely suffer loss and damage.

49. It is said that in those circumstances and having regard to the proximity of the relationship between the plaintiffs and the defendants (in particular, the first named defendant, his servants or agents (including BIM)), the plaintiffs were owed a duty of care by the defendants in respect of the proper management of the bottom seed mussel resource.

50. Despite being equipped with new and more modern vessels, the quantity of bottom seed mussels harvested fell dramatically between 2003 and the date of the commencement of the plaintiff’s proceedings in 2006. The plaintiffs attribute this fall off in seed mussel

harvesting to negligent mismanagement of the resource by the defendants. In particular they complain, firstly that the Northern Ireland fleet was allowed significant access to aggressively harvest the State's mussel fishery without any consideration for the extent and sustainability of the resource; and secondly, that in any case SMAC allocated seed mussel tonnage quotas in the absence of any evidence as to whether this tonnage was available or not, and that despite a lack of good survey data they simply rolled over quota allocations from year to year.

51. In summary, the plaintiff's claim is that due to negligence by the defendants, their servants or agents, in and about the management of stocks of bottom mussel seed, there was insufficient mussel seed available to be harvested by them in terms of their projected needs for the viable operation of their new vessels, and that as a consequence they have suffered loss and damage.

52. Before considering the legal issues arising in the context of such a claim, it is necessary to consider what evidence was offered in support of the claim of alleged mismanagement, and the findings of fact in that regard by the High Court.

Mussel Seed Resource Management – Expert Evidence

53. Both sides adduced expert testimony on this issue, and the evidence of the experts is summarised between paragraphs 34 to 43 inclusive of the High Court's judgment. Again, the reader is referred to the High Court's judgment for the necessary detail. The principal expert for the plaintiffs was Dr Julie Maguire, while the principal expert for the defendants was Dr Terence O'Carroll. The expertise of both Dr Maguire and Dr O'Carroll to comment on mussel seed resource management was uncontroversial and not in dispute.

54. Dr Maguire's testimony was based on a report prepared by her for the plaintiffs in 2012 and entitled "*Management of the Mussel Seed Bed Resource in the Irish Sea*" (the

“2012 Maguire Report”), and a follow up report with the same title (essentially an updating of the 2012 report) prepared by her in 2018 in advance of the High Court hearing (“the 2018 Maguire Report”). In her said reports, Dr Maguire reported on the status of the mussel seed bed resource in the Irish Sea which, by the date of her second report, she identified as having declined to such an extent as to be on the brink of collapse. Dr Maguire identified increased access to the fishery as being a problem for sustainable fishing. She opined that the damage to the fishery due to the increased number of boats from the UK entering the fishery since the early 00’s had resulted in the aforementioned decline. She identified a change in the fishing strategy from fishing half grown mussels late in the year to small seed mussel early in the year as a major contributing factor. She further identified the system of assessing the sustainable total allowable catch and the system of allocating quotas as being fundamentally flawed and as leading to overfishing.

55. Dr O’Carroll, who testified for the defendants, did not produce an independent report of his own, but he participated in a meeting with Dr Maguire on the 26th of June 2012 in which they discussed the 2012 Maguire report in detail, following which the two experts issued a joint report. The testimony of the experts reflected what was contained in the joint report, both in terms of where there was agreement and disagreement.

56. In his judgment the High Court judge, having summarised the testimony of Dr Maguire, stated (at para 37) with respect to the testimony of Dr O’Carroll that:

“Though he [Dr O’Carroll] agreed with Dr Maguire on a number of points there were areas of disagreement. In particular, on the issue of over wintering, Dr. O’Carroll was of the view that there was considerably more evidence to suggest that over wintering occurs more frequently than that accepted by Dr. Maguire. Further, Dr. O’Carroll placed considerably more emphasis on mussel seed being a creation of nature and thus subject to many influences over which humans have no control.

Contrary to the views of Dr. Maguire, Dr. O'Carroll was not convinced that restricting fishing for mussel seed areas to specific periods of time would be beneficial".

57. Later, at paragraph 58 of his judgment, the trial judge added:

"In the instant case, there was a dispute between two qualified and experienced experts, Dr. Julie Maguire and Dr. Terence O'Carroll, as to the appropriate way for the first named defendant to manage the mussel seed resource. ... I would characterise the differences between the experts in the instant case as being an honest difference of opinion"

58. In his oral submission to this Court counsel for the plaintiffs has sought to characterise the joint report, and the testimonies based on same, as reflecting huge agreement between the experts on the issue of the failure to properly manage the mussel seed resource, suggesting that there was a "*clear consensus*" on this issue, and that "*while there may have been disagreements about some of the things that affect mussels and mussel seed ... there was no disagreement about there having been a failure to manage properly.*"

59. Counsel for the plaintiffs takes issue with the trial judge's treatment of the expert evidence, on the basis that the paragraph quoted tends to unfairly magnify the extent of the actual differences between the experts, conveying the impression that there were significant disagreements which, he maintains, was far from the case. Counsel submitted that, contrary to the impression conveyed in the judgment, there was huge agreement between the experts, and that to the extent that there was disagreement, it was minimal.

60. While counsel for the plaintiffs accepted that the normal rule, per *Hay v O'Grady* [1992] 1 I.R. 210 and related jurisprudence, was that an appellate court was bound by findings of fact made by the trial court, he submitted that the rule could not apply where those findings did not fairly reflect the evidence that was given. In circumstances where the

experts' testimony merely reflected the written reports supplied in advance, being those of Dr Maguire, and the joint report of Dr Maguire and Dr O'Carroll, both of which are available to this Court, it was said that this Court can judge for itself the true extent to which the experts were in fact in agreement, or otherwise.

The Maguire / O'Carroll joint report

61. In the course of his oral submissions before us counsel for the plaintiffs took us through the joint report in great detail. We think it may be helpful to highlight salient passages.

62. At the outset the joint report indicates that the experts were in agreement that section 2 of the 2012 Maguire report giving a historical overview of mussel seed in the Irish Sea was as accurate as could be, as the estimation of seed landings remains problematic, with seed landings data varying depending on the source. There was agreement that this reliability of data problem needed to be addressed.

63. Section 3 of the 2012 report had described the economic and social objectives of the bottom mussel sector and was uncontroversial and agreed in full, with just one minor agreed change. A key passage from subsection 3.1 of the report, incorporating the said minor change, read:

“... the annual yield of bottom-cultured mussels is highly variable due to fluctuations in seed supply e.g. in 1999, 9,644 tonnes (€4,115,000) of bottom cultured mussels were harvested, whereas one year later, more than double that amount (21,615 tonnes, worth €10,562,000) was harvested (BIM website). A survey of the bottom mussel industry for the whole island of Ireland estimated that the mussel seed demand for 2002 was almost 90,000 tonnes (the demand for Northern Ireland was one third of this amount) and it was hoped to source at least 68,000 tonnes from the Irish Sea. The

demand for seed in 2003 was even higher than this amount. However, 2001 yielded one of the highest ever landings of seed from the east coast and this was only 23,000 tonnes. It has been reported that the total request for 2006 seed allocation reached some 130,000 tonnes (32 County basis), with a projected/expected reality of about 25,000 – 30,000 tonnes. The question therefore remains how will SMAC allocate licenses (source: development of best practice in relation to movement of bivalve shellfish stock 2006.)

Similarly, production fell from 23,583 tonnes in 2006 to 18,270 tonnes in 2007 (22.5% decrease) as a direct result of a reduction in mussel seed relayed in the Republic of Ireland in 2005. By 2010 production further declined to 30,001 and 68 tonnes (www.bim.ie).”

64. In subsection 3.2 of Dr Maguires’s report it had also been reported, uncontroversially, that:

“the number of registered vessels fishing proceed had risen in the early ‘00s to 28 boats but declined in the Republic of Ireland in 2005 due to new requirements for vessels including the attainment of a certificate of compliance for each boat. However foreign vessels were not obliged to get this certificate (in compliance with EU regulations) even though they were granted access to fish in Irish national waters.

In 2005 the official seed uptake by these licensed vessels was 17,870 tonnes (including Cromane). In 2005, the demand for seed was five times greater than the actual amount of reported seed fished (see Table II). Also, the overall quantity of seed allocations granted by the authorities exceeded the actual supply.”

65. Part 4 of Dr Maguire's report had dealt with conservation and management of the resource. The joint report indicated that subsection 4.1, dealing with traditional management of a traditional fishery versus today, was agreed without reservation. In this subsection Dr Maguire had described how the traditional Republic of Ireland fleet had successfully sourced their mussel requirements from the Irish Sea throughout the 1980s and into the 90s, based on the "partly grown principle". This principle involved only lifting seed in the autumn that had fallen in the spring, or even perhaps seed that had fallen the previous spring or autumn. This age of seed gave the best growth and survival results when re-laid. It was apparent that there was merit in this practice of fishing larger seed and that it was clearly a good system. However, by 2002 this practice could no longer exist due to the expansion of mussel farms in Northern Ireland who fished for mussel seed in Irish waters. Competition for seed was fierce and inexperienced fishermen often took seed that was too small to survive and thrive. Over the previous four years, little or no mussel seed had over-wintered or even been allowed to grow from spring to summer. It was reported that growth and survival rates had been poor because seed was harvested when it was too small.

66. Dr Maguire's report had gone on to describe an All-Ireland, 32 County approach proposed in 2004 via SMAC, which resulted in a formal set of guidelines which sought to ensure "*the orderly exploitation and monitoring of the resource, available berthing and landing facilities*". Initially it was envisaged that only UK registered dredgers with a proven Northern Ireland economic link, and Irish registered vessels, might apply to be allowed to fish for seed mussels within the jurisdictions of Ireland and Northern Ireland. However, under the so called "joint management arrangements" implemented in 2005, a new fleet of United Kingdom registered mussel vessels were allowed to fish on the traditional mussel spat resources off the coastline of this State and this had had a negative financial impact on existing mussel production companies here. The report stated that, "*they are now unable to*

fish enough native seed mussels for relaying on their culture plots as this UK fleet is still allowed to fish in Irish waters to this day.”

67. Subsection 4.2 of Dr Maguire’s report had dealt with “Problems and Best Practice for Mussel Seed Allocation”. She had reported that one of the main difficulties faced by the SMAC in making recommendations for seed allocations was the shortfall in good real-time survey data. SMAC allocated seed tonnage in the absence of real evidence that this tonnage was available or not. Therefore, it was imperative, that overall mussel seed survey strategies were refined and improved. The report went on to outline a number of recommendations that had been made by Dr Maguire in earlier published work. The joint report expressed no disagreement with any of these recommendations, and simply offered the commentary:

“we agree that mussels about to spawn or those that had just spawned should not be harvested as this would result in a higher mortality. We also agree that a spawning assessment should be made. Also we agree that broodstock, come from multiple sources; inter-tidal and sub-tidal seed beds and culture plots. The more mature mussels there are, the likelihood is of an increased recruitment.

On the over wintering issue the Maguire court report had stated both sides of the argument. Some beds can overwinter and some beds do not. We agree that the location of stable seedbeds (those that survive for more than one winter) is confirmed and management plan for each of these beds is established, which might include information such as the minimum viable stock to remain on the seedbed following harvest.”

68. The joint report again expressed total agreement with subsection 4.3 of the 2012 Maguire report, which concerned the “Necessity of Research for Successful Management of Seed Resource”.

69. In subsection 4.4 of her report Dr Maguire considered the “Mussel Allocations of the Plaintiffs”, and set out what she believed to be the relevant figures for the years 2004, 2005 and 2006. She opined that it was difficult to understand the reasoning behind the allocations which had followed upon applications to SMAC. She went on to express views that:

“2003 was a most unusual year insofar as it was a bumper year for seed with 35,236T. However, since then seed has been significantly lower. In 2004 24,147T were fished and in 2005 14,861T were fished. Overall, the amount of seed available in recent times is not enough to sustain UK shellfish farms. The historical seed collection amounts (before the 2005 joint management arrangements) may just have been enough to sustain the Irish industry. The management of access to seed resource has to be reconsidered for the survival of the Irish mussel fishery.

In the years in question 2004 and 2005 I believe there would've been sufficient seed to meet the plaintiffs (sic) allocations if the resource was managed properly (see section 8 and 9). The resource is limited but the quantities could be maximized and increased if managed properly. Because it is managed on a joint basis there are now too many actors looking for seed which is unsustainable. In addition, rules governing allocation discriminated in favor of Northern Irish larger vessels and new operators (Browne et al. 2006) -see section 6. 2.

In conclusion, the resource would be insufficient for the plaintiffs to realize their business plans if SMAC had considered their plans when making their allocations.”

70. The joint report indicated that Dr O'Carroll agreed with Dr Maguire insofar as the figures stated were concerned, but not with her conclusions as expressed in the paragraphs just quoted.

71. Part 5 of the 2012 Maguire report described and dealt uncontroversially with the Voisinage Agreement, and the joint report simply records that it is, “*Agreed*”.

72. Part 6 of the 2012 Maguire report had dealt with the “Seed Mussel Allocation Committee (SMAC)”. Subsection 6.1 simply described the SMAC’s remit and was uncontroversial. Subsection 6.2 was entitled “Issues with Administration of SMAC Scheme” and again was largely uncontroversial, save in respect of how Dr Maguire had interpreted a DEFRA report by other experts, i.e., Browne *et al* (2006). Dr Maguire had referred to the report of Browne *et al* (2006) pointing out that the authors had described certain difficulties in the administration and enforcement of the SMAC scheme, and summarised the findings in that regard. She sought to emphasise one particular finding, which was that the new rules discriminated in favour of Northern Irish larger vessels and new operators, and had concluded this subsection with the following comment:

“Finally in the DEFRA report by Browne et al (2006) they described that the most regular descriptors of the Irish system from regulators and industry in Ireland were ‘chaos’ and ‘shambles’ and concluded that lessons would be learned for the British system on how not to do it.”

73. In the joint report the authors state, “*we agreed with most of the section apart from how we interpreted the DEFRA report. Therefore the direct quotes from the DEFRA report are as follows:*

“The “established” fishing sector in the South complained that the changing criteria discriminated in favour of northern larger vessels and new operators, and against “traditional” operators, a discrimination compounded by the implementation of more stringent regulations regarding seaworthiness of fishing vessels in the Republic, which forced several fishing boats to remain tied up.

Discussions with regulators and producers have all produced similar comments on the reality of the failed efforts to regulate the sector through SMAC, with the most regular descriptors being “chaos” and “shambles”. Nevertheless, or indeed perhaps because of this, lessons can be learned from the “Irish experience” in attempting to manage translocation of shellfish, specifically seed mussels for relaying and on-growing for commercial benefit.

An initial conclusion is that there is clearly a significant potential for confrontation at best and conflict at worst between different economic interests, most notably:

- *between established operators and new entrants*
- *between small-scale/artisanal and large-scale operators*
- *between local users (or potential users) and distant users*

Such conflicts would equally exist under a laissez-faire, free-for-all situation, therefore the intervention of government and regulation must aim to reduce the scale of such conflicts or confrontation, through the implementation of a credible, rational and coherent management plan’

74. The joint report went on to note that the DEFRA report had also stated on pages 34 and 35:

“The situation has been exacerbated by the differences in interpretation of vessels surveying requirements between North and South, favoring the larger more modern vessels from the North at the expense of the smaller or traditional vessels from the South.

However, the Irish situation raises issues over management of seed resources in a sustainable way and also suggests there could be increasing pressure on GB stocks, especially if new growers enter the business from elsewhere.”

75. Subsection 6.3 of the 2012 Maguire report addressed the “Failure of SMAC to maximise seed mussel resource potential”. Dr Maguire reported that the opening of the fishery is discussed in February and the date is set (usually in June) before any stock assessment has taken place. However, studies had shown that after acute stress such as transporting and relaying mussels survived better if they were larger. A later opening of the fishery had been practiced successfully before SMAC came into existence. She was critical of SMAC management for being inflexible regarding requests from the industry to defer fishing for reasons of best practice. She reported that at the time of reporting all seedbeds were being fished and none had been set aside for over wintering.

76. Dr Maguire further complained in this subsection that the estimation of mussel seed was consistently incorrect, resulting in a very significant difference between allocations and actual uptake.

77. Dr Maguire further opined that dredging was likely to destabilize seedbeds and aggravate natural dispersal with the onset of winter storms. She advocated regulation of the number of fishing vessels allowed to dredge on a given seabed at any one time.

78. Dr Maguire also expressed the belief that the allocation system needed to be based on three transparent criteria: experience (recommended at 5 years or more) in fishing seed and on-growing mussels; ownership of a mussel fishing vessel; and ownership of an area of “suitable” culture plots. In terms of what may be suitable, mussel seed must be sown at a density to make best use of the resource and she opined that the SMAC “recommended density” was too high for most culture plots.

79. Commenting on the above the joint report remarks:

“We agreed with most of this section. TOC stated that after 2005 SMAC did not exist. Its role was taken over by a management committee. Also the Bottom Grower Mussel Consultative Forum (BGMCF) was established. However, this forum had no authority to make decisions. Mussel allocations were just rolled over each year since 2006.”

80. Part 7 of the 2012 Maguire report described “The Food and Agriculture Organisation (FAO) Code of Conduct for Responsible Fisheries” and was uncontroversial in any way and was fully agreed in the joint report. Dr Maguire had observed, *inter alia*, in subsection 7.2, regarding inadequate consideration of traditional mussel fishers, that:

“It would seem from all available information to this author, that neither state involved in the management of the Irish mussel seed resource have accounted for the impact on the traditional Republic of Ireland bottom mussel community that is sustained by this fishery. This despite their having maintained a continually increasing mussel production for many decades prior to the establishment of the SMAC. In many cases muscle aquaculture has provided the primary, or sole, source of employment in rural coastal areas. The sharp increase in the Republic of Ireland’s mussel production in the years since the cross-border management of this resource under SMAC indicates that the current regime is unsustainable and in sharp contrast to section 7.6.7 of the FAO code which states:

‘In the evaluation of alternative conservation and management measures, their ... social impact should be considered.’

In actuality, it is unclear what factors were considered in the formulation of the SMAC management policies, but it appears that social impact was not one of them.”

81. In subsection 7.3 of Dr Maguire’s report she reviews several specific provisions of the FAO code, before commenting that (*inter alia*):

“While all the sections cited above are to large extent self-explanatory (focused primarily on gathering and disseminating sufficient data to make informed management decisions), it is worth pointing out that the Irish State, while being ultimately responsible for the management of this resource (both under Irish and European law), has to date not acted on what is considered best scientific evidence. In fact there is a distinct paucity of data for any such informed management plan. There were measures identified by many authors Maguire et al. (2007) and Jaap Holstein (consultant to the Dutch authorities) as being essential for the sustainable management of this resource but which have not been implemented. Judging by the recent ROI production figures (see figure 4), this lack of implementation has proven detrimental to the indigenous mussel industry. The ideal of maintaining ongoing sustainability in the fishery occurs repeatedly in the FAO’s code [section 7.2.1 of the code is then quoted in terms].

This ideal appears to be lacking in the management of this fishery at present”

No issue whatever is taken by Dr O’Carroll with these views.

82. Part 8 of the 2012 Maguire report is concerned with recommendations to maximise use of seed resource regarding seed size and unreserved agreement with this part of the report is expressed in the joint report. The same is true with respect to part 9 of her report which concerned recommendations for management. The final part of her report, part 10, contained observations on the future of the industry. The joint report notes that Dr O’Carroll and Dr Maguire disagreed in respect of her conclusions as expressed in that part. Dr Maguire had said:

“it is clear that the managers for the mussel seed resource were negligent. It is also clear that if the current system continues the bottom mussel industry faces collapse. Therefore it is difficult to see how the minister and the managers of the resource were

not in breach of their legal responsibility to protect the resource in a sustainable manner. Therefore it is imperative that the regime is changed and that an intervention of government with industry cooperation to create a comprehensive realistic policy vision for the sector (sic). From this the implementation of a credible, rational management system needs to be put in place into the medium-term (3 – 5 years). The system remains unchanged it is clear that the plaintiffs will be unable to maintain a business in the short term.”

83. At the oral hearing before us counsel for the plaintiffs observed that with respect to part 10 that:

“There an expert did, perhaps, that which an expert shouldn’t do, go so far as to say negligence and Mr. O’Carroll didn’t agree with any of that. But with the greatest of respect his cavilling with section 10 -- I do respectfully suggest -- and is somewhat formulaic given all that he’d already agreed. That’s why I do respectfully suggest that the impression given in the judgment that there were two competing bodies of evidence on this issue of whether or not there had been mismanagement is not accurate ..., not even remotely accurate.”

84. In fairness to the High Court judge, in summarising the evidence of Dr Maguire he had quoted, *inter alia*, two significant passages from her updated report (2018), at paragraphs 34 and 35 of his judgment which, if anything, state her concerns in even starker terms than she had originally expressed them in 2012.

85. Nevertheless, having considered the expert evidence in detail, and how it was dealt with in the High Court’s judgment, I consider that it is a fair characterisation to suggest that it creates a misleading impression that there were two competing bodies of evidence on the issue of whether or not there had been mismanagement. A careful reading of the High Court judge’s actual words makes clear that, having summarised the views of the plaintiffs’

principal expert on the issue of possible mismanagement, and having done so fairly in my view, he had felt it appropriate to point out that the defendants' principal expert had not agreed with her on certain matters of detail. Regrettably, however, he did not make clear that there was nonetheless a very large measure of agreement by the experts on the fact of mismanagement notwithstanding some relatively minor disagreements on matters of detail. In the circumstances I do think the judgment creates a misleading overall impression of the evidence. Moreover, at paragraph 58 of his judgment, he characterised the differences between the experts as a "*dispute ... as to the appropriate way for the first named defendant to manage the mussel seed resource*", when in truth there was no dispute between them that there had been mismanagement of the resource. The fact that the experts might each have approached aspects of the detail of the management of the mussel seed resource differently if it had been their responsibility, in no way undermined their shared view that there had not been proper management. Despite this, the trial judge held that the expert evidence, reflecting in the trial judge's view no more than "*an honest difference of opinion*" between the experts, was insufficient to establish negligence.

86. Be all of that as it may, I am satisfied that the decision to ultimately dismiss the plaintiffs' claims did not primarily turn on a finding that there was an evidential deficit with respect to alleged mismanagement. While that may have formed part of the matrix that underpinned the decision to dismiss, it rested mainly on other (legal) reasons to be elaborated upon later in this judgment. Accordingly, even though I am satisfied that the complaint is made out that the judgment creates the impression that there were two seriously competing bodies of evidence on the issue of mismanagement, when in truth there was mostly consensus; by the same token I am not satisfied that the error here ultimately goes to the heart of the matter.

The High Court's judgment.

87. The High Court judge noted the various complaints by the plaintiffs concerning the involvement of the SMAC in the seed mussel allocation process, and he concluded (at paragraph 39 of his judgment) that *"I am not convinced that this controversy is directly relevant to the claims being made by the plaintiffs"*. In his view, *"the central issue is the amount that was allocated to each of the plaintiffs and how it was calculated."*

88. The trial judge found as a fact that *"the allocations from the early years were simply 'rolled over' from year to year"*, but that *"in each year, save for 2004, the amount of mussel seed actually fished does not come close to the amount that was allocated."* In the High Court judge's view, therefore, *"the problem facing the plaintiffs was not allocation but rather availability of mussel seed"*, leading back to the issue of mussel seed resource management and the fishing activities of Northern Ireland registered vessels in Irish territorial waters.

89. The High Court judge found (at paragraph 40) that while Dr Maguire had supported a greater application of the "precautionary principle", this would have involved temporary closure of some mussel areas which would have had a short-term negative (and, on the evidence, unquantified) impact on the plaintiffs. He regarded the complaint about the activities, including the aggressive fishing practices, of Northern Ireland registered vessels as being *"at the heart of the plaintiffs' claim"*. However, in that regard he concluded (at paragraph 43) that *"[t]hough the evidence of the activities of the Northern Ireland registered vessels was clear, evidence of its actual effect on the livelihoods of each of the plaintiffs was less so."* While the evidence established *"a generalised loss for the mussel industry of this State, it does not establish any particular losses in respect of the individual plaintiffs"* and he considered that it was not open to him to simply apportion amongst the plaintiffs the amount of mussel seed fished by Northern Ireland registered vessels, because while the plaintiffs might have had the ability to absorb the extra capacity, other mussel fishermen in the State

might well have staked a claim to part of the additional supply, as might possibly new entrants into the market.

90. The High Court judge referred (at paragraph 44) to the evidence of a chartered accountant called on behalf of the plaintiffs as to their claimed losses and rejected it on the basis that it was premised on what he regarded as a legally untenable assertion by the plaintiffs *“that the aquaculture grant application detailing the expected allocation of mussel seed should have been the amount allocated by the first named defendant”*. Moreover, he found that *“there was no specific evidence for each of the plaintiffs establishing that the difference between the allocation of mussel seed set out in the grant application and the amount actually allocated (or fished) was the result of the fishing of Northern Ireland registered boats and/or mismanagement of the mussel seed resource. In my view, in the absence of such evidence, a court could not be in a position to assess damages were such to arise.”*

91. The High Court judge’s overall findings from the evidence are summarised as follows at paragraph 46 of his judgment:

“By reason of the foregoing, I make the following findings:

(a) Had vessels registered in Northern Ireland not been fishing for mussel seed in the territorial waters, there would have been additional mussel seed available for the plaintiffs and other vessels licensed by the State.

(b) There was insufficient evidence to quantify how much of the mussel seed made available by the absence of Northern Ireland registered vessels would have been fished by the plaintiffs. Further, account would have to be taken of the extra amount that could be fished by vessels other than the plaintiffs registered in the State and new entrants into mussel seed fishing.

(c) Though the manner in which the allocations of mussel seed to the various plaintiffs were made may be open to criticism, the evidence shows that, for the most part, the amount of mussel seed fished by each of the plaintiffs fell short of their respective allocations.

(d) Even if it were established that the first named defendant failed to manage the mussel seed resource appropriately, there was no evidence to quantify this. Indeed, an aspect of good management as proposed by the plaintiffs would have led to a closure of areas for mussel seed fishing which would have led to a reduction in the amount fished.”

92. Accordingly, even before considering whether the plaintiffs had a legally sustainable cause of action on any of the bases that they had pleaded, the High Court judge was provisionally of the view that because of what he characterised as “*serious deficiencies in the evidence given by the plaintiffs*”, they would not in any event be able to prove attributable losses such as might entitle them to compensation.

93. In then addressing the legal issues pleaded by the plaintiffs, the High Court judge addressed them in a different order to how they have been canvassed before us. As already alluded to, the case agitated on appeal was very much centred on the plaintiffs’ claims in negligence, with their reliance on alleged breaches of, or interferences with, various of the plaintiffs’ constitutional rights, and on specific guarantees under the Constitution, being at most a fall-back position (based on the so-called *Blehein* principles). However, the High Court’s judgment addresses the issue of alleged breach of constitutional duties/rights first (paragraphs 48 to 53 inclusive, and only then addresses “Negligence/Negligent Misstatement” (from paragraphs 54 to 59 inclusive). As previously indicated negligent misstatement is at this stage no longer being relied upon (nor is breach of statutory duty which is dealt with between paragraphs 60 and 64 of the High Court’s judgment).

94. In fairness to the High Court judge, the defendants have squarely maintained in this appeal that the plaintiffs' claim, as it is now being presented, is wholly different in emphasis from that litigated in the High Court. That certainly seems to be the case, having regard to the substantial number of issues not now being pursued, but which were pursued before the High Court, and having regard to the ostensible recalibration of the case on appeal so as to move the claim based on negligence to centre stage. While it cannot be gainsaid that the litigation before the High Court partly embraced a claim in negligence, it was not then the plaintiffs' contention that it was the principal basis on which they were claiming to be entitled to recover damages for their alleged loss and damage, or that their other claims based on breaches of constitutional and other rights represented "fall-back" claims. It seems to me that having regard to how the appeal has been presented, the most convenient order in which to review how the High Court dealt with the relevant legal issues is to do so in the order on which they are now being relied upon, rather than in the order in which they are dealt with in the High Court's judgment.

The High Court's Treatment of the Negligence Issue

95. The key passage from the High Court's judgment, in so far as it related to the negligence issue, and in which the trial judge rejected negligence as a potential cause of action that could avail the plaintiffs, is contained in paragraph 53, where he stated:

"Though there are recognised torts that make it unlawful to manage or use property in such a manner that injures others, I do not see that the tort of negligence arises in the instant case. As mussel seed is the property of the State, I cannot see that the State is under a duty of care to manage the mussel seed in such a way that protects the commercial interest of the plaintiffs. In the same way the owner of a gravel quarry is not under a duty to manage the gravel in order to protect the commercial interest of

persons engaged in road building. Though it is clearly desirable to manage mussel seed appropriately, I cannot see that failing to do so amounts to negligence.”

96. At the hearing of the appeal counsel for the plaintiffs characterised these views as representing “*an overly blithe*” analysis, and a “*wholly incomplete*” analysis. While the latter description might be criticised as being tautologous, counsel’s essential point, and a matter I will come back to, was that the trial judge ostensibly failed to engage with the facts to explore whether there was a sufficient relationship of proximity between the parties to render it just and reasonable to postulate a duty of care, much less to adequately consider foreseeability of damage, or to consider at all whether (even if the criteria of sufficient proximity and foreseeability could be met) it was just and reasonable that the law should impose a duty of care on the defendants for the benefit of the plaintiffs, having regard to all the circumstances including countervailing public policy and public interest considerations.

97. The High Court judge found support for his views in remarks of MacMenamin J at paragraph 198 of his judgment (Dunne J agreeing) in *Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food* [2016] IESC 6, [2017] 1 I.R. 119 (“*Cromane*”), and the relevant passage is quoted in the High Court’s judgment at paragraph 56. Counsel for the plaintiffs submitted at the appeal hearing in this case that the passage relied upon does not all support the trial judge’s finding of no negligence in this case for the reasons which he stated. On the contrary, the quoted passage is said to represent a finding by MacMenamin J that a duty of care was not owed to the plaintiffs in *Cromane* precisely because a relationship of sufficient proximity had not been demonstrated to exist. In the present case, however, it was suggested that there had been no, or certainly no adequate, engagement with the crucial issue of whether a sufficient relationship of proximity existed.

98. The High Court judge, although he had expressed the view that no duty of care arose in the circumstances of the plaintiffs’ case, went on to postulate as to what would have been

the appropriate standard of care concerning the management of mussel seed if he was wrong in the view that he had expressed. He queried whether the appropriate standard would have been that which applies to professionals (as opposed to that attributable to the reasonable person), and concluded that the “professional negligence” standard would have applied, once again finding support for his views in the judgment of MacMenamin J in *Cromane* at paragraph 199, which he quotes at paragraph 57 of his judgment. However, as counsel for the plaintiffs submitted in arguendo before us, on a correct reading of the said paragraph 199 MacMenamin J. had merely posed the question as to what might be the relevant standard of care, on the basis that it represented one of a number of difficult issues in that case, but he had not suggested an answer.

99. The trial judge said at paragraph 58 of his judgment:

“In my view, were there to be a duty of care on the first named defendant, the appropriate standard would be that which applies in professional negligence actions. I say this as it is clear from the evidence that managing a natural resource like mussel seed involves exercising judgment in areas such as natural science, biology and economics. I would characterise the differences between the experts in the instant case as being an honest difference of opinion which, of itself, does not amount to negligence.”

100. Accordingly, the claim in negligence was rejected, firstly, because the trial judge was of the view that, because mussel seed was the property of the State, the State could not owe a duty of care to the plaintiffs to manage the mussel seed resource in a way that protected their commercial interests; secondly, because even if such a duty of care was owed, the appropriate standard of care would be the professional negligence standard and the expert evidence, reflecting in the trial judge’s view no more than “an honest difference of opinion” between

the experts, was insufficient to establish a breach of that standard; and thirdly, because there was an evidential deficit with respect to proof of loss or damage.

The High Court's Treatment of Breach of Constitutional Duties/Rights

101. These issues are dealt with between paragraphs 48 and 53 of the High Court's judgment. At the outset it should be stated that no reference whatever is made to the *Blehein* principles which counsel for the plaintiffs now accepts must apply.

102. Noting the plaintiffs' successful appeal to the Supreme Court in *Barlow II*, the trial judge commented that, "[m]ussel seed therefore is not the property of the plaintiffs and this has legal consequences". Having cited and quoted extensively from *Casey v. Minister for Arts* [2004] 1 IR 402 to the effect that the nature and ambit of the right to earn a livelihood does not entitle the citizen to have access, as of right, to the property of third parties and use it for business purposes, the trial judge commented:

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

103. The reference to *Greene* was criticised at the appeal hearing as being "surprising", and not really in point. I don't believe that much turns on this, and it will suffice to note that counsel for the plaintiffs' central complaint in this area of the claim was encapsulated by his submission to us in oral argument that:

“what I want to suggest is that my clients definitely have constitutional rights: they have property rights in their boats; they have property rights in their aquaculture sites; they have property rights in their allocations, which the evidence was clear to the effect that those allocations enhance the value of their aquaculture sites; and of course they have a right to earn a livelihood and carry on the business which was alluded to but not analysed. So there is a whole series of constitutional rights in play and I respectfully suggest that that’s unanswerable in the case but in fact not so found.”

104. When challenged by a member of the Court to identify, precisely, how those rights were breached, and what might be the consequences of any breach, counsel for the plaintiffs suggested that the appropriate analysis involved considering in the first instance whether the right in question had been interfered with; then whether any interference with the right in question had been proportionate; and that, if not, that his clients might then be entitled to a declaration on the basis of the approach taken in *Hempenstall v Minister for the Environment* [1994] 2 IR 20, and the point was made that the plaintiffs had sought declaratory relief as well as damages. However, in so far as damages were concerned, it is conceded that the *Blehein* principles must apply to that aspect of the claim.

105. Returning to the High Court’s judgment, the High Court judge referenced *An Blascaod Mór Teoranta v. Commissioners of Public Works (No.4)* [2000] 3 IR 565 as having been cited by the plaintiffs in support of their claim that they were entitled to compensation on account of the State’s prejudicing of their constitutional rights (presumably those listed by counsel at paragraph 93 above) by allowing Northern Ireland fishing vessels to fish in Irish territorial waters without legal authority. He concluded:

“In my view, the plaintiffs have failed to establish that the damage which they claim to have suffered flowed directly from the unlawfulness ultimately found by the

Supreme Court. The plaintiffs contend that the damage which they have suffered is a breach of their right to earn a livelihood. This right however is based on a right to mussel seed which the Supreme Court has found is the property of the State and in respect of which the plaintiffs do not have a right.”

106. The High Court judge then alluded to the principles set out in *Glencar Exploration PLC v. Mayo County Council* [2002] 1 IR 84 (“*Glencar Exploration*”) as being “a hurdle that confronts the plaintiffs”. He quoted from the judgment of Keane CJ, who in turn had cited Finlay CJ’s judgment in *Pine Valley Developments v. The Minister for Environment* [1987] IR 23 (“*Pine Valley*”) in support of the idea that it is a requirement of the common good that persons in whom statutory powers of decision making are vested should have immunity from claims for compensation where they have acted *bona fide* and without negligence. The trial judge observed that the *Glencar Exploration* case was considered in *Cromane* while further noting that “in *Cromane Seafoods Ltd* what was involved was aquaculture sites in respect of which the plaintiffs had a proprietary right. In the instant case, however, what is involved is mussel seed which is the property of the State and in respect of which, as I have found, the plaintiffs do not have a right.”

107. The trial judge then referenced the judgment of MacMenamin J in *Cromane* where that Supreme Court judge, again referencing *Pine Valley*, observed that the Supreme Court had:

“held, unanimously, that where a Minister is exercising a public statutory duty, he or she will not be liable in damages, even for an ultra vires action, unless the exercise of the power involves the commission of a tort, or is actuated by malice, or unless the authority knew that it did not possess the power which it purported to exercise. A Minister, in reaching his or her decision to grant a licence, and acting bona fide, in

pursuance of advice which they had been given by a departmental senior legal advisor, could not be guilty of negligence or negligent misrepresentation”

108. The High Court judge then commented:

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

109. On the specific issue of potential liability for breach of proprietary rights the High Court judge concluded that the plaintiffs could not recover in circumstances where they “do not have a proprietary interest, for the reasons stated, in mussel seed”. An attempt to argue that the plaintiffs’ situation was somewhat analogous to that of the plaintiff taxi drivers in the cases of *Muldoon v Minister for Environment and Local Government* [2015] IEHC 649 and *Gorman v Minister for Environment and Local Government* [2001] 2 IR 414 was rejected on the basis that those plaintiffs had a proprietary interest in their taxi plates, whereas the plaintiffs in the present case lacked a proprietary interest in the mussel seed at issue.

The High Court’s Treatment of the Legitimate Expectation Claim

110. The claim for legitimate expectation was dealt with between paragraphs 65 and 69 of the High Court’s judgment. In circumstances where a claim based on legitimate expectation is no longer being pressed in the context of this appeal, it is sufficient to record simply that the High Court also rejected the claim based on legitimate expectation.

The High Court's Treatment of the Claim under the ECHR

111. A claim based upon Article 1 of Protocol 1 of the ECHR, relying in part on *O'Sullivan McCarthy Mussel Development Ltd v. Ireland* (Application No 44460/16, 7 June 2018) ("*O'Sullivan McCarthy*") was also rejected. The *O'Sullivan McCarthy* case had been based on established property rights in the aquaculture business which would engage the provisions of Article 1 of Protocol 1. However, the trial judge said:

"As I have referred to earlier in this judgment, however, the instant case does not concern the plaintiffs' property rights in their own aquaculture business but rather they are seeking to establish property rights in mussel seed. The decision of the Supreme Court in the Barlow II proceedings established that mussel seed is the property of the State and thus it cannot be the property of the plaintiffs. I have also rejected the contention that the plaintiffs constitutional right to earn a livelihood extends to a property right over mussel seed. Thus, in my view, this decision of the ECtHR is of no assistance to the plaintiffs."

Other Issues dealt with by the High Court

112. Although the High Court's judgment also dealt with claims based on negligent misstatement, breach of statutory duty, and unlawful delegation it is unnecessary to review how he dealt with these in circumstances where these claims are no longer being pressed.

Grounds of Appeal and Submissions

113. An extensive notice of appeal was filed on behalf of the plaintiffs, to which I have had full regard. However, I consider it unnecessary to set out each and every ground relied upon in circumstances where the document runs to over fifteen pages of closely spaced typescript, and where in any case not all of the grounds pleaded are ultimately being relied upon. I

consider that I have already set out an adequate summary of the main issues raised on the appeal. The Notice of Appeal asks this Court to overturn the judgment and order of the High Court, and to grant the plaintiffs various declarations, a mandatory order directing the first named defendant to assess the plaintiffs' applications for mussel seed licences, damages, interest under the Courts Acts and costs.

114. Note has also been taken of the respondents' notice filed on behalf of the defendants which joins issue with the plaintiffs on each of their grounds of appeal, and which asks this court to dismiss the appeal and uphold the judgment of the High Court.

115. Both sides have furnished the Court with extensive written submissions and books of authorities, and we are grateful for the assistance these have provided.

The Case in Negligence

Overview

116. In general, public authorities will not be liable in tort in relation to acts and omissions done in the exercise of public functions. . The well recognised basis for this is the potential chilling effect of exposure to potential liability for administrative action carried out, and administrative decisions made, by public servants in good faith; both in terms of their willingness to take bold action in implementation of policy, and in terms of their work practices more generally. Reflecting this, Geoghegan J stated in the Supreme Court in *Kennedy v Law Society of Ireland* [2005] 3 I.R. 228, (at p.259 of the report) that:

“a body such as the first respondent, carrying out a public function in pursuance of public duty, is not liable to a private individual in tort unless the authority, in so acting, has committed the tort of misfeasance in public office”

117. However, an extensive body of caselaw suggests that the actual position in law is more nuanced than this general statement might suggest. That said, it appears to be beyond

question that a private party aggrieved by how a public authority has performed (or failed to perform, as the case may be) a public function entrusted to them by statute, cannot establish liability in negligence, at least not without the addition of something more.

118. As to what more might be required, Morgan, Hogan, and Daly, have stated in their work on *Administrative Law in Ireland*, 5th edn, (2019) (Dublin: Round Hall Thompson Reuters):

“Sometimes the public authority will have interacted with the plaintiff or plaintiffs in such a way as to create a relationship of proximity.”

119. As the review which follows demonstrates, the case law to date does not seemingly foreclose (to put it no stronger than that) on potential liability for negligence where the following requirements are conjunctively met, i.e., (i) a sufficient relationship of proximity between the individual or individuals and the public authority has been demonstrated to exist to justify the postulation of a duty of care; (ii) it is foreseeable that damage could ensue should that duty of care be breached, and (iii) it is fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. Relevant in this context is whether there is an absence of countervailing public policy considerations militating against, or tending to negative, the recognition of a duty of care in the circumstances of the case.

120. In the present case, although the licensing of mussel fishing vessels, and the licensing of mussel fishing, are each respectively regulated under statute, the plaintiffs are neither contending that the defendants have acted *ultra vires* any discretionary statutory power in those areas, nor are they claiming that the defendants owed them a direct statutory duty, actionable *per se* which they have breached. Whilst disavowing the notion that any statutory duty was owed to them, they rely instead on a common law duty of care. However, in asserting that a common law duty of care was owed to them, and that it was breached, the

plaintiffs nevertheless complain of the negligent exercise of public law powers and rely upon proximity of relationship, foreseeability of damage, the ‘fair just and reasonable’ test and ‘the absence of countervailing public policy considerations’ as providing the rationale for the imputation to the defendants of a private law duty of care owed to the plaintiffs. In asserting a negligence claim on that basis for alleged loss and damage due to what they characterise as “mismanagement of the mussel seed resource”, the plaintiffs complain predominantly about alleged omissions to exercise public law powers (e.g., the failure to adequately survey stocks, and the failure to make allocations on an informed basis with knowledge of actual stock levels) although they also complain about some positive actions (e.g., allowing Northern Ireland vessels to fish aggressively for mussel seed in Irish territorial waters without regard to available stocks, and the rolling over of allocations from year to year notwithstanding the absence of reliable data concerning actual stocks). That such mismanagement, if what occurred may be characterised as such, took place against a background of the existence of statutory powers in relation to the licensing of mussel fishing vessels, and the licensing of mussel fishing (subject to conditions, including the allocation of quotas, where such were considered appropriate by the Minister), simply provides context. It was made clear to us that the plaintiffs disavow any suggestion that the Minister, or other defendants, owed them a statutory duty actionable in private law, *qua* the management of the mussel seed resource.

121. I should say before proceeding further that in so far as the plaintiffs seek to maintain a case in negligence against the defendants, based upon omissions (whatever about acts of commission), such a case is, to say the least of it, problematic. Generally speaking, a party will not owe a duty of care towards third parties to prevent them from being harmed (whether physically or financially) by a danger or circumstance which was not created by the party in question (subject to possible exceptions to be discussed later in this judgment). In the absence

of circumstances giving rise to a duty on an exceptional basis, public authorities generally owe no duty of care towards individuals to confer a benefit on them by protecting them from harm, any more than would a private individual or body. As Lord Toulson put it in *Michael v Chief Constable of South Wales Police (Refuge and Liberty intervening)* [2015] AC 1732 (“*Michael*”):

“It is one thing to require a person who embarks on action which may harm others to exercise care. It is another matter to hold a person liable in damages for failing to prevent harm caused by someone else.”

122. It should be observed in this context that the law of tort in Ireland has recently moved on from speaking in terms of any rigid dichotomy between acts of commission and omission, because it is often possible to frame a set of circumstances in both ways. Thus, as was alluded to by Clarke CJ and MacMenamin J, in their joint judgment in *University College Cork v Electricity Supply Board*, [2020] IESC 38, (“the *UCC* case”) at para 8.15, the failure of a motorist to slow down when approaching a dangerous bend or an incident on the road that would lead a reasonable driver to reduce speed, might be characterised on the one hand as the driver’s act of commission in driving too fast, or on the other hand as his/her omission to apply the brakes. In the *UCC* case the Supreme Court expressed agreement with recent case law in the United Kingdom which seeks to frame the issue in terms of a “do no harm” principle rather than the previous case law which tended to analyse such matters by distinguishing between acts of commission and omission (note: although O’Donnell J dissented as to the result in the *UCC* case, he did not dissent on this issue).

123. As is observed in McMahon and Binchy on the *Law of Torts*, 4th edn, (2013) at para 19.58, “*Even the most liberal judge could not deny the anodyne proposition that ‘the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise to a duty of care at common*

law.’” [The internal quotation is from the judgment of Keane C.J. in *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84 at 140–141]. It does seem to me to be problematic in terms of the case that the plaintiffs are seeking to make, that the essence of their complaints about how the State defendants managed the ground mussel seed resource, regardless of whether those complaints are framed as acts of commission or omissions, is that they were denied a benefit or benefits which they might otherwise have received.

124. Be that as it may, the plaintiffs recognise that the circumstances in which liability might potentially be imposed for the negligent exercise of discretionary public law powers are extremely limited. There are strong judicial statements in a series of Supreme Court cases, notably in *Pine Valley*, *Glencar Exploration*, *Cromane*, *Bates v Minister for Agriculture, Fisheries and Food* [2020] 2 I.R. 149 (“*Bates*”), and most recently, the *UCC* case, suggesting that the Irish courts have been very reluctant to hold that public authorities owe members of the public a duty of care, particularly in respect of omissions/alleged failures to act; and, per Morgan, Hogan & Daly in their work *Administrative Law in Ireland* 5th ed, (cited already) at paragraph 20-136, “*even in the case of ultra vires acts, the courts are unwilling to impose liability where these public functions have been discharged in good faith*”.

125. Indeed, in the judgment of Charleton J in *Cromane*, where he was amongst the majority of a five-member panel of the Supreme Court that divided 3:2, he states that the appropriate tort for a wrong committed in the course of an administrative duty is misfeasance in public office, which requires malice to be actionable. Reflecting Geoghegan J’s generalisation, cited above, Charleton J’s judgment suggests sympathy for a view that misfeasance in public office may be the only possible tort on foot of which an aggrieved party might potentially recover damages arising from the discharge (or non-discharge) of a public duty, although he did not go so far as to definitively hold that to be the case. However, he stated:

“I do not preclude the possibility that, in the future, the jurisprudence on State liability may develop or evolve further. But, this is a case where I think the law should not be developed, but rather applied. One simply cannot ignore legal authorities, such as Pine Valley Developments v. Minister for the Environment [1987] I.R. 23 and Glencar Exploration p.l.c. v. Mayo County Council (No. 2) [2002] 1 I.R. 84, and the fact that, in acting as he did in 2008, the Minister was acting on a matter of public interest where specific duties were vested in him, and the State.”

126. Consistent with these views, Charlton J had at an earlier point in his judgment observed that a new concept was not to be incorporated into the law whereby the tort of misfeasance in public office might be bypassed through simply claiming that a public body had been negligent.

127. Be that as it may, none of the other judges in *Cromane* went quite as far as Charleton J. Though there were numerous highly nuanced aspects to the judgments, the majority (including Charleton J.) ultimately dismissed the plaintiffs’ claims on the basis that they had failed to demonstrate the existence of a duty of care owed to them, even if loss might have been foreseeable. It was therefore a dismiss of the plaintiffs’ claim on the merits for having failed to establish an essential proof, rather than on the basis that the claim was legally misconceived.

128. Moreover, a strong minority judgment by Clarke J., (with whom Laffoy J. concurred) evinced sympathy with the idea of leaving the door open to claims in negligence against public authorities in appropriate cases. The minority view was that it was possible for a State authority to be liable in respect of the tort of negligence when, in respect of a purely administrative part of its function not involving, to any material extent, questions of policy or discretion, it was in breach of a duty of care in accordance with the principles in *Glencar Exploration* to a person to whom that duty was owed. Moreover, a court should be careful, in

applying the basic requirements of proximity, foreseeability and absence of countervailing policy factors, not to do so in a way that excluded liability on the part of State authorities in an unjustifiable and disproportionate way that operated on a materially more generous basis than that which would be applied in the private sphere. Any restriction that was sought to be imposed on the potential liability of a public authority was to be scrutinised to ensure that it was justified and proportionate in light of the public interest sought to be protected.

129. In the present case the plaintiffs' claim in negligence is predicated on their belief that the present state of the law does not utterly foreclose on the possibility of establishing liability for the negligent exercise of discretionary public law powers, provided (and this is acknowledged by the plaintiffs) that the claimant can establish, *inter alia*, the existence of a sufficient relationship of proximity as between him/her/it and the public authority in question, as well as establishing foreseeability and that it is fair, just and reasonable that the law should impose a duty of care on the defendants towards them.

130. The plaintiffs' case is that the dealings between them, and the defendants, their servants or agents, in connection with their applications for NDP grant aid / FIG assistance, and the encouragement they received from the defendants, their servants or agents to seek such grants/assistance, and to invest substantial additional funds (from their own resources and through borrowing), towards upgrading their vessels, provides evidence of the existence of a sufficient relationship of proximity between the parties, to allow for the imputation of a duty of care owed by the defendants to the plaintiffs in connection with the management of the mussel seed resource. They further say that it was manifestly foreseeable that if the mussel seed resource was mismanaged that the plaintiffs and their businesses were at risk of being caused loss and subjected to damage. They further say that excluding them from liability would be unjust, unfair, unreasonable, and disproportionate in the absence of countervailing policy factors sufficient to justify such exclusion.

131. Further, to the extent that it is suggested that *Pine Valley*, *Glencar Exploration* and *Cromane*, present hurdles to be overcome in terms of the plaintiffs' entitlement to recover, the plaintiffs say that those cases are distinguishable from the present case on the basis that there was an evidential deficit in each of those cases as to a course of dealing indicative of the existence of a sufficient relationship of proximity between the parties. They say that their cases "*stand miles away*" from those cases and instead "*stand much, much closer*" closer to the case of *Ward v McMaster* [1988] I.R. 337 ("*Ward*").

Relevant jurisprudence

132. It is appropriate at this point to review the pertinent jurisprudence in a little more detail. In addition to those of *Pine Valley*, *Ward*, *Glencar Exploration*, *Cromane*, *Bates* and *UCC* already mentioned, the cases of *Siney v Dublin Corporation* [1980] IR 400 ("*Siney*");; *Sunderland v Louth County Council* [1990] ILRM 658 ("*Sunderland*") and *Convery v Dublin County Council* [1996] 3 I.R. 153 ("*Convery*") are also relevant. It is best to take them in chronological order.

Siney v Dublin Corporation [1980] IR 400

133. *Siney* is an early case, which although not in the book of authorities, features in reviews of the relevant jurisprudence in several of the later cases, and in leading textbooks. In this case the Supreme Court held that the Corporation, as a housing authority, owed a duty of care to those whom it housed in flats under the provisions of the Housing Act 1966, to ensure that the flats provided were fit for human habitation. The flat which was let to the plaintiff was damp and had a defective ventilation system leading to fungal growth on the walls and was accordingly unfit for human habitation. Moreover, an inspection which had taken place was inadequate. It is unclear from the report of the case whether the inspection was

conducted pursuant to the Corporation's statutory powers or statutory duties. However, the Supreme Court held (*inter alia*) that the Corporation was liable in negligence to the plaintiff for having breached their duty of care under the neighbour principle enunciated in *Donoghue v. Stevenson* [1932] A.C. 562. The correctness of the decision is patent in the circumstances of the case, but as McMahon & Binchy (previously cited) point out (at para 19.11) "*Siney does not ...throw a great deal of light on the wider question of the circumstances in which it may be appropriate to impose a duty of care in negligence on public authorities in relation to the exercise of their ... powers.*"

Pine Valley Developments Ltd & Ors v. The Minister for Environment & Ors [1987] IR 2

134. The plaintiffs had purchased a development site with the benefit of outline planning permission (OPP) granted by the Minister. However, the relevant local authority refused to grant approval in the terms of the OPP. The plaintiffs successfully sought an order of *mandamus* in the High Court, which order was appealed to the Supreme Court. The order for *mandamus* was discharged by the Supreme Court on the basis that the grant of OPP had been *ultra vires* and was a nullity. The plaintiffs then brought an action claiming damages against the Minister and the State for breach of statutory duty, negligence and negligent misrepresentation, and as against the State only for failure to defend and vindicate their property rights. It was agreed that it should be determined as a preliminary issue whether any action for damages was maintainable in the circumstances of the case.

135. The plaintiffs lost in the High Court and appealed to the Supreme Court, where they were again unsuccessful. The Supreme Court held, on the negligence/negligent misrepresentation issue, that in reaching his decision to grant outline planning permission the Minister had acted *bona fide* in pursuance of the advice which he had been given by the department's senior legal adviser, therefore he was not guilty of negligence or negligent

misrepresentation. Further, where a Minister is exercising a public statutory duty, he will not be liable in damages for an *ultra vires* action unless the exercise of the power involves the commission of a tort, or is actuated by malice, or unless the authority knew that it did not possess the power which it purported to exercise. In this case the Minister believed that he possessed the power which he purported to exercise, thus his decision to grant outline planning permission, although an *ultra vires* act, was not actionable.

136. The Supreme Court also rejected the claim against the State based on the alleged failure to defend and vindicate the plaintiffs' property rights, on the basis that the grant of outline planning permission by the first defendant was not intended as a limitation of the owner's property rights but rather as an enlargement and enhancement of these rights. The subsequent finding that the Minister's decision was invalid, although probably contributing towards a diminution in value of the lands, could not be seen as an unjust attack on the plaintiffs' property rights. The court went further and stated that it could be seen as a requirement of the common good that immunity from claims for compensation be granted to people who exercise that requires a decision where they acted *bona fide* and without negligence.

137. The leading judgment in the *Pine Valley* case was that of Finlay C.J. At page 34 of the report the former Chief Justice noted the finding by the High Court that the Minister had acted in good faith on erroneous advice given to him by his legal advisors. Finlay CJ then stated (at page 35 of the report):

“Having regard to that finding, I am quite satisfied that the learned trial judge was right in reaching the conclusion which he did that the first defendant could not be said to have been negligent or to have been guilty of negligent misrepresentation. If a Minister of State, granted as a persona designata a specific duty and function to make decisions under a statutory code (as occurs in this case), exercises his discretion bona

fide, having obtained and followed the legal advice of the permanent legal advisers attached to his department, I can not see how he could be said to have been negligent if the law eventually proves to be otherwise than they have advised him and if by reason of that he makes an order which is invalid or ultra vires. The plaintiffs on this appeal expressly waived any question of an allegation of malice or improper motives against the first defendant, nor indeed was any allegation of malice or impropriety made against him in the pleadings. I am, therefore, satisfied that in so far as the plaintiffs have appealed against the learned trial judge's findings, that an action in damages for negligence or for negligent misrepresentation does not and can not lie, the appeal must fail.”

138. The former Chief Justice went on to record that the plaintiffs in that case were not contending that the mere fact that the OPP was a nullity gave rise per se to an action for damages. Their claim was more nuanced. He said:

“What the plaintiffs do contend, however, is that the exercise by the first defendant of his powers under the Act of 1963 in the form of the decision which he made to grant outline planning permission which materially contravened the Development Plan, was such a gross abuse of the power which he was purporting to exercise that it could not reasonably be an exercise of that power.

It was, therefore, submitted that it constituted a breach of a duty owed to the plaintiffs as persons who might become and were in fact affected by the granting of that outline permission. The duty was alleged to be to exercise his statutory power of decision in a reasonable fashion and, it was submitted, a breach of it was actionable in damages.

I am satisfied that this submission also fails. The Minister in making his purported decision to grant an outline planning permission was exercising a decision-making power vested in him for the discharge of a public purpose or duty. The statutory duty

thus arising must, however, in law, be clearly distinguished from duties imposed by statute on persons or bodies for the specific protection of the rights of individuals which are deemed to be absolute and breach of which may lead to an action for damages.”

139. Finlay CJ then adopted with approval the summary contained in the fifth edition of Wade on *Administrative Law*, where the authors state:

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

- 1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.*
- 2. If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons.*
- 3. If the authority knows that it does not possess the power which it purports to exercise.”*

Significantly, the former Chief Justice added: *“I am satisfied that there would not be liability for damages arising under any other heading.”*

140. Allowing that in principle a gross abuse of power, or wholly unreasonable exercise of power, might justify an inference that the Minister was aware that he was exercising a power that he did not possess, Finlay CJ then rejected the idea that the evidence in the case before him supported the contention of gross abuse of power, or wholly unreasonable exercise of power, such as might lead to such an inference. Indeed the evidence was entirely to the contrary. He then went on to say:

“Not only am I satisfied that this is the true legal position with regard to a person exercising a power of decision under a public statutory duty, but it is clear that there

are and have always been weighty considerations of the public interest that make it desirable that the law should be so. Were it not, then there would be an inevitable paralysis of the capacity for decisive action in the administration of public affairs.”

141. There were concurring judgments by Henchy J and Lardner J. On the issue of whether there could be tortious liability for the exercise of a discretionary statutory power, Henchy J stated (at page 40 of the report):

*“ Breach of statutory duty may occur in a variety of circumstances and with a variety of legal consequences. Here we are concerned only with a breach of statutory duty in the making of a decision which has been committed by statute to the decision-maker. The weight of judicial opinion as stated in the decided cases suggests that the law as to a right to damages in such a case is as follows. Where there has been a delegation by statute to a designated person of a power to make decisions affecting others, unless the statute provides otherwise, an action for damages at the instance of a person adversely affected by an ultra vires decision does not lie against the decision-maker unless he acted negligently, or with malice (in the sense of spite, ill-will or suchlike improper motive), or in the knowledge that the decision would be in excess of the authorised power: see, for example, *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158; *Bourgoin S.A. v. Ministry of Agriculture* [1985] 3 All E.R. 585. While the law as I have stated it may be lacking in comprehensiveness I believe it reflects, in accordance with the requirements of public policy, the limits of personal liability within which persons or bodies to whom the performance of such decisional functions are delegated are to carry out their duties.*

142. On the issue of the possible liability of the Minister to the plaintiffs for negligence in the circumstances of the case before him, Henchy J stated:

“It has been urged in particular on behalf of the plaintiffs that because the grant by the Minister of the planning permission was in disregard of the requirements of s. 26, sub-s. 3 of the Act of 1963 (requiring advance public notification of the grant of the permission and allowing objections and recommendations from the public to be heard), his conduct in granting the permission was such an obvious abuse of his functions that he should be held to have been negligent. However, since the evidence was that the Minister's deviation from what was required of him by the statute was something which successive senior legal advisers to his department had advised to be within his legal competence, I would hold that the grant of planning permission in those circumstances did not amount to negligence of any kind on his part.”

Ward v McMaster [1988] I.R. 337

143. In the *Ward* case the plaintiffs, who were of modest means, had purchased a house with the assistance of a local authority housing loan, which turned out to be structurally unsound, a source of danger and a risk to health. The loan was made under a statutory scheme which provided, *inter alia*, that no advance should be made by the Council (in this instance Louth Co Council) until satisfied as a result of a report of the Council's valuer as to the actual value of the property. The plaintiffs did not have the house professionally surveyed by an Engineer before purchasing it, and neither did the Council before providing loan assistance, both relying instead on the Council's valuer's report which had reported the property to be in good repair. However, the valuer had had no qualifications in building construction or engineering and his assessment of the soundness of the property turned out to be quite wrong. The plaintiffs sued the builder/vendor, the Council and the valuer. In the High Court Costello J. gave judgment for the plaintiffs against the first and second defendants and dismissed the claim against the valuer. The Council appealed to the Supreme Court on the grounds firstly,

that it owed no private law duty of care to the plaintiffs; and secondly, that its failure to carry out a detailed structural examination was a policy decision within the discretion of the Council and which was not open to review by the courts.

144. Costello J in the High Court had held that although the Council carried out the valuation for its own purposes and to comply with its statutory obligations, the Council ought to have been aware that it was probable that the plaintiffs, persons of limited means, would not have gone to the expense of having the house examined by a professionally qualified person and would have relied on the inspection which they knew would be carried out for the purpose of the loan application. There was therefore a sufficient relationship of proximity and there was nothing in the dealings between the parties which restricted or limited the duties owed in any way.

145. The Supreme Court dismissed the appeal holding that while the Housing Act, 1966, did not create a private duty to take care to prevent damage to purchasers under the scheme, such a duty arose from the relationship between the parties. Further, it was reasonably foreseeable by the Council that purchasers under the scheme would not only lack the means of having their own expert examination of the house but would also rely, as the plaintiffs did rely, on the fact that the Council was investing its money in the house as a mark of its value.

Sunderland v. Louth County Council [1990] ILRM 658;

146. In the Sunderland case Louth County Council granted permission to a private individual for the erection of a dwelling house. The individual in question, who had no previous building experience, built a house with the aid of direct labour. He carried out no check on the suitability of the site. When the house was built, he decided to sell it. He then discovered that the planning permission he had obtained did not apply to the site on which he had built the house, and successfully sought a permission from the Council for retention of

the house. The plaintiffs, having received an architect's report on its condition, purchased the house in February, 1979. Because of the unsuitability of the site on which it was built and the manner in which the septic tank had been constructed, the house and garden were liable to flooding and the house proved uninhabitable. The plaintiffs sued the vendor, the architect and the Council for negligence, arguing *qua* the Council, and relying on the *Ward* case, that it was just and reasonable that a duty to the occupier should attach to the Council, that a sufficient relationship existed between the plaintiffs and the Council to create such a duty, that it was foreseeable that damage to the plaintiffs would result from a want of care by the Council, and that there was no compelling exemption based on public policy.

147. In response, the Council argued that the primary duty to take care was on the developer. The grant by the Council of planning permission did not necessarily mean compliance by the developer; it only meant that the Council had considered the application and its own development plan; the grant of permission was not a green light to proceed. The Council further argued that, since inspection by the plaintiffs' architect did not reveal the defect, there could be no fault on the part of the planning authority in a like failure. Further, unlike in *Ward v. McMaster* where the plaintiffs had relied on the Council's valuers report as warranting the soundness of the property, the plaintiffs did not rely in that way upon the planning permission.

148. The claim was dismissed in the High Court, and the plaintiffs appealed to the Supreme Court. The Supreme Court dismissed the appeal, McCarthy J. (with whom the other members of the Court agreed) stating:

“The Act in conferring statutory powers on planning authorities imposed on them a duty towards the public at large. In my view, in conferring those powers, the Oireachtas did not include a purpose of protecting persons who occupy buildings erected in the functional area of planning authorities from the sort of damage which

the plaintiffs have suffered. This being so, the Council, in the exercise of those powers, owed no duty of care at common law towards the plaintiffs.”

Convery v Dublin County Council [1996] 3 I.R. 153;

149. In the Convery case the plaintiff resided on an estate which had been privately developed in the 1970s. In granting planning permission, Dublin Co. Council had insisted on a particular layout. It was envisaged that certain roads ("the Alderwood roads"), on which the plaintiff and other similarly affected residents lived, would be designed as estate roads rather than for through traffic. However, due to delays in completing the proposed roads infrastructure, the Alderwood roads were used as through roads. Considerable development, including a very large shopping centre, took place in later years, and the volume of through traffic on the Alderwood roads increased substantially. The construction of a new road had been proposed for several years but had never been undertaken.

150. The Roads Department of the Council concluded that existing traffic arrangements were unacceptable and that a more equitable sharing of the traffic burden was required. After consideration by various sub-committees of the Council and consultation with residents' groups, the County Manager advertised his intention to temporarily close access to the estate via one of the Alderwood roads. However, this proposal was abandoned after receipt of over 2,000 objections.

151. The plaintiff contended that due to an excessive weight and volume of traffic, cracks had appeared in houses; the noise level was unbearable; windows had to be kept permanently closed due to the stench of fumes; children were in danger; and there had been a number of fatal accidents. She alleged that the situation constituted a public nuisance attributable to the Council, and also that the Council had been in breach of a duty of care owed, as a planning authority, to her. In particular, she contended that the defendant should have obtained a

contribution from the developer of the shopping centre towards the construction of the proposed road. She sought an injunction requiring the defendant to abate the nuisance and to prevent use of the Alderwood roads as an access route for through traffic.

152. The plaintiff succeeded in the High Court against the Council on the basis that a public nuisance had arisen due to the negligent exercise by it of its statutory duties. The Council appealed successfully to the Supreme Court. In allowing the appeal, the Supreme Court held that, a public nuisance consisted of an act or omission which caused injury to, or materially affected the reasonable comfort and convenience of the public, or a section of the public, but was only actionable at the suit of an individual who had suffered particular damage over and above that suffered by other members of the public. It further held that to treat the defendant as the author of a public nuisance would be contrary to principle and unsupported by authority. The traffic did not originate on premises owned or occupied by the defendant, and was not generated as a result of activities carried on by it. The volume of the traffic was due not only to the defendant's decision but to a number of factors, including large scale development by private interests; the decisions of thousands of individual drivers to use the Alderwood roads; and the failure of central government to allocate funds for the necessary roads infrastructure.

153. With respect to the claim that a duty of care in negligence was owed to the plaintiff, the Supreme Court held, following the *Sunderland* case, that the powers and duties of the Council as a planning authority and roads authority were vested in it in order to ensure the proper planning and development of the area and the provision and maintenance of an appropriate road network for the area. While the exercise of those powers and duties could be regulated by the High Court by means of judicial review, to ensure that they were exercised only in accordance with law, the plaintiff did not belong to any special category of persons to whom the defendant, in the exercise of those powers, owed a duty of care.

Glencar Exploration PLC & Anor v. Mayo County Council (No 2) [2002] 1 IR 84

154. In this case the applicants were public mining companies who held prospecting licences from the Minister for Energy and who had carried out extensive prospecting in Co Mayo with encouraging results. However, their hopes of exploiting their putative find were frustrated when, notwithstanding contrary recommendations from the Minister, Mayo Council proceeded to ratify a draft development plan which incorporated a mining ban covering extensive areas of Co Mayo, including the areas which the applicants had hoped to mine based upon the results of their prospecting activity. The applicants brought judicial review proceedings in the High Court where they successfully challenged the inclusion of the mining ban in the Council's County Development Plan on the basis that it had been *ultra vires* their powers and null and void in consequence; those proceedings had also claimed damages, but this aspect of the matter was adjourned with liberty to apply. See the judgment in *Glencar Exploration PLC & Anor v. Mayo County Council (No1)* [1993] 2 IR 237 ("*Glencar (No 1)*").

155. While *Glencar (No.1)* was pending, an intended joint venture arrangement between the applicants and an Australian company, Newcrest Mining Ltd, to exploit the applicants' find had collapsed, with Newcrest pulling out of the joint venture due to the inclusion of the mining ban in the County Development Plan.

156. Having succeeded in having the mining ban set aside but lacking the resources to go it alone without Newcrest to exploit that which they believed they had found, the applicants then pressed ahead with the damages claim that had been adjourned by the High Court.

Damages were sought from the respondent for losses and damage said to have been incurred due to misfeasance in public office, breach of statutory duty, negligence, breach of legitimate expectations and wrongful interference with the applicants' constitutional rights. The

applicants sought to recover all the monies they had expended prior to the imposition of the ban, a sum which was agreed without prejudice to liability at IR£1,938,264.

157. The claim for damages failed in all respects in the High Court. In respect of the aspect of the claim that was based on negligence and breach of statutory duty, Kelly J held, *inter alia*, that, there was no direct relationship between the doing of an *ultra vires* act and liability for that (as a breach of duty) sounding in damages. Applying *Pine Valley*, he held that the relevant statutory provisions created a duty in favour of the general public, not any duty which the legislature intended to be enforceable by an individual in a claim for damages. Further, while the decision to impose the mining ban in the respondent's development plan was made negligently in his view, in that the respondent did something which no reasonable authority would have done, there was no duty of care extant between the respondent and the applicants when the mining ban was imposed.

158. The applicants appealed unsuccessfully to the Supreme Court which agreed with the High Court that the decision of the respondent to adopt a mining ban constituted the purported exercise by the respondent of a power vested in it by law for the benefit of the public in general and not the fulfilment by it of a duty imposed by statute for the specific protection of particular categories of persons (such as the applicants), the breach of which would lead to an action in damages. The *ultra vires* exercise of the said power could not of itself provide the basis for an action in damages.

159. It further held that an administrative action which was *ultra vires* but not actionable as a breach of duty would only ground an action for damages where either: a) it involved the commission of a recognised tort; b) it was actuated by malice or; c) the authority knew that it did not possess the power which it purported to exercise. The Supreme Court considered that, despite the finding of the High Court that the respondent had acted negligently, in that its decision was one that no reasonable local authority would have taken, the respondent did not

owe a duty of care to the applicants. Moreover, the decision by the respondent that it would not grant planning permission for any mining development within the area covered by the ban was, on the assumption that it was *intra vires*, the exercise by it of a statutory power which would result in the withholding of a benefit from the applicants, which would foreseeably result in their suffering financial loss. However, since the powers in question were exercisable by the respondent for the benefit of the community as a whole and not for the benefit of a defined category of persons to which the applicants belonged, there existed no relationship of proximity between the applicants and the respondent that would render it just to impose liability.

160. The decision in *Glencar Exploration* was that of a five-judge bench of the Supreme Court and there were two judgments, i.e., that of Keane C.J., and that of Fennelly J., with both of which the other members of the court expressed agreement.

161. In considering the issue of possible liability in negligence specifically, Keane CJ alluded to what he characterised as “*an impressively wide ranging discussion in this court as to the nature of the modern tort of negligence*”. Starting with *Donoghue v Stevenson* [1932] A.C. 562, and moving through later cases including *Hedley Byrne & Co Ltd v Heller* [1964] A.C.465, *Anns v Merton London Borough* [1978] A.C. 728 and later English authorities which had adopted a more restrictive approach than that taken in *Anns*; and then the Irish case of *Ward* ; the then Chief Justice engaged in a detailed analysis of the basis on which a duty of care might be attributed to a defendant.

162. In *Anns v Merton London Borough*, Lord Wiberforce had concluded:

“... the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage

to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...”

163. In later English cases doubt was cast as to whether this two-stage test could be of universal application. Keane CJ observed that Lord Wilberforce’s two-stage test, “*was open to the possible interpretation that foreseeability alone was a sufficient criterion of liability. It was also seen as eroding the distinction, already noted, between positive acts causing injury or damage and a failure to prevent such injury or damage.*” Ultimately, he noted, the House of Lords had adopted a different approach, namely that in *Caparo plc v Dickman* [1990] 2 A.C. 605 (“*Caparo*”) involving a three stage test which has to be satisfied if a negligence claim is to succeed, namely (a) damage must be reasonably foreseeable as a result of the defendant's conduct, (b) the parties must be in a relationship of proximity or neighbourhood, and (c) it must be fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

164. It is appropriate to observe that since *Glencar Exploration* was decided, the UK Supreme Court endeavoured to clarify in the later English case of *Michael*, and further reiterated their clarification in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736 (“*Robinson*”), that the idea that *Caparo* established a tripartite test is mistaken. As Lord Reed explained, at para [29] of his judgment in *Robinson*:

“Properly understood, the Caparo case thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question

whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.”

165. Further, in two more recent cases, our own Supreme Court has had the opportunity to further consider the proper approach which should be adopted by the common law courts when considering the evolution of the common law or its application to new and evolving circumstances. The cases in question were *Morrissey v Health Service Executive* [2020] IESC 6 (“*Morrissey*”) and the *UCC* case. In their joint judgment in the *UCC* case, Clarke C.J., and MacMenamin J stated, *inter alia*:

8.5 Where a court is called on to determine the appropriate approach in common law to new or evolving circumstances or where it is suggested that a court should consider developing the existing case law, a court should first seek to identify whether there are any fundamental guiding principles to be found in the existing case law. Where such principles can be identified then the principles in question should inform any evolution of the jurisprudence or the manner in which the law in the area in question should be applied in new or evolving circumstances.

8.6 However, it must also be recognised that there can be areas where it may be difficult to discern any overarching but consistent fundamental principle. In such circumstances it may well be that the existing case law has grown up on the basis of an attempt by the courts, on a case by case basis, to deal, within some overall broad framework, with many different types of circumstances. It is in that context that the incremental approach to the development of the law by making appropriate analogies with the position already identified in similar situations may provide an appropriate

approach. See in that regard the comments of Clarke C.J. in Morrissey at paras. 12.2 to 12.5.

8.7 Those two approaches were characterised in Morrissey as being the ‘back to first principles’ model and the ‘evolution by analogy’ approach. ...”

166. They added:

“8.9 We would add one further observation. The two approaches are not necessarily mutually exclusive. There may be situations where it is possible to identify at least some level of very broad general principle behind the existing case law, but where the application of such broad principle would, of itself, be insufficient to give any acceptable level of clarity as to how the law should be determined in new or evolving cases. In such a situation the Court should have regard to, and operate in a manner consistent with, any such principle for overall guidance, but may also have to consider the ‘evolution by analogy’ approach for a more detailed evaluation of the precise boundaries of any evolution.”

167. Returning to my review of the *Glencar Exploration* case, while noting that some commentators had suggested that *Ward* had adopted the two-stage test commended by Lord Wilberforce in *Anns v Merton London Borough*, Keane C.J. was unconvinced that that was so, commenting (at pp 137-138) with reference to the judgment of Henchy J in *Ward* that:

“..., although there was, as in this case, an extensive debate as to the nature and scope of the duty of care, Henchy J. was satisfied that the facts of the case were such that it could be decided in accordance with what he described as ‘well established principles’. In his view, the relationship between the first plaintiff and the local authority was such that the latter owed a duty to him to take due care in the valuation of the house since they should have known that, in the light of his lack of means, he would rely on their having carried out an appropriate valuation. There is,

*accordingly, nothing in his judgment to indicate that he was adopting the more expansive view of the extent of the duty of care, rightly or wrongly attributed to Lord Wilberforce in *Anns v. Merton London Borough* [1978] A.C. 728, rather than the more restrictive approach subsequently adopted in the English authorities.”*

168. Ultimately, the former Chief Justice concluded:

*“There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of ‘proximity’ or ‘neighbourhood’ can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in *Ward v. McMaster* [1985] I.R. 29, by Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 and by the House of Lords in *Caparo plc. v. Dickman* [1990] 2 A.C. 605.”*

169. Keane C.J noted following his review of the jurisprudence that difficulties had arisen in determining whether, and to what extent, a statutory authority can be made amenable in damages for the negligent exercise of a power which they were entitled, but not obliged, to invoke. He concluded (at p.140-141) that:

“For the purposes of this case, it is sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise to a duty of care at common law. The facts of a particular case, however, when analysed, may point to the reasonable foreseeability of damage arising from the non-exercise of the power and a

degree of proximity between the plaintiff and the defendant which would render it just and reasonable to postulate the existence of a duty of care. That approach is consistent with the reluctance of the law to impose liability for negligence arising out of an omission to act rather than out of the commission of positive acts which may injure persons or damage property.”

170. He opined that, although the applicants’ loss was undoubtedly reasonably foreseeable, *“when one bears in mind that the powers in question were exercisable by the respondent for the benefit of the community as a whole and not for the benefit of a defined category of persons to which the applicant belonged (as in Siney v. Corporation of Dublin [1980] I.R. 400 and Ward v. McMaster [1985] I.R. 29; [1988] I.R. 337), I am satisfied that there was no relationship of ‘proximity’ between the applicants and the respondent which would render it just and reasonable to impose liability on the respondent.”*

171. He then added the following passage that counsel for the plaintiffs in the present case has identified as being a key one from his client’s perspective:

“In considering whether such a relationship of “proximity” existed and whether it would be just and reasonable to impose a duty of care on the respondent, I think one also has to bear in mind that this was not a case in which it could reasonably be said that the applicants, in incurring the expense of their prospecting activities, could be said to have been relying on the non-negligent exercise by the respondent of its statutory powers. Their position is in contrast to that of the plaintiffs in both Siney v. Corporation of Dublin [1980] I.R. 400 and Ward v. McMaster [1985] I.R. 29; [1988] I.R. 337 where, in each case, they belonged to a category of persons for whose benefit a particular statutory framework had been created and who might reasonably be said to have relied on the local authority in each case taking reasonable care in the exercise of the statutory powers vested in them. The applicants in the present case

could rely on no more than a general expectation that the respondent would act in accordance with the law which is not, in my view, sufficient to give rise to the existence of a duty of care.”

172. Counsel for the plaintiffs in the present case contends that this passage supports his client’s case, precisely because his clients’ case is, he says, distinguishable from that of the applicants in the *Glencar Exploration* case on the issue of reliance on non-negligent exercise by the respondents of their powers. It was urged upon us in terms on day one of the appeal hearing that, *“If you look at my clients and incurring the expenses which they did in building up their businesses and taking on liabilities that they did, it totally depended on the proper management of mussel seed which is the raw material of their business”*. Accordingly, it was submitted, the *Glencar* jurisprudence, far from ruling out the possibility of the plaintiffs recovering damages in negligence, provides support for their claim to be entitled to do so. It was repeatedly emphasised by counsel for the plaintiffs that *“it is important to understand what Glencar has decided and what it has not decided”*. As this contention is at the heart of the plaintiff’s case, we will return to consider it further later in this judgment.

Cromane Seafoods Ltd v Minister for Agriculture, Fisheries and Food [2017] 1 I.R. 119

173. In this case the plaintiffs, who were mussel fishermen engaged in the bottom cultivation and harvesting of mussels in Castlemaine harbour, sued the State and various State defendants for significant losses allegedly suffered by them due to negligent implementation in Ireland of European Union environmental obligations arising out of Council Directive 79/409/EEC (the “Birds Directive”) and Council Directive 92/43/EEC (the “Habitats Directive”), in consequence of which the mussel fisheries at Castlemaine harbour were compulsorily closed down while the State attempted to bring Irish law into compliance with EU law in this area.

174. In summary the background to the case was that in 1993 Castlemaine Harbour had been designated as a special protection area (“SPA”) under the Birds Directive and later a candidate special area of conservation (“SAC”) for the purposes of the Habitats Directive. However, the plaintiffs were advised by agents of the State that it was not envisaged that such designation would restrict then current usage of the designated areas. This was on the basis of the first defendant's (the Minister for Agriculture, Fisheries and Food's) understanding that the obligation to complete an appropriate assessment under article 6.3 of the Habitats Directive did not apply with respect to existing activities carried out prior to the designation. This view turned out to be erroneous and indeed the State was on notice that it was considered to be in breach of its EU obligations from as early as 2003 when the European Commission stated that to be its view in a reasoned opinion. Despite this opinion there was inaction by the relevant Irish State authorities. This led to infringement proceedings before the Court of Justice of the European Union (CJEU) which ruled against Ireland in the case of *Commission v. Ireland*, Case C-418/04, [2007] E.C.R. I-10997. Following the CJEU's decision there was yet further delay. Eventually, however, the State closed Castlemaine Harbour for periods of time between 2007 and 2010, thereby disrupting the plaintiffs' operations and precipitating the plaintiffs' subsequent claim for damages for, *inter alia*, negligence. The plaintiffs were successful in recovering such damages in the High Court, and the defendants appealed (successfully) to the Supreme Court.

175. As has been mentioned the Supreme Court divided 3:2, with McMenamin, Dunne and Charleton JJ., constituting the majority, and Clarke and Laffoy JJ., dissenting. There were three judgments, that of McMenamin J., with which Dunne J. expressed agreement, and that of Charleton J., for the majority; and that of Clarke J., with which Laffoy J. agreed, for the minority.

176. It was held, *inter alia*, by the majority, per MacMenamin J., that what was being contended for was “*operational negligence*” in the sense of a “*long term omission*”, whereby “*over a period of many years, the Minister failed to carry out regular scientific tests or monitoring, which would have provided the baseline data*” to properly discharge the State’s obligations under EU Law. However, there was no precedential basis for finding that a concept of operational negligence, based on an alleged ministerial mistake of law, could constitute a cause of action giving rise to loss and damage and such a concept was to be rejected. With the introduction of operational negligence, certainty of law would be dissolved, and public decision making would become subsidiary to the views of experts at several removes from the pressures of government.

177. The majority further held that any analysis of liability in negligence had to commence with the consideration of whether a duty of care existed between the plaintiff and the defendant and, where the relationship was governed by statutory powers, the first point of analysis had to be the legislative matrix. There was nothing to suggest that the duty of the Minister under the statutory regime governing the activity in question gave rise to a duty of care towards the second plaintiff and, on the contrary, the clear duty of the State was to conserve the protected sites and not allow any non-conservation activity until it was certain it would not impact upon the environment and the species therein, MacMenamin J. further observing (at para 198) that “*... it is difficult to find that anywhere in the relationship there could be said to be a ‘duty of care’ or ‘proximity’, even if loss might have been foreseeable*”, and that it could not be said that the plaintiffs “*were ‘so closely and directly’ affected by the Minister’s actions or omissions (whenever they occurred) that the duty to them took primacy, in 2008, over the duty to comply with European Union law*”.

178. Charleton J., in his judgment, went further and opined that negligence was not all encompassing and had not swamped every other tort. The appropriate tort for a wrong

committed in the course of an administrative duty was misfeasance in public office, which required malice to be actionable. A new concept was not to be incorporated into the law whereby the tort of misfeasance in public office might be bypassed through simply claiming that a public body had been negligent. Dissenting on that and other issues, Clarke J (with whom Laffoy J concurred) expressed the view that while it would make a nonsense of the carefully worked out parameters of various other torts if a party were to find it easy to get around those parameters established in case law for the boundaries of the tort in question by simply bringing a claim in negligence, it did not seem likely that negligence could readily be used to get round such limitations. Those limitations derived from an assessment of countervailing factors which would need to be taken into account in assessing the duty of care.

179. Further, Clarke J., in dissenting from the majority view opined that it was possible for a State authority to be liable in respect of the tort of negligence when, in respect of a purely administrative part of its function not involving, to any material extent, questions of policy or discretion, it was in breach of a duty of care in accordance with the principles in *Glencar Exploration* to a person to whom that duty was owed. In his view a court should be careful, in applying the basic requirements of proximity, foreseeability and absence of countervailing policy factors, not to do so in a way that excluded liability on the part of State authorities in an unjustifiable and disproportionate way that operated on a materially more generous basis than that which would be applied in the private sphere. Any restriction that was sought to be imposed on the potential liability of a public authority was to be scrutinised to ensure that it was justified and proportionate in light of the public interest sought to be protected.

180. Clarke J. further considered that the proper way to approach the question as to whether a public authority might have a duty of care imposed was to first consider whether a duty of care would be imposed on a private individual in an analogous circumstance and then to

consider whether there was any sufficient countervailing factor that could provide a proportionate basis for not imposing a like duty on a public authority. What leant against the imposition of a duty of care in certain cases involving public authorities was the countervailing factor derived from the fact that the actions of the public authority concerned, might involve questions of policy, discretion or adjudication, which were to be determined in the public interest and whose exercise in that manner ought not be stifled. However, the weight to be attached, as a countervailing factor, against purely administrative actions had to be much less.

181. As to the merits of the case before him, Clarke J considered that the proximity and foreseeability tests were met as, at least from the time when the prospect of proceedings against Ireland being taken was first mooted, it was clearly foreseeable that, in the event that the European Commission was proved to be right, a small and defined group of operators (being those who were carrying out traditional activities in protected areas) would suffer losses by temporary closure. Those operators were persons who ought reasonably to have been in contemplation. In his view the plaintiffs could and should succeed in circumstances where the duty of care asserted was confined to a matter that lay well on the implementation or administrative, rather than policy or discretion, end of the spectrum and there was no countervailing factor to suggest that a State or public authority, in the circumstances of the case, should be any less liable than a private individual in an analogous situation.

Bates v Minister for Agriculture, Fisheries and Food [2020] 2 I.R. 149

182. In this case the plaintiffs succeeded in a claim for negligence/negligent misstatement in the High Court arising from their arrest while fishing for scallops in an area of water (area VIIIa) just outside French territorial waters in the Bay of Biscay. They were subsequently charged with, and pleaded guilty to, charges of illegal fishing and were fined. An error had

been made within the Department as to the status of area VIIIa. Shortly before their arrest (and after being warned off by the French authorities) they had made contact with the Department and had been advised, both orally and by fax, that they were entitled to fish in area VIIIa.

183. The plaintiffs held on to their victory on appeal. Charleton J., with whom MacMenamin and Dunne J.J. agreed, gave the only judgment. Insofar as there were issues as to whether the licences issued to the plaintiffs were inaccurate, he stated (at para 24), *there is no question but that this was done by the Department in good faith and within the limits of the jurisdiction it was exercising. There[fore], there can be no liability*". That language appears to reflect Charleton J.'s view that, in respect of the licensing function, the only potential basis for liability would be in misfeasance.

184. Charleton J. then addressed the issue of liability for negligent advice. The advice was not given pursuant to any statutory duty or power nor, in giving the advice, was the Department subject to any "*wider duty ... which excluded a duty of care to the plaintiff fishermen.*" (para 26). Having referred to some of the cases on negligent misstatement (including *Hedley Byrne & Co v Heller & Partners* [1964] A.C. 465), he expressed his conclusions as follows (at para 28):

Mere reliance cannot be enough and nor is the knowledge that the person seeking the advice is likely to rely on it. That is to equate foreseeability of risk with the imposition of a duty of care. Since the primary question is whether there is a duty of care in the particular circumstances, the nature of what information is sought, the party from whom it is sought and the relationship between them are the points of focus. This was a classic case of the voluntary assumption of responsibility by the Department in circumstances where it was likely that fishermen would rely on it. Here, the information sought by the plaintiff was in a situation of peril, that of imminent arrest.

The guidance given was particular to that situation. It involved the consultation of documents that reposed within the expertise of the Department. While the relationship between the parties was not a professional one, or, to use the language from some of the older cases, one that would be regarded as equivalent to contract, in the situation from which advice was called for and the assumption of responsibility to provide accurate information which the Department assumed, this was what is now more commonly referred to as a special relationship giving rise to liability for negligent advice.” (emphasis added)

185. While the present case is not a negligent misstatement case as such, the judgment in *Bates* is nonetheless relevant in that it serves to illustrate the kind of circumstances in which a public body may incur liability in negligence in connection with the discharge of its public law functions and powers. The key concept is that of a “voluntary assumption of responsibility”. This is a matter to which I shall return later in the judgment.

University College Cork v Electricity Supply Board [2020] IESC 38

186. This litigation arose from disastrous flooding in Cork City in November 2009. The River Lee burst its banks causing very significant loss and damage to (*inter alia*) UCC. Its insurers brought a claim against the ESB alleging that it was guilty of negligence and/or nuisance in its management of its up-river dams at Inniscarra and Carrigadroid, thus causing or contributing to the flooding. UCC succeeded in the High Court (subject to a finding of contributory negligence) but ESB were successful in its appeal to the Court of Appeal.

187. On further appeal to the Supreme Court, the decision of the Court of Appeal was reversed (O’ Donnell J dissenting). Clarke CJ and McMenamin J gave a joint judgment with which Dunne and Charleton JJ agreed. In doing so they considered the UK Supreme Court

case of *Robinson* which had been concerned *inter alia* with the issue as to when a duty of care might arise to prevent harm which arises from a danger that was not created by the alleged wrongdoer, and in which the following formulation of the so-called “omissions principle” (by Tofaris and Steel in their article entitled *Negligence Liability for Omissions and the Police* (2016) 75 CLJ 128) was considered and implicitly endorsed [see para 34 of the judgment of Lord Reed]:

“[39] *In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.*”

188. In essence, the majority in the *UCC* case, adopting in part the analysis and approach of the UK Supreme Court in *Robinson* (i.e., it was accepted in *UCC* that the circumstances comprising category (iii) in the passage just quoted could justify an exception to the general rule) found that ESB owed a duty of care to UCC (and other downstream land owners and occupiers) because, in practice, it “*had a significant level of special control over water levels in the River Lee downstream of the Lee Dams*” (para 13.2). In such circumstances, there was an exception to the general principle that omissions do not give rise to tortious liability (what was alleged against ESB is that they failed to take steps sooner to reduce the levels of water building up upstream). The majority distinguished the case from *Cromane* and thought that there were no countervailing factors that would warrant excluding liability (para 13.4)

189. The dissenting judgment of O’Donnell J. is helpful in the present context for its lengthy and illuminating discussion of the circumstances in which a public body may be liable in negligence. Although he was in dissent, there is little apparent conflict between his

analysis and that of the majority at the level of principle, notwithstanding that he did express doubt as to the correctness of one of the central tenets of *Robinson* – namely that, at common law, public authorities are generally subject to the same liabilities in tort as private individuals (see in that regard the judgment of Lord Reed in *Robinson* at para 31 and following). O’Donnell J.’s judgment offers the following observations (*inter alia*):

“123 Fourth, I would respectfully share the doubts expressed by the concurring judgments in Robinson that the policy factors that lay behind some of the earlier cases can be expelled entirely, or reduced to a minor role. This is particularly so in cases concerning liabilities of public authorities and, perhaps most acutely, police authorities. It may also be doubtful that the cases in that regard can be so comprehensively re-characterised as to be understood as merely cases of omission/prevention of harm or failure to confer benefit cases where the same principle should apply, and result ensue, as if a private individual was involved.

124. Dicey's principle of equality before the law (a phrase that made its way into Bunreacht na hÉireann, but having there a rather different meaning) means, as I understand it, that there is no rigid distinction made by the common law – by which I think Dicey meant English law – between administrative law and private law, as there is in the civil law systems. A trespass by a police officer was the same as a trespass by a private individual and, as importantly, was dealt with by the same code.

125. However, I do not see that that is of decisive effect here. Equality means treating like persons alike in respect of those matters in respect of which they are alike. A state employee owes the same duty of care while driving a car as a private individual does, but unless the principle is stated as a very high level of generality, it does not help in addressing those areas where a public body is not the same as, or even like, a private

individual. No private person has the power or, as importantly, the duties of a police officer. If it is concluded that a public authority performing a public function is the same as a private individual carrying out a quite different activity for profit, so that a duty of care may arise in both cases, a judgment is being made, but for reasons not necessarily clearly articulated.

126. There are, moreover, good reasons for distinguishing between the exercise of a public law power and the carrying on of public duties, on the one hand, and private conduct on the other. The differences of functions, capacity, duty, power and nature, between a public body established pursuant to statute and, say, a private individual engaged in commerce, are all relevant to the issue which is addressed by the question of the existence of a duty of care in negligence. In the classic context of a private action between individuals, the identification of a duty of care is an important part of the tort of negligence. The function of the tort is generally to provide for the compensation of persons suffering injury or loss by reason of acts deemed wrongful in the past, but is also intended to affect, and improve, future behaviour. The use of a duty of care and liability for breach seeks to dissuade persons from engaging in behaviour that can cause unacceptable loss or damage to others, or at least to bear the cost of that activity. As Calabresi observed, if a person is held liable for the damage and loss they caused to others, this person will eventually refrain from carrying out the harmful activity. (G. Calabresi, 'Some Thoughts on Risk Distribution in the Law of Torts' (1961) 70(4) Yale Law Journal 499).

127 A private individual or business can choose to engage in an activity and alter its manner of operation if it finds it too costly to do so, or alternatively decide to absorb

the cost if that is considered preferable to the cost of avoidance, or may abstain from the activity altogether if the risks of accident and the cost of avoidance make the activity unprofitable. A public body is not necessarily in an equivalent position. For example, it cannot necessarily decide to refrain from an activity authorised, permitted, or sometimes required by statute, simply because of the potential for litigation, nor is it necessarily desirable that it should. It is still desirable that such bodies should carry out their functions carefully and avoid possible injury or loss to others, or indeed prevent harm to them, or confer benefits on them. But it is not self-evident that the same analytic structure should be applied to such a question as to a private individual engaged in activity, perhaps for profit. Indeed, it is perhaps noteworthy that Tofaris and Steel, in their article, cited at para. 95 above, make this point, albeit for the purposes of arguing that the police should be subject to liability where a private individual would not. They argued that:-

“[I]t is doubtful that the rule of law, even on Dicey's conception, is truly engaged here. The rule of law does not prohibit differential treatment of the state and private individuals if there are normatively important differences between individuals and the state which justify this. It is hard to believe that there are no normatively important differences between police officers and private individuals with respect to the suppression of crime”.

128. Finally, and in any event, it is doubtful that it is possible to take the step in this case of recasting the existing Irish law on the identification of a duty of care solely in terms of omission/failure to confer benefits or prevent harm and positive action, even if that were considered desirable. Without doubting the analytical benefit, therefore, of identifying cases which can be said to be omissions or, more accurately, failure to

prevent harm from others, I do not think it can be the sole or decisive touchstone for this case. Also, while the principle of a distinction is valid, the East Suffolk case, despite its points of contact with the present case, is not an ideal example. [The reference here is to *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, discussed at length elsewhere in the judgment.] *If, for example, the catchment board had succeeded in repairing the wall within 14 days, but had done so defectively so that the wall burst again, they would, as I understand it, be liable on the Geddis principle.* [The reference here is to the principle enunciated in *Geddis v The Proprietors of the Bann Reservoir* [1878] 3 A.C. 430.] *It is difficult to see a clear bright line distinction between such a case and what was done by the board in fact. East Suffolk must therefore be seen at best as the high water mark, as it were, of the principle.”*

Decision on the negligence issue

Mismanagement of the resource – question of fact

190. The plaintiffs’ claims in negligence, as with all such claims, are dependant in the first instance on establishing by means of evidence that the defendant(s) committed an act (or acts) and/or an omission (or omissions) sufficient to give rise to a cause of action in negligence according to the law. The factual basis for the claims being advanced in this litigation is that the defendants were collectively responsible for proper management of the seed or ground mussel resource, which is owned by the State, and that that resource was mismanaged by them during the years complained of through both acts and omissions committed by them, their servants or agents. Amongst the positive “acts” complained of was allowing greatly increased access to the fishery (especially by Northern Ireland operators)

and aggressive harvesting without any consideration for the extent and consideration of the resource and in disregard of the “precautionary principle”; allocating seed mussel tonnage quota (through SMAC in the years during which it existed, and otherwise), in the absence of any evidence as to whether this tonnage was available or not; and rolling over quota allocations from year to year despite a lack of good survey data. As far as omissions were concerned it is principally complained that there was a failure to utilise mussel seed survey strategies to obtain scientific data necessary to adequately inform their decision making about mussel seed harvesting, and potential mussel seed yields, and a failure to make allocations on an informed basis.

191. Normally at the hearing of an appeal such as the present the starting point for this court would be acceptance of the findings of fact by the trial judge, it being the law per *Hay v. O’Grady* [1992] 1 I.R. 210 that where the findings of fact made by the trial judge are supported by credible evidence, an appellate court is bound by those findings. The rationale advanced for this rule has been stated to be that:

“An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial Judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.”

[Per McCarthy J in *Hay v. O’Grady* at para 13.]

192. Sometimes, however, it will be contended on appeal, and the present case is one such case, that the findings of fact at first instance are unsupported by credible evidence, and whether this be so or not is itself a question of law to be determined in the course of the appeal. If the argument that the findings of fact at first instance are unsupported by credible evidence finds favour with the appellate court, the question then arises as to whether the appellate court can substitute new findings for those made by the court below and determine

the appeal on that basis or, alternatively, whether it must send the case back for re-trial. There is no hard and fast rule, but in general an appeal court will lean in favour of directing a re-trial where the issue(s) of fact to be determined are heavily dependent on the assessment of oral testimony (the observations of McCarthy J quoted above being apposite). However, an appellate court may be more readily prepared to re-evaluate for itself the evidence given in the court below where it is dependent or largely dependent on documentary evidence.

193. In the present case the plaintiffs contend that the trial judge's assessment of the expert evidence was incorrect and against the weight of that evidence. The plaintiffs claim that there was a clear consensus between the experts on the failure to properly manage the mussel seed resource. The trial judge had, however, found there was an honest difference of opinion between the experts and had seemed to be of the view that this difference extended to the fundamental question of whether there had been a failure to properly manage the mussel seed resource. It is conceded by the plaintiffs that there were some differences of opinion between the experts on both sides on points of detail concerning what might be required to best manage the resource; conclusions to be drawn from agreed figures, and concerning the future of the industry, but they have adamantly maintained before us that the overwhelming weight of the evidence was to the effect that it was accepted on both sides that there had been a failure to properly manage the mussel seed resource in the main respects complained of. Counsel for the plaintiffs has invited us to find that the trial judge's assessment of the expert evidence was incorrect and against the weight of that evidence, and has urged upon us that, should we be of that view, we can re-evaluate the expert evidence ourselves in circumstances where the experts' testimony merely reflected the written reports supplied in advance and which are available to this court to review.

194. I have already expressed the view, at paragraph 85 of this judgment, that the High Court's judgment creates a misleading impression that there were two competing bodies of

evidence on the issue of whether or not there had been mismanagement, and that in truth there was no dispute between the experts as to whether or not there had been mismanagement of the resource. For the avoidance of doubt, having re-evaluated the expert evidence as disclosed in the experts' reports, I am satisfied that the experts were agreed that there had not been proper management of the mussel seed resource in the main respects complained of by the plaintiffs and that the other issues arising on this appeal must be considered against that background and on the premise that the plaintiffs have established mismanagement of the resource as a matter of fact.

195. Notwithstanding that mismanagement of the resource has been established, that is not enough, in and of itself, to establish liability on the part of the defendants in negligence. They must also establish that they were individually owed a duty of care in respect of the management by the State and its agents of the ground mussel seed resource. To do so they must establish sufficient proximity in their relationship with the defendants to impute such a duty to them. Further they must be able to show that it was reasonably foreseeable that they would suffer loss and damage in the event of such a duty of care, if it was owed, being breached. In addition, the defendants being public authorities engaged in the performance of a public function, the plaintiffs must show that it is fair, just and reasonable to regard them as being subject to the of care duty being claimed.

Proximity

196. I am satisfied that the mere fact that the State is the owner of the ground mussel seed resource, and is entrusted as a public authority with its proper management having some, but by no means comprehensive, discretionary statutory powers to assist them in that regard (i.e., in the sense spoken of earlier in paragraph 26 above), would not of itself, and without more, result in a private duty of care in the matters now being complained of, being imputed and

potentially owed to the plaintiffs. It seems to me that in that situation the only possible duty of care that might be owed would be to the Irish public at large. Decisions concerning, and the exercise of discretion in matters such as, who should be allowed access to the fishery and when; the setting of quota allocations in any individual year, or over a number of years; and what, if any, mussel seed survey strategies should be utilised to obtain scientific data necessary to inform resource management decision making, involve matters such as the setting of a public policy, or operational decisions taken in the implementation of such a policy, or steps taken concerning, or in connection with, the allocation of resources. They do not comprise decisions required to be taken, or discretion exercised, in circumstances where the public authorities concerned are under a duty to act in a particular context, such as for the benefit of, or to protect, the interests of particular categories of persons such as the plaintiffs. Actions taken, or perhaps more commonly a failure or failures to act, or indeed both, in protection or furtherance of the interests of the Irish public at large, may sometimes lead to private individuals or entities suffering loss or damage and acquiring a grievance on account of it. However, such actions or omissions, even if they comprise gross mismanagement, will not be actionable in negligence at the behest of a private individual or entity absent circumstances demonstrating that a relationship of sufficient proximity existed between the public authorities and the private individual or entity in question such as would impute the existence of a duty of care owed specifically to them, and rendering it just, fair, and reasonable to impose liability on the public authorities in question.

197. In this case the plaintiffs contend that the necessary degree of proximity in their relationship with the defendants is to be found based on their dealings with relevant State entities, or their agents. Their case in that regard has already been outlined at paragraph 120 above. Counsel for the plaintiffs was pressed by a member of our bench at the appeal hearing concerning the nature of the interactions being relied upon. The evidential background to the

exchanges between counsel and the bench, which I will relate momentarily, was that there was no evidence of any express warranty having been given to the plaintiffs or having been received from the defendants concerning either the extent of available ground mussel seed stocks or likely allocations. On the contrary, the documentation prepared by, and correspondence received by the plaintiffs from the defendants, in connection with the plaintiffs' applications for NDP grant aid/FIFG assistance had stressed that "*the offer of grant aid, if accepted, does not imply any right whatsoever to future allocation of mussel seed*", and that "*the seed mussel allocation procedure is separate and distinct from the process of approval for grant aid*". Moreover, the sea fishing boat licences which the plaintiffs held similarly emphasised that those licences conferred no entitlement to any allocation of mussel seed. Against that background, there were the following exchanges:

MR. JUSTICE COLLINS: Interactions here Mr. Cush didn't involve any discussions about allocation policy or any representations with allocation policy?

MR. CUSH: No.

MR. JUSTICE COLLINS: It wasn't part of the interaction at all?

MR. CUSH: No, but what was absolutely essential to the interaction and you saw when Ms. Kelly was writing off to Brussels, she was saying it's all dependent on mussel seed. She's saying it in terms. Everybody knows it's dependent on mussel seed. The discussion about allocations went to particular allocation as being necessary for the viability of the project that you're going to grant aid. So there is not a discussion that says and you will be sure to manage properly the mussel seed, won't you. It's not done at that level, but it's absolutely the understanding between the parties in my respectful submission.

MR. JUSTICE COLLINS: There wasn't any, I'm not saying the absence of it is fatal to your case by any manner or means, but there wasn't any representation at any

stage that your clients would get a sufficient allocation to make them viable or that there would be an allocation policy that would ensure that they would get enough to be viable.

MR. CUSH: Well I think there was a discussion about the allocation that rendered it viable. There was that discussion because that's in the business plan which the Department approves. There isn't evidence in the case so far as I am aware, I might be corrected, but I don't think any witness said, and I had discussion with the official or the Minister, and you'll manage that properly now, won't you, to give me the best chance. I don't think there is that evidence. I respectfully suggest it's far from fatal. That's hardly required to impose the duty to manage properly.

MR. JUSTICE COLLINS: What you're saying is there is an assumption that it's going to be managed properly and that assumption somehow gives rise to a duty that's cognizable by private law action, that seems to me to be a big jump."

MR. CUSH: Well no it's not simply an assumption because the analysis I think is firstly to say is there sufficient proximity, proximity between my client and the Minister and is there sufficient foreseeability that if there isn't the exercise of care that it will result in damage. If you take those two as the starting points they give rise to the duty of care; proximity and foreseeability. Foreseeability I think is a given in the case ... and if you're looking at proximity ... you look at all the facts ... and then clearly I have the proximate relationship with the Department who have encouraged me into this business, encouraged me to scale it up, encouraged me to take on these liabilities, advocate it to Brussels et cetera. It's proximity, so that gets me to duty of care and then I've already been over the evidence that I suggest is breach of the duty."

198. In his somewhat Delphic response to the question posed by Collins J., counsel seemed to be saying that his clients were not proceeding simply upon assumption precisely because they were in such a proximate relationship to the defendants that they were owed a duty of care. Put another way he was saying that because his clients were in such a proximate relationship to the defendants as to give rise to a duty of care they had reason to believe that the resource would be properly managed, i.e., they were entitled to assume that that would be the case. It seems to me, however, that what matters here is not what assumption may or may not have been made by the plaintiffs, but rather whether the interactions between the defendants and the plaintiffs were such as to allow us to conclude that the defendants had, in effect, voluntarily assumed the responsibility of ensuring that the mussel seed resource would be properly managed so as not to cause foreseeable loss or damage to the plaintiffs.

199. I agree with the submission made by counsel for the plaintiffs that the trial judge's rejection of the case in negligence did not adequately engage with the evidence on the issue of whether a relationship of sufficient proximity existed to allow for the postulation of a duty of care being owed to the plaintiffs in the context of what were essentially private dealings. The trial judge's approach was to reject any contention that the State could be under a duty of care to manage the mussel seed resource in a way that protected the commercial interests of the plaintiffs, in circumstances where mussel seed was the property of the State. While State ownership of the resource was a relevant factor, the issue did not begin and end there. A very important consideration, which was not sufficiently engaged with by the trial judge, was the public function associated with its management.

200. In my view the mussel seed licensing functions being performed by the Minister and his delegates (i.e., the SMAC) cannot be equated with any private law function where a duty of care would arise. As O'Donnell J points out in his (dissenting) judgment in the *UCC* case, "*There are ... good reasons for distinguishing between the exercise of a public law power*

and the carrying on of public duties, on the one hand, and private conduct on the other. The differences of functions, capacity, duty, power and nature, between a public body established pursuant to statute and, say, a private individual engaged in commerce, are all relevant to the issue which is addressed by the question of the existence of a duty of care in negligence.”

Having now conducted the appropriate analysis, I consider that sufficient proximity such as would give rise to a duty of care specific to the appellants has not established.

201. There is no doubt but that there was evidence before the High Court that the defendants, their servants or agents, gave significant encouragement to the plaintiffs to invest in fleet improvements and in that regard to seek to avail of partial funding by way of NDP grant aid and FIFG assistance. In doing so, the defendants, their servants or agents, were seeking to further stated public policy on the promotion and development of aquaculture as set out in the National Development Plan. Moreover, in doing so they rendered active assistance to the plaintiffs in preparing and submitting their applications for such grant aid/FIFG assistance and lobbied relevant European authorities in various respects on the plaintiffs' behalf. Further, the availability of FIFG assistance was understood by both sides as being dependent on the plaintiffs ability to demonstrate the potential viability of the project to be supported, and in practical terms this meant, and was understood by all concerned to mean, that the applications were required to indicate realistic projected tonnages of ground mussels to be harvested at a level sufficient to generate enough income for the project to be viable, including covering the costs of servicing any debt incurred and of running the vessel(s) concerned. The plaintiffs say they based their projections on what they believed was achievable based on historical yields and on the assumption that in the immediate future stocks would be sufficient, subject to them receiving sufficient tonnage allocations, to enable harvesting in principle of the projected quantities of ground mussel seed necessary to ensure viability. The plaintiffs contend that the defendants, who were responsible for managing the

resource, and as such were best placed to assess likely future stocks, gave them no reason whatever to doubt that their projected figures were achievable. On the contrary, the defendants actively encouraged the plaintiffs in their investments and applications for grant aid/assistance, and in doing so would have become fully familiar with the projections on which they were being based. The point was made that the defendants never suggested to the plaintiffs that their projections were unrealistic or unachievable having regard to existing and/or likely future stocks.

202. As against that, the defendants contended that they had offered no warranties as to available stocks, or as to tonnage allocations, and moreover had sought to emphasise repeatedly that any offer of grant aid or financial assistance would not imply a right to future allocation of mussel seed. Perhaps tellingly, the plaintiffs have never at any stage made the case that the State owed them a duty to allocate them a sufficient proportion of the mussel seed stock to make them viable, or that they were entitled to any priority in mussel seed allocation. It might also be observed that I also regard it as significant in this context that counsel for the plaintiffs conceded that his clients could not tenably make a claim based on misfeasance and, in exchanges with the bench, effectively conceded further that relief by way of judicial review was not realistically open to his clients, expressing it in terms that a public law claim in respect of the day to day management of the mussel fisheries “*might be difficult*”. I will allude to these exchanges in more detail when discussing later in this judgment the issue of whether it would be just, fair and reasonable to impute a duty of care.

203. The plaintiffs are correct that the High Court judge did not engage with the detail of the evidence, a summary of which I have just rehearsed, on which it was contended that the court could find a relationship of proximity sufficient to impute a duty of care owed by the respondents to the appellants. Be that as it may, I do not find any error on the part of the trial judge. The trial judge made clear that he was taking a restrictive view of negligence “*in*

accordance with the decision in the Cromane Seafoods Ltd case". His approach can therefore be understood as being: that in circumstances where one is talking about a natural resource in public ownership, and in respect of which the State and its agents had a management responsibility (for the discharge of which the relevant Minister in this case had been provided with certain discretionary statutory powers, albeit that his toolbox was not comprehensively equipped in that respect) for the benefit of the nation and its people, it was not possible to impute a separate duty of care owed in negligence to manage the resource at issue for the benefit of private individuals who might wish to commercially exploit that resource, notwithstanding any course of dealings that might have occurred between those persons and the State or its agents. In that regard the trial judge, at paragraph 56 of his judgment, specifically referenced views to similar effect expressed by MacMenamin J. at paragraph 198 of his judgment in Cromane. In other words, in the circumstances obtaining here, regardless of what dealings there might have been between the parties, such dealings simply could not have given rise to a relationship of sufficient proximity to impute the duty of care being contended for. In my view in adopting that approach the trial judge was correct, particularly in circumstances where the sector is substantially, albeit not comprehensively, regulated by statute. Accordingly, I am satisfied that there was no obligation on the trial judge to engage with the detail or minutiae concerning the course of dealings being relied upon notwithstanding having heard extensive evidence in respect of it.

Pure Economic Loss

204. Before moving on in the next section of this judgment to consider whether, separate from any proximity issue, it could be fair, just and reasonable to hold that a duty of care was owed by the defendants to the plaintiffs, I consider it appropriate to mention that it appears to me that it is (at least) arguably the case that the plaintiffs' claims are claims in pure economic

loss.. However, in response to a question from the Court, counsel for the State made it clear that the State was not contending that any different or special principles of liability were applicable on that basis.

Would it be fair, just and reasonable to hold that a duty of care

was owed by the defendants to the plaintiffs in the circumstances of the case?

205. Even were I not of the view that no sufficient relationship of proximity could arise in the circumstances of the case, I would find the case being made by the plaintiffs to be problematic under this heading. The law is clear that in so far as the performance of a public function is concerned, more is required than the establishment of a sufficient relationship of proximity to permit the imputation of a duty of care owed to a private individual or entity. It must also be fair, just and reasonable to impute the duty of care contended for.

206. It is important to appreciate that in determining whether the imposition of a duty of care is fair, just and reasonable, one does not consider the facts and circumstances of the individual case. In that regard, and speaking for the Supreme Court in *Whelan v Allied Irish Banks plc* [2014] IESC 3, [2014] 2 IR 199 – a professional negligence claim – O’ Donnell J stated that:

*“[67] Second, the just and reasonable test in *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 is also essentially a policy consideration and it has been determined long ago that it is just and reasonable that a solicitor, or indeed any other professional advisor, should owe a duty of care in such circumstances. It is also important that the question must be approached at that level of abstraction. As Lord Browne-Wilkinson observed in *Barrett v. Enfield London Borough Council* [2001] 2 A.C. 550 at pp. 559 to 560:-*

'... the decision as to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered ... questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.'

The test does not mandate or permit a consideration of each individual case and whether the imposition of a duty of care, and therefore liability, meets some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court. In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson.

[68] If indeed it is necessary to consider afresh the question of policy then at the appropriate level of abstraction at which that issue must be addressed, it seems clear that the law has consistently and correctly held that an advisor such as a solicitor will owe a duty of care when giving advice to a client on an area within his or her

expertise and where the request for the advice, and provision of it, is neither in casual circumstances nor entirely separate from the business then being transacted.”

207. Accordingly, the test we must apply is not whether it would be fair, just and reasonable to impose a duty of care in the circumstances of this particular case, but rather whether it would be fair, just and reasonable to impose a duty of care on the Minister, his servants or agents, in respect of the exercise of the licensing functions at issue here. The mismanagement complained of in this case was committed by authorities who were engaged in carrying out an overarching public function. The question is whether, even if one were to assume the existence of a sufficient proximity of relationship between the plaintiffs and the defendants, and the foreseeability of harm, it would be fair, just and reasonable having regard to all relevant considerations to deem that the defendants owed the duty of care contended for to the plaintiffs. Stripped back to its essentials, the mismanagement complained of involved the failure to take appropriate actions to manage, conserve and rationally exploit the ground seed mussel resource as a whole in fulfilment of what was primarily an overarching public obligation, albeit that it might be postulated, as the appellants have sought to do, that a collateral or additional duty of care towards the plaintiffs specifically had been assumed by virtue of the proximity of the relationship that was said to have developed between them and the fact that it was foreseeable that the plaintiffs might individually suffer loss or damage if such a duty of care was breached.

208. The defendant's management role, which it is said was negligently performed, very much involved making policy choices about the husbandry and allocation of what was a scarce public resource and implementing those policy choices. The policy choices to be made, and decisions to be made in implementation of those choices, involved actions or omissions by public servants that were not designed or intended to benefit the interests of any specific category of persons, but rather were directed to the interests of the people of Ireland

in general. No resource management decisions were taken by the defendants, involving either action or inaction, with the specific interests of any individuals in contemplation, or which required that they be in contemplation. Further, the mismanagement complained of did not involve the type of purely administrative actions in respect of which a duty of care might more readily be extended. But for the interactions between the plaintiffs and the defendants, there could be no question of holding the defendants liable in negligence for mismanagement of the resource, because to do so would have a chilling effect on public policy making, and on the exercise of discretionary or adjudicative power in implementation of public policy.

209. In the circumstances outlined I have concluded that, regardless of the proximity of any relationship between the appellants and the respondents, it would not in any case be fair, just or reasonable to impute the duty of care contended for as having been owed by the defendants to the plaintiffs. In so holding, I am not without sympathy for the plaintiffs.

Arguably, in encouraging the plaintiffs to improve their fleets and mussel fishing capabilities, and in assisting them to apply for grant aid/FIFG assistance to that end, the defendants, as owners and managers of the mussel seed resource, assumed a duty of care to the plaintiffs to provide them with accurate information as to existing stocks and future stocks in so far as they could be projected (always bearing in mind as Dr O'Carroll had pointed out that mussel seed stocks are subject to many influences, such as climate effects, disease and predation, over which humans may have little or no control), or if they could not do so to be candid about that; and that if there was negligence leading to loss and damage, it was in allowing and indeed encouraging the plaintiffs to seek grant aid/assistance on an ill-informed basis and one which the defendants knew, or ought to have known, was unrealistic and unachievable in circumstances where the resource had not been, and was not being, properly managed.

However, that is not the case that has been made, at least in so far as the claim in negligence is concerned. The acts and omissions complained of, and which are said to comprise the

breach of a duty of care, and thus constitute the negligence alleged, relate to how the resource was managed, not to how the defendants conducted their dealings with the plaintiffs.

210. There is a fundamental difference between these two things. The plaintiffs' dealings with the defendants in the context of their planned fleet expansions and applications for grant aid/financial assistance related to their private interests, and the encouragement and the assistance rendered involved administrative action taken in regard to those private interests. In contrast the actions and omissions complained of as constituting the mismanagement of a natural resource in the ownership of the State was centrally concerned with the performance of a public obligation in furtherance of what was fundamentally the public interest.

211. I alluded earlier in this judgment to certain exchanges between counsel for the appellants and the bench concerning the nature of the duty being contended for by the plaintiffs. They occurred towards the end of day two of the appeal hearing. It may be instructive to set out those exchanges *in extenso*, :

“MR. JUSTICE COLLINS: Can I ask you this, Mr. Cush, just coming back to what you say is the duty here, the duty here is to manage the mussel stock with due care, is that it?”

MR. CUSH: Reasonable care.

MR. JUSTICE COLLINS: Reasonable care. And is it the case that, as a matter of public law, SMAC, as it has been referred to, and/or its successor, which I think was perhaps some less formally constituted body, would be under a duty to manage the mussel stock carefully? Is that a public law duty that they have?

MR. CUSH: Yes. Well, it's a duty that they have.

MR. JUSTICE COLLINS: Yes. Well, let's just focus on it as a public duty, a public law duty for the moment.

MR. CUSH: Yes.

MR. JUSTICE COLLINS: Could you, for example, have brought proceedings on the judicial review side against SMAC and/or The Minister, saying; 'You are not properly discharging your functions and duties and the way that you are not properly discharging your functions is because you haven't collected enough data in order to inform yourself and you are', to use your language, 'putting too high a proportion of the mussel stock beyond the reach of mussel farmers on this side of the border.'

MR. CUSH: Well, I wonder about that, because it is not easy to see how that set of facts would fit within the remedies available public law; certiorari, mandamus, declaration and the like.

MR. JUSTICE COLLINS: Well, sorry, could you have looked for mandamus requiring SMAC to conduct surveys or to prohibit it from making allocation decisions without first conducting surveys?

MR. CUSH: I just hesitate to say a straightforward yes to that, Judge Collins. I just think that some of the strictures of public law make that sort of a case very difficult. I could have sought saw, for example, to quash on validity grounds some of what was being done à la what actually happened ultimately, but in terms of just the day-to-day management of the fisheries, if you like, could I have brought a public law claim in respect of that, I think it might be difficult.

MR. JUSTICE COLLINS: Well, what about the other aspects of your complaints? What about the allocation of tonnage to Northern Ireland, whether by way of allowing Northern Ireland vessels into territorial waters and bringing mussels back to Northern Ireland or allowing Northern Ireland operators access to mussels farmed by Irish registered vessels, either or both of those together, would you have been in the position to say that's an unreasonable or an improper exercise, leaving aside the Article 10 point, because I think that is separate, would you be able to say; 'Well,

that's an unreasonable exercise of discretion here because, its unfair, its arbitrary, or it is tantamount to allowing overfishing.'

MR. CUSH: Well, it could possibly be framed in some of those reasonableness type arguments, failing to take into account relevant considerations, namely, you don't know how much you have and yet you are giving away large -- I mean, you could conceivably, and maybe seek to prohibit the giving away of any further stock until the proper data had been collected, it is conceivable.

*MR. JUSTICE COLLINS: Let me tell you where I am coming from so that you are not surprised by this. It seems to be, and I am not sure what way it cuts or if it cuts either way, Mr. Cush, but a question that arises is; is the private law duty that you are positing, leaving aside its consequences and its consequences are that it sounds in damages as opposed to a public law remedy, but forget the scope of the actual duty that you are positing as a private law duty here, is that actually different to the public law duty that would seem to apply in any event and if it is different, what are the consequences in terms of the Court finding that there is or there is not a private law duty, because on the one hand, there is a body of case law that says on the legitimate expectation side -- this is debated in your written submissions, both parties -- that it adds nothing to say that there is a legitimate expectation that a public body is going to apply the law, and that is the *Atlantean* and *The Atlantic Marine* case, Glan Bothair, I think.*

MR. CUSH: Hmm.

MR. JUSTICE COLLINS: On the other hand, if what you are saying involves a private law duty, that actually is quite different to, or significantly incremental to the public law duty of the body concerned, that may be be a basis for saying, well, stop,

that's not appropriate to impose an additional substantive layer of obligation, leaving aside its consequences in terms of a breach and liability to damages.

MR. CUSH: Well, that's possibly an explanation of why there are very few cases in this sphere where private remedy in damages has succeeded and, of course, I start with that.

212. The exchange just related merits particular consideration in light of the decision of the Supreme Court in *Beatty v Rent Tribunal* [2006] 2 I.R. 191, and the emphasis placed by Fennelly J in his judgment in that case [at para 66 of the report] on the availability of alternative remedies to a plaintiff, in any consideration of whether it would be just fair and reasonable to impose a duty of care on a public body sounding in damages for negligence. In the exchange highlighted above counsel for the plaintiffs was taxed with the possibility that his clients might have had alternative remedies, including the judicial review remedies of “*certiorari, mandamus, declaration and the like*”.

213. In my judgment the level of engagement with the concerns raised by Mr Justice Collins on behalf of the Court about whether the plaintiffs might possibly have had alternative remedies available to them was insufficient to allay those concerns. Counsel for the plaintiffs was inclined to resist the suggestion that the failure to maintain accurate/up-to-date data on mussel stocks could have been the subject of judicial review but, in principle, it seems to me that it could (whether by way of (i) *mandamus* that the necessary steps be taken to collect that data, (ii) *prohibition* on the issuing of licences in the absence of such data or (iii) *certiorari* of any licences issued in the absence of such data on the basis that a decision to issue such licences was *ipso facto* unreasonable or some combination of such reliefs; conceivably, declarations could also have been sought).

214. If one were to accept counsel’s asserted position – that the sort of decisions at issue were not, in practice, amenable or readily amenable to judicial review – the question arises

why not? Would that be because the Minister and their delegates were under no public law duty to manage the mussel stocks? If so, on what basis could it be fair, just and reasonable to impose a private law duty of care? If, on the other hand, it is said that, while there was such a public law duty, judicial review proceedings would have failed because it could not have been shown that the decisions were unreasonable or otherwise unlawful, what would that say as to the appropriateness of imposing a liability in damages? How could that be reconciled with the approach taken in cases such as *Pine Valley* and *Glencar Exploration*? Those decisions emphasise that the fact that a public authority has acted *ultra vires* does not necessarily (or ordinarily) result in a private law liability. But if the Minister did not act *ultra vires* here, on what basis could a private law liability arise?

215. While counsel for the plaintiffs then went on to again press his view that whether or not a private duty existed, as he was contending, depended on the particular relationship between the plaintiff and defendant in a particular case, I regarded his arguments as being not persuasive in the context of the actual case before the court. On the contrary, his concessions as to the difficulties faced by his client in anchoring the claimed private law duty of care, and his assertions (unconvincing to my mind) as to the non-availability of alternative public law remedies, served only to cement in place the views that I have already expressed that it would not be fair, just and reasonable to impute to the defendants in this case, or any of them, the private law duty of care being contended for.

216. In circumstances where, in addition to not being satisfied that the contended for proximity of relationship existed, I am further not satisfied that it would be fair, just and reasonable to impute the duty of care contended for as having been owed by the defendants to the plaintiffs, I would dismiss the claim in so far as it is based upon negligent mismanagement of the ground seed mussel resource.

Whether the court must fashion a bespoke remedy to vindicate the plaintiffs' rights?

217. At the start of this lengthy judgment I alluded to a claim in the alternative being made by the plaintiffs to the effect that if this court considered that they could not recover in negligence (or within some other recognised category of action at common law which they had pleaded) it must vindicate their constitutional rights by fashioning a bespoke remedy for them. It is necessary at this point to engage with this contention.

218. The starting point in doing so must be principles outlined by McKechnie J in *Blehein v The Minister for Health and others* [2018] IESC 40. He stated:

“57. The following principles can be deduced from the case law ...:

(i) It is generally accepted that in the vast majority of cases, a breach of constitutional rights will give rise to a remedy for the resulting loss, causatively arising: there will be some limited situations where for policy reasons this will not necessarily be so.

(Murphy v. A.G. [1982] I.R. 241: A v. Governor of Arbour Hill Prison [2006] 4 I.R. 88).

(ii) On the principle of ubi jus ibi remedium (‘for every wrong, the law provides a remedy’) the court itself may be called upon to create and define such a remedy, but only where this becomes necessary. In so doing, the court would be exercising its judicial power, as the organ of the state ultimately responsible for the enforcement of constitutional rights. However, it will be called upon to do so only in very rare circumstances.

(iii) The “necessity” referred to is very much a fallback position; it will only come into play if a cause of action at common law is not available to vindicate the right which has been breached, or is otherwise inadequate or ineffectual to that effect. This is how Byrne v. Ireland and Meskell v. C.I.É. should be read, as, when speaking the passage above quoted (paras. 43 & 45 above), Walsh J. was dealing with special or

exceptional cases which by their nature, stood isolated from and external to, actions within the general body of the common law.

(iv) Accordingly, the first task in any such exercise is to examine the facts as alleged, and ascertain whether such can be identified within the general corpus of the common law, for if they can, as a great number will be, that cause of action will provide an adequate vehicle by which to vindicate the antecedent constitutional breach.

(v) Classification of the asserted cause of action will not depend on how it is pleaded: it will depend on the true nature of the claim and the type of relief sought for any causative loss which has occurred. Thus seeking damages for a breach of constitutional rights, simpliciter, will not of itself take the case outside the general principles herein outlined. Howsoever termed or phrased, it is the substance which is of importance.

(vi) If, having conducted such an examination, the facts and circumstances set out fall within a recognised category of action at common law, then the issues pleaded, always to be considered against the backdrop of a constitutional violation, must be determined within those parameters. This means that in whatever way the action is circumscribed at common law, such features will equally apply to the action in question.

(vii) If, however, in the rare and exceptional case the suggested cause of action cannot be so classified, or as stated, cannot attract an appropriate or effective remedy, then the court, in the discharge of its constitutional obligation, will create a means by which to vindicate the loss established.

For clarity, I should add that if an appropriate cause of action with a suitable remedy could be found within equitable principles or in statute law, such would equally suffice.”

219. It will be apparent from this quotation that the jurisdiction of this court to fashion a bespoke remedy for the plaintiffs can only be engaged if the wrongful conduct being complained of constitutes a breach of a plaintiff’s constitutional rights, and a cause of action at common law is not available to vindicate the right which has been breached, or is otherwise inadequate or ineffectual to that effect.

220. The first enquiry must therefore be whether the conduct complained of in this case, namely the failure by the defendants to properly manage the State’s ground seed mussel resource, and further the encouragement of the plaintiffs by the defendants to invest in improving their fleets through a combination of borrowing and availing of grant aid/financial assistance, in circumstances where the defendants knew or ought to have known that the available seed mussel stocks were likely to be insufficient to viably sustain such an investment, amounted to the breach of a constitutional right or rights enjoyed by the plaintiffs. Unless an identifiable constitutional right (or rights) enjoyed by the plaintiffs is considered to have been breached, there can be no question of the jurisdiction to fashion a bespoke remedy in furtherance of the maxim *ubi jus ibi remedium* being engaged.

221. In that regard, the counsel for the appellant advanced the following case on day one of the appeal hearing:

“... what I just want to suggest is that my clients definitely have constitutional rights: They have property rights in their boats; they have property rights in their aquaculture sites; they have property rights in their allocations, which the evidence was clear to the effect that those allocations enhance the value of their aquaculture sites; and of course they have a right to earn a livelihood and carry on the business,

which was alluded to but not analysed. So there is a whole series of constitutional rights in play and I respectfully suggest that that's unanswerable in the case but in fact not so found."

222. In so far as the claim is based on alleged breaches of property rights it was clarified or nuanced by counsel for the plaintiffs at the appeal hearing that his case in that regard was that his clients' property rights were diminished in value by reason of mismanagement of the ground mussel seed resource. He further clarified that in so far as the State's failure to comply with Article 10 of the Constitution was concerned it did not represent a breach of his clients' property rights *per se*. However, the invalidity of what was done, namely allowing Northern Ireland registered boats unrestricted access to fish in Irish territorial waters other than in accordance with a provision in law allowing for that, was an additional feature in the case, and a feature that had facilitated the breaching of the plaintiffs' property rights by mismanagement of the fishery in that and other respects, resulting in diminution in the value of the property rights concerned.

223. In my judgment the evidence adduced before the High Court fell far short of establishing a diminution of the property rights being relied upon as a direct consequence of the mismanagement complained of. The trial judge made the following findings of fact [at para 46 of his judgment] based on the evidence before him:

"(a) Had vessels registered in Northern Ireland not been fishing for mussel seed in the territorial waters, there would have been additional mussel seed available for the plaintiffs and other vessels licensed by the State.

(b) There was insufficient evidence to quantify how much of the mussel seed made available by the absence of Northern Ireland registered vessels would have been fished by the plaintiffs. Further, account would have to be taken of the extra amount

that could be fished by vessels other than the plaintiffs registered in the State and new entrants into mussel seed fishing.

(c) Though the manner in which the allocations of mussel seed to the various plaintiffs were made may be open to criticism, the evidence shows that, for the most part, the amount of mussel seed fished by each of the plaintiffs fell short of their respective allocations.

(d) Even if it were established that the first named defendant failed to manage the mussel seed resource appropriately, there was no evidence to quantify this. Indeed, an aspect of good management as proposed by the plaintiffs would have led to a closure of areas for mussel seed fishing which would have led to a reduction in the amount fished.”

224. I find no error on the part of the trial judge in so finding. On the evidence before him, or more accurately having regard to the lack of evidence before him tending to demonstrate that the plaintiffs’ property rights had been quantifiably diminished in value, those findings were open to him and are unassailable on this appeal. In circumstances where there is insufficient evidential support for the contention that the plaintiffs’ property rights were breached in the manner alleged by them, the jurisdiction of this court to provide them with a bespoke remedy in vindication of those rights has not been engaged.

225. However, there is an even more fundamental problem with this aspect of the plaintiffs’ case. No breach of any constitutional rights of the plaintiffs has been established. Even if a diminution of/adverse impact on the plaintiffs’ property rights was established on the evidence, that is not enough to give rise to a claim. The “bespoke remedy” is not available simply because you have failed to establish a claim in tort. Otherwise, every litigant who failed in a claim in negligence against the State would be able to recover in a constitutional claim.

226. In his judgment for the Supreme Court in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, McMenamin J. cautioned that it needs to be borne in mind that:

“...the courts have repeatedly emphasised that resort to constitutional remedies should take place only where strictly necessary. As Barrington J. pointed out in McDonnell v. Ireland [1998] 1 I.R. 134, at p. 138, only if necessary will the courts define a right and fashion a remedy for a breach of the Constitution. There may be cases where the fact that a tort is also the violation of a constitutional right may give rise to an award for exemplary or punitive damages. But, as Barrington J. warned, constitutional rights should not be seen as “wild cards” to be played at any time to defeat all existing rules (p. 148). If the general law provides an adequate cause of action to vindicate a constitutional right, an injured party cannot ask a court to devise a new and different cause of action.”

227. The fact that a plaintiff has failed to establish liability does not in itself suggest that existing tort law is inadequate. Irish tort law provides various avenues of redress – misfeasance claims, negligence claims in certain – albeit limited – circumstances. I ask rhetorically, on what basis is it said that these remedies are inadequate other than that if the plaintiffs don’t win they are *ipso facto* inadequate? I am satisfied that no cogent basis for contending that existing Irish tort law is inadequate has been advanced.

228. In so far as the claim of a breach of the plaintiffs’ right to earn a livelihood is concerned, the trial judge rejected that there had been any breach of that right in circumstances where mussel seed was the property of the State and not the property of the plaintiffs. The trial judge found support for his view in that respect in the decision of the Supreme Court in *Casey v Minister for Arts* [2004] 1 IR 402, where Murray J had stated:

“To engage in ... a lawful business activity for the purpose of earning a livelihood is something which a citizen is entitled to do as of right. It is self-evident that the right to

carry on such a business does not entitle the citizen to have access, as of right, to the property of third parties and use it for business purposes. It does not matter whether the property ... is privately owned or owned by the State”

229. I find no error on the part of the trial judge in his approach to the claim that the plaintiffs’ right to earn a livelihood had been breached as a result of mismanagement of the ground mussel seed resource. He was correct in holding that the right in question was not breached. Once again, in circumstances where the plaintiffs have failed to demonstrate breach of a constitutional right relied upon, the jurisdiction of this court to provide them with a bespoke remedy in vindication of that right has not been engaged.

Overall Conclusion

230. The appeal should be dismissed.

(Power and Collins J.J. both indicated their agreement with this judgment.)

APPROVED JUDGMENT