

THE HIGH COURT

[2023] IEHC 603

[Record No. 2020/ 999JR]

BETWEEN:

**NOEL MCDOWELL, KILLYBEGS FISHING ENTERPRISES
LIMITED, KILLYBEGS SEAFOODS UNLIMITED, AND THE
KILLYBEGS FISHERMEN’S ORGANISATION LIMITED**

APPLICANTS

AND

SEA FISHERIES PROTECTION AUTHORITY

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 3rd day of November, 2023

INTRODUCTION

1. These proceedings concern the lawfulness of the control measures adopted by the Respondent (hereinafter “the Authority”) in furtherance of its obligations under the Common Fisheries Policy (hereinafter “the CFP”) of the European Union at Killybegs Port in October, 2020 to weigh fish on landing. Under the control measures in issue a catch was required to be weighed (hereinafter “monitored weighing on landing”) in the presence of an official of the Authority prior to transport from the place of landing. At that time, the State had the benefit of a “*control plan*” by way of derogation agreed with the European Commission (hereinafter “the Commission”) in 2012 (and since rescinded in April, 2021) which permitted the weighing of pelagic species of fish (including mackerel and herring) at authorised premises after transportation.

2. The issues which now arise for determination concern the exercise of a power to require a monitored weighing on landing at the pier-side notwithstanding the existence of a derogation which permitted weighing at an authorised premises after transportation.

BACKGROUND

3. The first named Applicant (hereinafter “the Master”) is a fishermen and professional fishing boat skipper or Master and he was, at the time of commencement of the within proceedings, one of the Masters of the Irish registered fishing vessel, the MFV Atlantic Challenge (hereinafter referred to as "the Vessel"). The second named Applicant is a limited liability company engaging in the business of capturing and selling fish. It is the registered owner of the Vessel, and it holds a sea fishing licence for the Vessel (hereinafter “the Owner”).

4. The third named Applicant is an unlimited liability company engaging in the business of buying, processing, and marketing fishery products (hereinafter “the Buyer”). It is one of the shareholders in the second named Applicant, and is dependent on, *inter alia*, the fishery products landed by the Vessel as raw material for its business. The Buyer operates a fish processing facility based in Killybegs equipped with a flow-scales. At all material times this instrument held the required certificate confirming its compliance with national metrology requirements. The Buyer owns a factory premises equipped with an approved flow-scales. The permit which issued to the Buyer authorising the weighing of fishery products following transfer to the Factory is endorsed with conditions and recites:

“The weighing of fishery product as stated in Council regulation (EU) No 1224/2009, article 60(6) may be conducted in the course of conducting official controls.”

5. The fourth named Applicant is a representative organisation and recognised fish producer organisation formed to represent and defend the interests of the fishing industry operating out of Killybegs and fishing the waters around the island of Ireland.

6. Until 2020, the standard weighing practice operated in accordance with a derogation agreed with the Commission through the terms of the Irish Control Plan (hereinafter “the Control Plan”) in place from 2012 was that the catch was stored on board the vessel in refrigerated sea water (RSW) and transported, still in sea water, to a fish processing facility holding a permit under the Control Plan and equipped with a flow scale (or conveyor belt weighing system) certified as compliant with national metrology requirements. There the fish were sorted by species and weighed. The use in this way of the flow scales for the weighing of fishery products such as mackerel was said to be essential by the Applicants for the preservation of the quality, freshness and value of the fish during the weighing process as it minimised damage caused by crushing/bruising (under column of fish) or temperature variation by

permitting the fish to remain in refrigerated water for the purpose of transportation to the factory premises where dewatering, sorting and weighing would occur. There is conflicting evidence as to the extent to which the Applicants are correct in this contention and it is the Authority's position that it is possible to mitigate the effects of "*de-watering*" in the weighing process to minimise impact on quality, freshness and value when weighing does not take place at a factory premises.

7. In the Irish pelagic fishing fleet, the two highest risk categories are '*medium*' and '*high*'. Until February, 2020, the Authority met its obligations under the Commission Implementing Regulations to ensure that at least 7.5% of the quantities landed for listed pelagic species at least 5% of the landing are fully inspected, by carrying out such inspections in factories after the catch had been transported from the place of landing. Such inspections by the Authority involved the monitor of trucks transporting the catch from the vessels to the factory. At the factory, the Authority witnessed the weighing of a vessel's catch over the factory's weighing system and verified the species being weighed. From time to time a '*carton count*' would be conducted which involved counting the cartons of fish being packed after weighing and grading.

8. Notwithstanding the derogation provided for in the Control Plan, the Authority maintains its entitlement to weigh fish on the pier immediately on landing under supervision as a control measure. It seems to be common case, however, that until a change of practice announced in December 2019, it did not exercise this entitlement. A change in practice in relation to the exercise of the power appears to have been prompted by concerns regarding the operation of Ireland's Control Plan as subsequently referred to by the Commission in its later decision to revoke the Control Plan. These concerns appear to have arisen from irregularities detected, some of which had resulted in prosecutions and a conviction before Donegal Circuit Criminal Court and prompting an Administrative Inquiry by the Authority at the request of the Commission (and subsequently an audit by the Commission). Against this background the Authority announced the introduction of a policy requiring a percentage of inspections to be carried out on landing which would involve weighing the catch over the pier side weighbridge at Killybegs and other designated ports for landings of pelagic fish of more than 10 tonnes before transport.

9. In its announcement by letter dated the 12th of December, 2019, addressed widely to affected persons throughout the fishing industry, the Authority stated:

“The weighing of catches prior to transport from the place of landing is required under EU Regulations. Compliance with this requirement involves the weighing of catches as may be directed by Sea Fisheries Protection Officers in the course of a landing inspection.

From the initiation of the 2020 Spring Pelagic Fisheries, the Sea-Fisheries Protection Authority is directed to introduce additional specific measures of control for landings of pelagic species prior to transport from the initial place of landing.

These measures, in addition to current control requirements, are set out in the recommendations of an audit conducted by the European Commission in relation to pelagic fisheries controls. Current regulations require that all catches being transported to locations outside the State prior to first sale are weighed upon landing. This measure will now be obligatory in relation to a percentage of catches of pelagic species being landed in the State.

Masters of vessels who are requested to undertake controls at landing as stated in Council Regulation (EC) No 1224/2009, article 60 will receive a written notification from an inspecting Sea-Fisheries Protection Officer who will direct that weighing prior to transport from the place of landing is required.

The dewatering of catches prior to such weighing will be the responsibility of the operator, and the SFPA may facilitate the use of water separation equipment. During such weighing operations an allowance of 2% for water will be deducted from the weights obtained. The resultant figure will be deemed the Official Weigh Record and will be the only figure that will be entered on the Official Pelagic Weigh Record documentation, all associated catch documentation, and recording systems used for recording of weighed catches.

SFPA staff will ensure that the weighing operation at landing prior to transport is completed in an efficient manner. We ask for the full co-operation of operators, which is necessary to facilitate and expedite the process.

The derogation that permits weighing of fishery products after transport in permitted establishments will continue in tandem to the procedures stated above. Controls in these establishments will continue, to ensure compliance with legislation and weigh permit conditions.”

10. The Authority explains on affidavit in these proceedings that weighing on landing controls were considered preferable and more reliable because they allowed for the weighing of fish at a neutral venue rather than at a factory which is controlled by fish processors and furthermore, such controls could be run more efficiently from the Authority's perspective. It seems likely however, that the Commission considered such weighing more reliable in view of its later expressed view that its audit revealed evidence of “*manipulation*” of weighing systems.

11. While the Authority announced a new departure in terms of its practices in this letter, the powers it proposed to exercise were pre-existing powers. Perhaps because of the failure to exercise these powers in the past, however, there was an apparent underdevelopment of systems and infrastructure on the pier to allow a weighing of fish in a manner which optimised the value of the fish to the fishing industry whilst also ensuring accuracy. Steps to develop systems were taken in 2020 with plans to install a flow-scales on the pier being advanced. By October, 2020, however, the fruits of these plans had not yet been fully realised at Killybegs Port. At that time a monitored weighing on landing, absent other measures, still involved the use of a weighbridge, where the vehicle, trailer, or receptacle into which the fish was to be unloaded, was weighed empty first, then loaded, and weighed again. In the case of an RSW fishing vessel fishing for mackerel therefore, when the fish were discharged from the vessel, the fish were pumped from the hold of the vessel into the trailer. The weighbridge in Killybegs, while a part of the Port infrastructure, is the property of the Department of Agriculture, Food and the Marine. The weighbridge is only capable of weighing the receptacle placed on top of it, and the weight of the contents of the receptacle is obtained by the classic technique of weighing the receptacle loaded and empty. Thus, if water is not separated from the fish, the resulting weight includes fish and water.

12. To facilitate the implementation in the change in practice announced in December, 2019, the Authority arranged for a water separator or “*hopper*” to be reconditioned at

considerable expense and made this separator available for use on the pier-side in Killybegs to address the problem of the inaccuracy recognised as flowing from weighing fish which has not been “*dewatered*”. For its part, the Applicants and wider fishing industry in Killybegs objected to the use of the water separator made available by the Authority for a variety of reasons including a claim that it was not maintained or preserved to a standard of hygiene, or cleanliness such as to permit it to be used, from a food safety perspective, in the food processing chain. It did not bear the CE mark nor was it quality certified. Logistical issues in relation to the transportation of the separator so that it could be used to dewater the fish prior to weighing have also raised on behalf of the Applicants but are disputed by the Authority. It is the Authority’s position, however, that while it took the step of making the water separator available for use, the responsibility for separating fish to ensure accurate weighing in accordance with the applicable legal requirements rests with the operator/buyer. As such they maintain that there was no obligation to use the water separator and the operator/buyer had the option of adopting other means or arrangements for separating the fish to ensure accurate weighing.

13. The immediate background to these proceedings is that notification of the impending arrival of the Vessel was given by the Master to the Authority by the communication of a “*Prior Notification of Arrival*” (or “*Hail Notice*”) in accordance with Article 17 of Council Regulation (EC) No. 1224/2009 (known generally as “*the Control Regulation*” and so referred to below) on the evening of the 11th of October, 2020. The electronic logbook returns made by the Master of the Vessel pursuant to Article 14 of the Control Regulation logged a catch of 3,000 kg of herring and 450,000 kg of mackerel between the 8th and 12th of October, 2020.

14. According to the Authority, the Vessel was then selected for inspection and a monitored weighing on landing control pursuant to Article 60(6) of the Control Regulation based on the then belief, from a review of the Authority's Integrated Fisheries Information System (“IFIS”), that the Vessel had not been subject to a full inspection for two years. It is further deposed that the selection of the Vessel was also informed by the obligation on the Authority under Article 107 of the Commission Implementing Regulation to ensure that 60% of landings inspected were belonged to the fleet segments in the two highest risk level categories identified. In 2020, the highest two categorisations of risk for vessels in Ireland were medium risk and high risk. The Vessel was in the medium risk category and therefore qualified for inspection with reference to the 60% benchmark.

15. It has subsequently transpired during these proceedings and upon further investigation that the belief that the Vessel had not been inspected for 2 years was incorrect and was caused by a computer logging error whereby the Authority failed to properly record an inspection occurring on the 27th of January, 2020 involving a weighing scale monitor and carton count at the Buyer's factory as a "*full inspection*". The Authority maintains that this error did not undermine its selection of the Vessel for inspection and relies on powers to inspect on a random basis.

16. While there is some dispute between the parties as to the detail of what transpired on the 12th of October, 2020, on arrival of the Vessel in the Port of Killybegs and thereafter, particularly as to the detail of what was said and also in relation to the impact of dewatering of a pelagic catch for the purpose of monitored weighing on landing, the following appears either to be common case or, if not agreed, has been established to my satisfaction on the evidence before me:

- I. The Vessel was boarded by officers of the Authority shortly after 08:00 am, pursuant to the powers of the same under the Sea Fisheries Jurisdiction Act, 2006 [hereinafter "the 2006 Act].
- II. The Master was informed that the Vessel had been selected for a supervised landing and he was served with a "*Notice to Weigh on Landing*" requiring that the fisheries products on-board be weighed on landing prior to transport pursuant to Article 60(6).
- III. In the said "*Notice to Weigh on Landing*", it was stated that the Authority:

"require that fishery products landed from the landing referenced above are weighed in accordance with Council Regulation (EC 1 1224/2009 Article 60 (6) 'The competent authorities of a Member State may require that any quantities or fisheries products first landed in that Member State is weighed in the presence of officials before being transported elsewhere from the place of landing'.

It was further stated:

“the operator responsible for the weighing of fishery products shall ensure that all fishery products are dewatered prior to weighing on a calibrated weighbridge scale. The legal allowance permitted for water and ice in pelagic products for human consumption landed in bulk is a maximum deduction of 2% from the total weight. There shall be no deduction for water or ice for landings of pelagic products for non-human consumption. The operator responsible for the weighing of fishery shall ensure that the figure resulting from the weighing shall be used for the completion of the official weigh record and associated documentation (Landing Declarations, Transport Document and Sales Notes). The operator weighing fisheries products prior to transport from the place of landing shall record the weighing carried out as required in Regulation 404/2011 Article 70(1). This shall be undertaken using the SFPA official pelagic weigh record to detail the weighing undertaken.”

- IV. The officers of the Authority informed the Master and the Buyer that they required the entire catch to be weighed over the weighbridge on the pier as part of a controlled weighing.
- V. The Master and Buyer expressed unhappiness with this on the basis that they would be weighing water as fish as the fish would not be separated.
- VI. The use of the Authority's water separator was offered but its use was declined.
- VII. The Authority was asked to dip the tanks on board and to carry out full inspection at a factory weighing but the Authority refused this request.
- VIII. Discharge of the catch was authorised pursuant to Article 81 of the Control Regulation on the condition of compliance with the *“Notice to Weigh on Landing”*.
- IX. The Master and Buyer were advised by the Authority that the final weight from the weighing on the weighbridge was the official weight to be used for the completion of the landing declaration and sales note. They were further advised that the responsibility to dewater and weigh the fish accurately lay with the operator.
- X. The monitored weighing on landing proceeded on the express basis that it was *“under protest”* with empty adapted bulk tankers being weighed over the

weighbridge and then being filled with catch from the Vessel and then reweighed full. This occurred 18 times in total.

- XI. The Buyer operated the weighbridge following advice on how to operate it from the Authority's inspectors.
- XII. The fish were not dewatered after being discharged from the Vessel and prior to weighing over the weighbridge.
- XIII. An Official Pelagic Weighing Record ("OPWR") was completed by the Buyer marked with the words "*under protest*" in respect of the weighing operation on the pier.
- XIV. The weighing was witnessed on behalf of the Authority and copies of the weigh slips generated during the weighing were retained by the Authority.
- XV. Concerns regarding the accuracy of the monitored weighing on landing were raised in writing on behalf of the Applicants during the control and even before it had concluded.
- XVI. The mackerel weight recorded from the weighbridge was 508,995kg following a deduction from the overall weight of the fishery product and water weighed of 2% (which percentage is provided for by law under the Commission Implementing Regulations) and less the weight of the herring caught. Weights for herring and mackerel were recorded by the Buyer in the OPWR for the weighing performed on the weighbridge even though the species were not weighed separately on the weighbridge. The weight recorded for herring was the weight obtained upon factory weighing when the fish were separated and sorted.
- XVII. On arrival at the factory premises in Killybegs the catch was weighed again over the certified flow scales. The factory weighing was not supervised by the Authority in person but there was a live video feed of the operation of the flow scales.
- XVIII. The documentary records maintained in respect of the weighing, packaging and processing of the fishery products discharged by the Vessel at the Factory over the 12th and 13th of October, 2020 were not inspected by the Authority.
- XIX. The Authority was formally put on notice of the Applicants' intention to use the figures obtained at the Factory on the official records generated which they contended were more accurate. The figures for mackerel and herring landed by the Vessel were ultimately recorded, after weighing over the certified flow

scales in the Third Named Applicant's approved facility, as 449,985 kg of mackerel and 12,189kg of herring and these figures were recorded in the Buyer's copy of the OPWR book maintained at its factory. This OPWR record has a different serialised reference number to that used on the pier such that there are two OPWR records in being.

- XX. There is a differential of some 11-12% between the weight for mackerel recorded from the weighbridge on landing and that recorded on the flow scales at the Factory.
- XXI. The flow scale figures and not the monitored weighing on landing figures were reported by the Buyer on the sales note submitted through the relevant online portal operated by the Department of Agriculture, Food and the Marine.
- XXII. The same figure was used to complete the landing declaration by the Master of the Vessel even though he was advised that the weights recorded in the monitored weighing on landing should be used.
- XXIII. In consequence, there is a discrepancy between the figures reported by the Authority to the Commission and the figures reported by the Master and the Buyer to the Department of Agriculture, Food and the Marine.
- XXIV. By email dated the 30th of October, 2020, the Master was called to the offices of the Authority in Killybegs for a meeting on the 3rd of November, 2020 in order to carry out a final "*inspection meeting*". The email specifically referred to the commission of two "*suspected offences*" alleged to consist of (i) not using the figure resulting from the monitored weighing on landing in order to complete a landing declaration, sales note or take over declarations, and (ii) exceeding the permitted margin of tolerance for the logbook entries as compared with the landing declaration.
- XXV. In subsequent *inter partes* solicitors' correspondence it has been confirmed that an investigation file has not yet been referred to the DPP in respect of this matter but the Authority was not in a position to confirm that no further action would be taken as this would be contrary to its obligation pursuant to Article 89 of the Control Regulation.
- XXVI. It has been confirmed on behalf of the Authority that the Authority has reported the figure resulting from the monitored weighing on landing to the European Commission under Article 33 of the Control Regulation.

17. It is common case that the monitored weighing on landing did not give an accurate weight as the fish had not been dewatered. It is not in dispute that a by-catch of herring was not sorted from the mackerel catch and separately weighed over the weighbridge on landing under supervision by the Authority.

LEGISLATIVE REGIME

Sea Fisheries Jurisdiction Act, 2006

18. The Authority is an independent body established pursuant to the provisions of the 2006 Act. The principal functions of the Authority are set out in s. 43 of the 2006 Act (as amended) including to secure the efficient and effective enforcement of sea fisheries law and to secure compliance with and deter contraventions of sea-fisheries law. The Authority is designated by s. 2 of the 2006 Act to perform the functions assigned pursuant to, *inter alia*, ss. 12 and 13 of the said Act to regulate and control the exploitation of the fishing opportunities in the waters of the Irish Territorial Sea and, to a more limited extent, the Irish Exclusive Economic Zone (hereinafter the “EEZ”). It is also the primary control authority in Ireland for ensuring compliance with the rules of the CFP.

19. Section 11 of the 2006 Act criminalises contraventions of the CFP including (under s. 11(5)) a failure to comply with obligations imposed in relation to weighing or documenting fish. Under s. 14(4)(b) of the 2006 Act the burden is on the accused to show that it was not possible to ascertain that a regulation was being breached.

20. Section 17 of the 2006 Act provides for a broad power on the part of a Sea Fisheries Protection Officer to stop and search any person believed to be conveying sea fish of any kind and to inspect the fish. Section 17 expressly provides for a power on the part of a Sea Fisheries Protection Officer to verify the accuracy of the information in any document or record which relates to the CFP (s. 17(1)(d)) and to check the weight of fish (s. 17(1)(e)).

Regulation of the Weighing of Fish under CFP

21. While the 2006 Act is the primary Irish legislation providing for the control of fishing and makes provision for powers to check weights and instruments used in weighing and to

verify the accuracy of documentation, the detailed legislative regime pertaining to the weighing of fish under CFP is contained not in the 2006 Act but in the three legislative measures which put in place a control system for ensuring compliance with CFP, namely:

- (i) Council Regulation (EC) No. 1224/2009 known generally as “the Control Regulation”;
- (ii) The European Commission’s Implementing Regulation (EU) No 404/2011 of the 8th of April, 2011 as amended by Commission Implementing Regulation (EU) 2015/1962 of the 28th of October, 2015 known as the “Commission Implementing Regulation”; and
- (iii) the Sea-Fisheries (Community Control System) Regulations 2016 (S.I. No. 54 of 2016) which are domestic implementing regulations.

22. Most important of these measures is the Control Regulation, already referred to above. It is the primary applicable measure of EU law and establishes a control system for ensuring compliance with the rules of CFP aimed at providing for the sustainable exploitation of living aquatic resources. As noted by Simons J. in his judgment in *Pelagic Weighing Services Limited v. Sea Fisheries Protection Authority* [2021] IEHC 345 one of the objectives of the Control Regulation is to give effect to the policy of allocating fishing quotas as between Member States. To achieve adherence to these quotas, the Member States are obliged to ensure that fisheries products are weighed. Detailed provision is made for weighing in the terms of the Control Regulation, as a measure of primary legislation, and Commission Implementing Regulations as a measure of secondary legislation.

23. To properly construe the reporting obligations which flow when a monitored weighing on landing has occurred at a time when a derogation from a requirement to weigh on landing exists, it is necessary to consider these provisions in greater detail.

Council Regulation (EC) No. 1224/2009 / the Control Regulations

24. Article 5(1) of the Control Regulation provides for control measures as follows:

“1. Member States shall control the activities carried out by any natural or legal person within the scope of the common fisheries policy on their territory and within waters

under their sovereignty or jurisdiction, in particular fishing activities, transshipments, transfer of fish to cages or aquaculture installations including fattening installations, landing, import, transport, processing, marketing and storage of fisheries and aquaculture products.”

25. As appears, it is the Member State who is to control the activities carried out by any natural or legal person within the scope of the common fisheries policy on their territory and within waters under their sovereignty or jurisdiction. Article 5(3) of the Control Regulation continues as follows:

“3. Member States shall adopt appropriate measures, allocate adequate financial, human and technical resources and set up all administrative and technical structures necessary for ensuring control, inspection and enforcement of activities carried out within the scope of the common fisheries policy. They shall make available to their competent authorities and officials all adequate means to enable them to carry out their tasks.”

26. Under Article 5(5) of the Control Regulation, a Member State is required to designate a “single authority” as follows:

“5. In each Member State, a single authority shall coordinate the control activities of all national control authorities. It shall also be responsible for coordinating the collection, treatment and certification of information on fishing activities and for reporting to, cooperating with and ensuring the transmission of information to the Commission, the Community Fisheries Control Agency established in accordance with Regulation (EC) No 768/2005, other Member States and, where appropriate, third countries.”

27. The Authority was designated as the single authority in Ireland as required pursuant to Article 5(5) of the Control Regulation and Article 46 of Commission Implementing Regulations by Regulation 3 of the Sea-Fisheries (Community Control System) Regulations 2016 (S.I. 54 of 2016).

28. Various provisions of the Control Regulation address the responsibility for accuracy of records and a duty to record weights. Specifically, Article 14 requires that the master of a vessel maintain a fishing logbook. Under Article 14(2)(f) it is mandated that the logbook contains the estimated quantities of each species of fish caught in kilograms live weight with a permitted margin of tolerance in estimates recorded in the logbook under Article 14(3) of 10% for all species. Under Article 14(9) of the Control Regulation the accuracy of the data recorded in the fishing logbook shall be the responsibility of the master. Separately, Article 17 provides for a requirement to give prior notification of landing (referred to above and during submissions as the “*hail*” notification) at least four hours before the estimated time of arrival at port giving prescribed information. Under Article 17(1)(e) and (f) of the Control Regulation prescribed information includes the quantities of each species recorded in the fishing logbook and the quantities of each species to be landed or trans-shipped. Under Article 17(5) the accuracy of the data recorded in the electronic prior notification shall be the responsibility of the master. In similar terms, Article 23 requires the completion and submission of a landing declaration. Under Article 23(2)(c) the landing declaration must record the quantities of each species of fish caught in kilograms in product weight. Article 23(4) provides that the accuracy of the data recorded in the landing declaration shall be the responsibility of the master. The landing declaration must be submitted not later than 48 hours after the completion of the landing.

29. Post landing activities are subject to further regulation in Chapter II of Control Regulation. Like Articles 17 and 23, Article 62 requires the completion of a sales notice by, *inter alia*, the registered buyer. Article 62(1) provides that the accuracy of the sales note shall be the responsibility of the person completing the notice, in this case the registered buyer. Article 64 prescribes the contents of the sales notes and requires under Article 64(1)(f) that the sales note provide details of the quantities of each species sold in kilograms in product weight. Article 68 provides for the completion of a transport document in certain circumstances and requires that the transport document indicate the quantities of each species transported in kilograms in product weight and places responsibility for the accuracy of the document on the transporter.

30. The provisions of the Control Regulation of most immediate relevance to these judicial review proceedings are those at Article 60 and Article 61 which provide for weighing of fishery products. These provisions draw a distinction between (i) the weighing of fisheries products

on initial landing, i.e. prior to their being held in storage, transported or sold; and (ii) the weighing of fisheries products after transport from the place of landing. Article 60 provides specifically for the weighing of fishery products and warrants being set out in full. It provides:

“1. A Member State shall ensure that all fishery products are weighed on systems approved by the competent authorities unless it has adopted a sampling plan approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.

2. Without prejudice to specific provisions, the weighing shall be carried out on landing prior to the fisheries products being held in storage, transported or sold.

3. By way of derogation from paragraph 2; Member States may permit fisheries products to be weighed on board the fishing vessel subject to a sampling plan as referred to in paragraph 1.

4. Registered buyers, registered auctions or other bodies or persons which are responsible for the first marketing of fisheries products in a Member State shall be responsible for the accuracy of the weighing operation unless, in accordance with paragraph 3, the weighing takes place on board a fishing vessel, in which case it shall be the master's responsibility.

5. The figure resulting from the weighing shall be used for the completion of landing declarations, transport document, sales notes and take-over declarations.

6. The competent authorities of a Member State may require that any quantity of fisheries products first landed in that Member State is weighed in the presence of officials before being transported elsewhere from the place of landing.

7. Detailed rules on the risk-based methodology and procedure of weighing shall be established in accordance with the procedure referred to in Article 119.”

31. Providing for derogation from a default obligation to weigh on landing under Article 60(2), Article 61(1) of the Control Regulation provides as follows.

“1. By way of derogation from Article 60(2), Member States may permit fisheries products to be weighed after transport from the place of landing provided that they are transported to a destination on the territory of the Member State concerned and that this Member State has adopted a control plan approved by the Commission and based

on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119.”

32. In its terms Article 60(1) imposes an obligation upon the individual Member States to ensure that fisheries products are weighed on systems approved by the national competent authorities. This can be done by weighing all fisheries products on landing in accordance with Article 60(2) and/or 60(6), or on board by way of derogation in accordance with Article 60(3) or in accordance with specific provisions which appears to include provision by way of permitted derogation under Article 61. Alternatively, it is permissible to weigh a sample only of fisheries products, if this is done pursuant to a sampling plan approved by the European Commission (hereinafter “the Commission”). Accordingly, there are no less than four different manners of weighing envisaged under Articles 60 and 61. In its terms, Article 61(1) provides for a derogation from Article 60(2). No provision is made for a derogation from Article 60(6).

33. The Control Regulation also provides for inspections in Title VII, Chapter 1. Article 73(2) provides that inspections shall be conducted in a “*non-discriminatory manner*”. Article 74(3)(a) of Control Regulation imposes a duty on officials to check in particular: (a) the legality of the catch kept on board, stored, transported, processed, or marketed and the accuracy of the documentations or electronic transmissions relating to it. Article 74(5) provides that officials must conduct inspections in such manner as to cause the least disturbance or inconvenience to the vessel or transport vehicle and its activities, and to the storing, processing, and marketing of the catch. It further provides that they must, as far as possible, prevent any degradation of the catch during the inspection. Article 76 provides for an inspection report after each inspection and Article 82 prescribes the procedure where it is believed that an infringement of the rules of the CFP has occurred. Article 85 mandates proceedings against the master of the vessel involved and any other person responsible for the infringement.

34. Article 33 imposes a duty on the State to record all relevant data expressly including data referred to in Articles 14, 23 and 68. Under Article 33(2)(a) the State is under a duty to report aggregated data each month for the quantities of each stock or group of stock subject to TACs or quotas landed during the preceding month. Curiously, no State entity has been designated under our domestic regulations for the purpose of Article 33. Under Article 109(2) a duty is imposed on Member States to ensure that all data recorded in accordance with the

Control Regulation are accurate, complete, and submitted within deadlines laid down in the common fisheries policy. Under Article 109(9) of the Control Regulation if the Commission identifies inconsistencies in the data entered in the database of the Member State because of its own investigations, and after having presented documentation and consulted with the Member State, it may require the Member State to investigate the reason for the inconsistency and to correct the data, if necessary.

35. The control function of the Commission is set out in Title X to the Control Regulation and the Commission is empowered under Article 96 to initiate and carry out inquiries, verifications, inspections, and audits. Further specific provision is made for audits by the Commission under Articles 100 and 101. The Control Regulation also delegated powers to the Commission to make regulations which lay down detailed rules for the implementation of the principles established in the Control Regulation itself under Article 119. Thus, the Commission has power to develop implementation rules where the essential elements to the powers to be implemented have been conferred under the Control Regulation.

The European Commission's Implementing Regulation (EU) No 404/2011 of 8 April 2011 as amended by Commission Implementing Regulation (EU) 2015/1962 of 28 October 2015

36. Some provisions of the Commission Implementing Regulation also warrant special mention for the purposes of identifying the relevant legal framework in respect of the issues arising in these proceedings. Articles 29, 30, 31, 32, 33, 34, 35, 36 and 37 make detailed provision for the format and method of return of the fishing logbook and landing declaration providing specifically that in the case of fish weighed on the vessel that the landing declaration will record the weight of quantities actually landed noting that the weight may be different from that entered in the fishing logbook (as per Annex X to the Commission Implementing Regulation). No similar provision is made for a separate recording of the results of the monitored weighing on landing and weighing post transport at an approved factory premises. Article 54 provides:

“When, in accordance with Article 61 of the Control Regulations, the fisheries products are transported from the place of landing before they have been weighed, the landing operation shall be regarded to have been completed for the purpose of the application

of Articles 23(3) and 24(1) of the Control Regulation when the fisheries products have been weighed.”

37. In this way the Commission Implementing Regulation provides that the landing declaration is made based on the weights as weighed in accordance with Article 61 of the Control Regulation (pursuant to the derogation and extant control plan) where the fish has been transported from the place of landing before being weighed. Of note, it expressly does not address itself to a situation where weighing occurs before transportation.

38. Articles 69 to 79 make more particular provision for the weighing and recording of weights of fish catch and species of catch and the adoption of a control plan. Article 72 of the Commission Implementing Regulation provides that all weighing systems shall be calibrated and sealed in accordance with national systems by competent authorities of the Member State. Article 72(3) further provides that where weighing is carried out on a conveyor belt system all use of the system shall be recorded by the natural or legal person responsible for the weighing in the weighing logbook. Article 70 requires the registered buyer and, where appropriate, the master of the vessel, to record weighing carried out in accordance with Articles 60 and 61 by indicating prescribed information including under Article 70(1)(b) the result of weighing for each quantity of each species in kilograms product weight. No specific or express provision is made for what happens where there is a monitored weighing on landing and a weighing at the factory post transport on foot of a control plan by way of derogation. This contrasts with the position regarding weighing on the vessel as Article 71(2) provides that when the fisheries products are weighed on board a Union fishing vessel in accordance with Article 60(3) of the Control Regulation and they are weighed again on land after landing the figure resulting from the weighing on land shall be used for the purpose of Article 60(5) of the Control Regulation.

39. Article 74 requires that before weighing the registered buyer, registered auction or other bodies or persons responsible for the first marketing of fisheries products shall ensure that the fisheries products be cleaned of ice as is reasonable without causing spoilage and reducing quality. The Commission Implementing Regulation is silent as regards the removal of water but provides that the deduction of water and ice from the total weight shall not exceed 2 %. In all cases Article 74(2) requires that the percentage for deduction of water and ice shall be recorded on the weighing ship with the entry for weight.

40. Article 75 of the Commission Implementing Regulation requires that competent authorities always have full access to the weighing systems, the weighing records, written declarations, and all premises where the fisheries products are stored or processed. Article 77 of the Commission Implementing Regulation provides in relation to control plans under Article 61(1) that the plan itself and any substantial modification thereof shall be adopted by Member States in accordance with the risk based methodology described in Annex XXI.

41. Articles 78 and 79 make special provision for the weighing of pelagic species providing that catches of species referred to in Article 78 of this Regulation shall be weighed immediately on landing but catches of these species may be weighed after transport where: - for a destination within a Member State the Member State concerned has adopted a control plan as referred to in Article 61 (1) of the Control Regulation in accordance with the risk-based methodology described in Annex XXI, and where this control plan or common control programme has been approved by the Commission. Article 80 of the Commission Implementing Regulation requires, for the purpose of weighing, that the master of a fishing vessel or his representative shall inform the competent authorities of the Member State in which the landing is to be made, at least 4 hours in advance of entry to port of landing concerned of the following:

“(a)the port he intends to enter, the name of the vessel and its external registration letters and numbers;

(b)the estimated time of arrival at that port;

(c)the quantities in kilograms live weight of herring, mackerel, horse mackerel and blue whiting retained on board;”

42. Article 81 of the Commission Implementing Regulation provides that the competent authorities of the Member State concerned shall require that the discharge of any catches referred to in Article 78 of the Commission Implementing Regulation does not commence until it is expressly authorised. If the discharge is interrupted, permission shall be required before the discharge can recommence.

43. Article 82 of the Commission Implementing Regulation provides as regards the fishing logbook that immediately upon arrival in port and before the discharge commences, the master

of a fishing vessel which is not under the obligation to record fishing logbook data electronically shall present the completed relevant page or pages of the fishing logbook for inspection by the competent authority of the Member State at the port of landing. The quantities of herring, mackerel, horse mackerel and blue whiting retained on board, notified prior to landing as referred to in Article 80(1)(c) of the Commission Implementing Regulation, shall be equal to the quantities recorded in the fishing logbook after its completion.

44. Article 83 in relevant part provides that in the case of publicly operated weighing facilities for fresh herring, mackerel, horse mackerel and blue whiting that the natural or legal persons weighing using the weighing facilities shall issue the buyer with a weighing slip which must be attached to the sales note. Article 84 provides further for privately operated weighing facilities requiring a record of each weighing but at Article 84(2) specifying that the record shall be completed immediately upon completion of the weighing of an individual landing and at the latest by 23.59 local time of the day of completion of weighing. Article 84(2) further requires, *inter alia*, the recording of the species of fish and the weight of each landing.

45. Article 89 of the Commission Implementing Regulation makes further provision for weighing as follows:

“1. The weighing of catches of herring, mackerel, horse mackerel and blue whiting from the vessel shall be monitored by species. In the case of vessels pumping catch ashore the weighing of the entire discharge shall be monitored. In the case of landings of frozen herring, mackerel, horse mackerel and blue whiting, all boxes shall be counted and the methodology for calculating the average net weight of boxes provided for in Annex XVIII shall be monitored.

46. Article 89(2) provides for the cross-checking of data relating to the quantities by species as between the weighing record and the quantities recorded in the sales note or transport documents.

47. The Commission Implementing Regulation provides in some detail for inspections. Vessels are selected for inspection based on risk assessment as provided for under Articles 98 and 105 of the Commission Implementing Regulation. Article 105 of the Commission Implementing Regulation also acknowledges the possibility of the Authority undertaking

random inspections. Article 107 of the Commission Implementing Regulation requires that the Authority ensure that at least 7.5% of the quantities landed for each species and at least 5% of all landings are fully inspected for pelagic landings. It is further required that on a yearly basis at least 60% of total inspections at landing shall be conducted on fishing vessels belonging to the fleet segments in the two highest risk categories identified according to Article 5(1) and 5(2) of the Commission Implementing Regulation.

The Sea Fisheries (Community Control System) Regulations, 2016 (SI 54 of 2016)

48. The Sea Fisheries (Community Control System) Regulations, 2016 (SI 54 of 2016) (hereinafter “the Domestic Regulations 2016”) designate the national authorities which are to fulfil the functions of “*competent authority*” and “*single authority*” for the purposes of the Control Regulation. The Authority is designated as the “*single authority*” for the purposes of Article 5(5) of the Control Regulation by virtue of Regulations 3 which provides:

“3. The Single Authority for the purposes of Article 5(5) of the Council Regulation and Article 46 of the Commission Regulation is the SFPA.”

49. The Authority is also designated as “*competent authority*” for certain functions pursuant to Regulation 4 which provides:

“4. (1) The SFPA is the competent authority, for the purpose of:.... (a) Articles 14(6), 15(1) and (2), 17(1), (2) and (3), 18, 19, 21(4), 22(1), (4) and (5), 23(3), 24(1), (4) and (7), 25, 27, 28(1), 29, 42, 52, 53, 58,59, 60(6), 62(1), (2), (3), (4) and (5) and 63, 66, 67 and 68(1), (2), (3) and (6), 71(4), 76(1), 82., 90 and 99(4) of the Council Regulation, and (b) Articles 20, 25(4) and (5), 29, 39, 47, 67, 71(3), 75, 80(1) and (2), 82(1), 87, 88, 97, 101, 105, 107, 109, 122(4) and 123(1) of the Commission Regulation.

50. Curiously, the Authority is not designated as a competent authority for the purposes of Article 33. It is one of two competent authorities with a role in the approval of weighing systems.

51. Under Regulation 5 the master of an Irish sea-fishing boat wherever it may be, or a sea-fishing boat in the exclusive fishing limits of the State, is required to comply with the

requirement imposed by the Control Regulation and the Commission Implementing Regulation in respect of fishing vessels and masters of such vessels. Similarly, Regulation 7 provides that a person shall not purchase fisheries products on first marketing other than in accordance with Article 59 of the Control Regulation. Regulation 7(2) provides that a person who is registered under Article 59(2) of the Control Regulation shall be responsible for the accuracy of weighing systems in accordance with Article 60(4) of the Control Regulation and shall:

“(a) record the weighing in accordance with Articles 70(1), 72(2) and 72(3) of the Commission Regulation,

(b) retain the record of the weighing in accordance with Article 70(2) of the Commission Regulation,

(c) in respect of frozen fisheries products, weigh in accordance with Article 73 of the Commission Regulation, and

(d) remove such ice and water as is required under Article 74 of the Commission Regulation.”

52. Regulation 7(3) further provides that a person referred to in Article 62(1) or Article 66(1) of the Control Regulation shall submit the sales note or the take-over declaration to the SFP A within 48 hours of the sale or take over. Under Regulation 7(4) a person referred to in Article 63(1) or Article 67(1) of the Control Regulation shall submit the sales note or the take-over declaration to the Authority electronically within 24 hours of the sale or the take-over. Regulation 12 deals with the approval of equipment or systems for weighing fishery products in compliance with the requirements of Article 72 of the Control Regulation and the Authority is empowered to permit fisheries products to be weighed after transport from the place of landing in accordance with Article 61(1) of the Control Regulation.

The Irish Control Plan

53. Ireland exercised the derogation provided for by Article 61(1) of the Control Regulation in that it submitted a Weighing of Fishery Products Control Plan (the 'Control Plan') to the Commission in accordance with the requirements of Article 61(1) of the Control Regulation

and the further requirements of the Commission Implementing Regulation. It is common case that such the Control Plan was adopted by Ireland and approved by the Commission by Article 1(3) of Commission Implementing Decision of the 13th of August, 2012 (2012/474/EU) (but revoked by the Commission in April, 2021 after the events which give rise to these proceedings). The core question in these proceedings is what impact the agreement of a derogation in the terms of the Control Plan had on the continued exercise of a primary power provided for under Article 60(6) to require a monitored weighing on landing. Accordingly, it is appropriate to record in some further detail the terms of the said Control Plan to appreciate what was sought to be achieved under the Control Plan.

54. The Control Plan created specific provision in the State for the weighing after transport in approved facilities of fishery products. The Control Plan stated, *inter alia*, in this regard:

‘ this Control Plan implements a derogation from the requirement to weigh fish prior to transport. Compliance with the weighing requirements may be achieved by applying the provisions of this Control Plan thereby allowing transport of fish prior to weighing’.

55. In this way, the Control Plan provided that where a consignment of pelagic fish was landed, for the same to be transported to a certified facility where the catch could be weighed, instead of the weighing taking place immediately after landing. The aim of the Control Plan was described as:

“to minimise the risk of non-compliance with the rules of the Common Fisheries Policy, in particular the under-recording or not recording of fish landed, in circumstances where the transport of fishery products from the place of landing to a destination within Ireland is permitted prior to weighing. At a practical level this Control Plan implements a derogation from the requirement to weigh fish prior to transport. Compliance with the weighing requirements may be achieved by applying the provisions of this Control Plan thereby allowing transport of fish prior to weighing.”

56. The Control Plan provided:

“The fishery products shall be accompanied from landing to the weighing destination with transport document containing all of the information specified in Article 68(5) of the Control Regulation with the following additional considerations

- The document will indicate nature of the transport operation, ie ' Fishery products to be weighed after transport in accordance with Article 61(1) of 1224/09*
- As part of the information on the destination (68(5)(a) the document will indicate the permit number of the registered buyer permitted to weigh after transport*
- Species weight (68(5)(d)) will be estimated for that transport consignment, e.g. on the basis of operational logbook totals, or transport capacity estimates”*

57. It further provided:

“Each operator responsible for the weighing of fishery products should maintain a bound, paginated weighing record, and/or equivalent electronic record, which will be completed immediately after weighing of the fishery product has taken place or at least by midnight on the day of weighing. Where weighing is carried out on conveyor belt systems, all use of the system shall be recorded, and the reading of the counter at the start of the weighing operation as well as the cumulative total shall be recorded. This weighing record shall be kept for a minimum of 3 years. All weighing of fisheries products shall be recorded by indicating the following information...”:

58. The Control Plan next provided:

“In order to minimise the risk on non-compliance, the accuracy of post-transport weighing will be validated on a risk-based sample of transport consignments. In general terms, this will involve the weighing of all or some of the fishery products, following separation of water/ice where relevant, prior to transport in the presence of SFPA. The weighing of these fishery products will then be monitored by SFPA post-transport. Operators transporting bulk-stored pelagic fish should take all reasonable steps to minimise water and ice content prior to this pre-transport weighing. SFPA may supervise sealing of transport units and recording of seal numbers by operators for subsequent removal of seal at destination when approved to do so by SFPA. Permitted Operators are obliged to facilitate these procedures to provide necessary assurance around accuracy of their post transport weighing.”

59. From the language used it appears to have been envisaged that there would be a validation process whereby the weights obtained post-transfer were checked against the weights obtained prior to transfer rather than the acceptance of weights on landing as the correct weights. Under the heading, “*Permit Holder Compliance*”, the Control Plan provided:

“The permitting of weighing post-transport is designed to facilitate to the extent possible a more practical means of compliance with the weighing obligations on registered buyers. Where non-compliance is suspected or detected the SFPA reserves the right to withdraw permission to weigh post transport. The withdrawal of permit will not prevent the Registered buyer engaging in their normal economic activity provided they comply with the obligation to weigh all fishery products on landing or where applicable any lesser amount indicated by the National Sampling Plan. The SFPA reserve the right to alter, amend or withdraw this Control Plan at any time.”

60. For present purposes it is important to note that the Control Plan made no reference to Article 60(6) or monitored weighing on landing provided for under the Control Regulation.

Commission Implementing Decision of 13th of April, 2021

61. By decision dated the 13th of April, 2021, after the events which give rise to these proceedings, the Commission revoked its approval for the Irish Control Plan [hereinafter “the Decision”]. In the body of the Decision the Commission referred to an audit it had carried out in 2018 aimed at monitoring the implementation of the Control Plan. It is stated that the findings of that audit identified irregularities, subsequently confirmed also by the administrative inquiry conducted by the Authority, which revealed that Ireland had failed to ensure effective implementation of the Control Plan in accordance with the obligations arising out of the Control Regulations. By way of particulars, the Decision referred to the fact that operators did not have in place a “*weighing system fit for purpose*”, as provided for under the Control Plan and the audit revealed manipulation of weighing systems. Furthermore, the Commission referred to the fact that Ireland did not take appropriate measures to address such non-compliance, in particular, by withdrawing the permission to weigh after transport as foreseen in the Control Plan.

62. The Commission concluded that the failures outlined had the consequence that the Control Plan did not minimise the risk of systemic manipulation of weighing pelagic catches in Ireland and Ireland could not guarantee effective control of the landed quantities of catches and minimise the risk of non-compliance with the rules of the CFP. The Commission pointed out that the failure to ensure appropriate weighing also put at risk the accuracy of the data reported that is essential for control purposes and monitoring the uptake of fishing quotas. Finally, the Commission stated:

“(5) Due to the absence of effective implementation of the control plan, derogation from the basic requirement set in Article 60(2) of Regulation (EC:) No 1224/2009 according to which all fishery products are to be weighed at landing before transport, should no longer be granted.”

63. Although the Applicants have sought records of the audit and the administrative enquiry under Freedom of Information and EU transparency rules, these have been withheld in the face of objection from the Commission who invoked Article 4(2) of Regulation (EC) No. 1049/2001 to curtail access to documents where disclosure would undermine the protection of inspections, investigations, and audits unless there is an overriding public interest in disclosure. While the Applicants do not have the benefit of this documentation, it is clear from the terms of its Decision to revoke that the Commission was concerned by irregularities detected over time and the failure of the Authority to address these concerns. It is clear from the papers and submissions made before me that the Authority did not undertake a monitored weighing on landing of the catch in this instance because of any concerns relating to the Applicants personally.

64. I am satisfied that the monitored weighing on landing which occurred in this case was part of a wider response to the Commission’s systemic concerns. It is possible even that the Authority may have had some forewarning that the Irish Control Plan was at risk of being revoked unless they could demonstrate better control and monitoring of the industry than previously, although this is not articulated. Even if a warning that the Control Plan was at risk was not signalled in express terms by the Commission (and the question was not addressed in evidence), the decision to revoke was obviously preceded by exchanges between the Authority and the Commission in relation to compliance concerns as referenced in the Decision to revoke such that the risk was foreseeable. In the event the Authority’s attempts to step up its exercise

of control powers did not alleviate the Commission's concerns and the Irish Control Plan was revoked anyway.

PROCEEDINGS

65. By order *ex parte* made on the 1st of February, 2021 the High Court (Meenan J.) gave leave to apply by way of an application for judicial review for the following reliefs including separate orders of certiorari quashing: (i) the "Notice to Weigh on Landing" on 12th October, 2020; (ii) the Official Pelagic Weighing Record required by the Authority to be completed by the third Applicant on 12th and 13th of October, 2020; (iii) the decision made by the Authority on or after the 12th of October, 2020 requiring the first and third Applicants to adjust the landing declaration incorporated in the electronic logbook and the sales note previously completed by the first and third Applicants; (iv) the Inspection Report made by the Respondent with regard to the first, second and third named Applicants on 3rd of November, 2020; (v) the report of the Authority to the European Commission made on or about 15th November 2020 in purported compliance with Article 33(2) of Council Regulation (EC) No 1224/2009 of 20 November 2009 and a broad range of related declaratory relief.

66. The Applicant's fundamental position in these proceedings is that the Authority does not have the right to suspend the operation of its own control plan. It is the Applicants' position that once the distinct administrative regime of the Control Plan was put in place under Article 61, and Masters of Fishing Vessels and Operators were permitted to organise their weighing systems in accordance with it, it could not be the case that the Authority could vary or suspend this administrative scheme to require a monitored weighing on landing in individual cases notwithstanding the provisions of the Control Plan.

67. The service of the proceedings was followed an extensive exchange of affidavits (18 affidavits in total) with a Statement of Opposition filed on the 27th of April, 2021. While the documentation is voluminous and quite repetitive, the Authority's position might be summarized as being that Article 60(2) of the Control Regulation sets out the default position that fish be weighed on landing prior to transport. By way of derogation from Article 60(2), Article 61(1) provides that Member States may permit fish to be weighed after transport (at the

factory). Where the Authority requires an Article 60(6) weighing on landing or monitored weighing on landing, the Article 61(1) derogation does not apply.

68. The position clearly articulated on behalf of the Authority is that where the Authority requires a weighing on landing pursuant to Article 60(6), the Article 61(1) derogation and the Control Plan adopted thereunder are not applicable and therefore irrelevant. They further rely on legal requirement that 7.5% of the fish landed or 5% of the landings of fish be fully inspected by the Authority. They also refer to Article 60(5) of the Control Regulation which provides that the figure resulting from the weighing shall be used for the completion of landing declarations, transport documents, sales notes and takeover declarations.

69. In respect of the assertion that a percentage of landings require full inspection, reliance was placed by the Applicants in response on the fact that the Authority had conducted such full inspections over the previous years under the Control Plan in the factory. It is maintained that there is no requirement in E.U. or domestic legislation that such inspections may only be conducted immediately on landing. It was contended that insofar as the Authority had returned figures based on the monitored weighing on landing, that it was in breach of its duties to report accurately.

ISSUES

70. Several related issues arise for consideration on the pleadings in this case. The Applicants maintain that the Vessel was unlawfully selected for monitored weighing on landing as at that time weighing ought properly to have occurred at the factory premises following transport from the pier pursuant to the terms of the agreed derogation. It is their contention that the system of weighing using the State-owned weighbridge at Killybegs Port was not fit for purpose because:

- (i) it gave an inaccurate result as both seawater and fish are weighed together where the separation of fish from water on the pier necessary for an accurate reading would cause damage to the fish; and
- (ii) there was no system in place for the weighing of the sorted by-catch separately from the catch as a whole despite an obligation to separately record the weights of different species.

71. Fundamentally, the Applicants maintain that the monitored use of a conveyor belt weighing system or “*flow scales*” system as available at the factory following transport from the port permitted the more accurate weighing of dewatered fish whilst minimising damage to the catch and that it was therefore unreasonable to require the official weighing to be done on the pier. They maintain that it was legitimate for them to rely on official documentation on the weighing which occurred subsequently at the Factory. The primary issues arising for determination on the case as argued appear to me to be:

- I. Whether the selection of the Vessel and the catch for monitored weighing on landing control was arbitrary and unreasonable and was not based on any risk assessment or objective requirement;
- II. Whether the Authority is entitled to require that any quantity of fisheries products first landed in that Member State be weighed in the presence of officials before being transported elsewhere in circumstances where a derogation to the general obligation to weigh on landing under Article 60(2) exists by virtue of Article 61(1);
- III. Where there was permission for fishery products covered by an Article 61(1) derogation to be weighed following transport and this occurred, there was still a requirement to report the figures given on a monitored weighing on landing in respect of the same products;
- IV. Whether the Authority acted (a) lawfully and (b) reasonably in obliging a weighing on landing and requiring the declaration of the resultant figure, in circumstances where accurate figures could not be obtained on the weighing on landing without negatively impacting the quality of the fishery products.

I will endeavour to address these issues in turn.

DISCUSSION AND DECISION

- I. *Whether the selection of the Vessel and the catch for weighing on landing control was arbitrary and unreasonable as was not based on any risk assessment or objective requirement*

72. It appears from the evidence that the Vessel was selected for monitored weighing on landing based on a mistaken belief that it had not been subject to full inspection for a two-year period and having regard to benchmarks fixed under the Control Regulation requiring inspection of a percentage of the catch on board the Vessel. These considerations were relevant and proper considerations. There is nothing in the evidence to suggest any improper purpose on the part of the Authority or its agents in selecting the Vessel and the catch for weighing on landing control. In circumstances where a power to inspect exists independently of any risk assessment or objective requirement but is a power which may be exercised randomly (pursuant to s. 17 of the 2006 Act and Article 105 of the Commission Implementing Regulations), it seems to me that the erroneous but genuine belief, which it is accepted occurred due to a human error in logging the previous inspection in relation to the absence of previous inspection within a two-year period, in no way undermines the power of the Authority to select the Vessel and its catch for a monitored weighing on landing control.

73. The power to require a monitored weighing on landing in the presence of Authority staff provided for in Article 60(6) of the Control Regulation is not tied to a risk assessment or the application of objective requirements. Similarly, the power to check the weights vested pursuant to s. 17(1)(e) of the 2006 Act is not subject to any requirement to conduct a risk assessment or follow a process before identifying vessels for the purpose of control inspections. In the provision made for inspections under Article 73 of the Control Regulation the only requirement is that inspections be conducted in a “*non-discriminatory manner*”. On the other hand, Article 74(3)(a) of Control Regulation imposes a duty on officials to check the legality of the catch kept on board, stored, transported, processed or marketed and the accuracy of the documentations or electronic transmissions relating to it. In the discharge of this duty, officials have broad powers to control and monitor the landing of catch and the weighing of same.

74. I am quite satisfied that the power to require a supervised weighing on landing or to inspect are powers which may be exercised randomly for so long as no discriminatory or other improper purpose is shown to exist. It has not been established on the evidence in this case that there was a frailty in the selection of the Vessel for weighing on landing or inspection which might taint the lawfulness of the process. As for the complaint advanced that there is no documentary record of the legal basis of the power exercised by the Authority in requiring the weighing on landing, it seems to me that there is no requirement for any documentary record in this regard beyond the “*Notice to Weigh on Landing*” which was served on the Master and

which clearly identified Article 60(6) as the legal basis for the requirement for weighing on landing. Reliance on *DPP v. White* [2022] IEHC 708 is misplaced in circumstances where that case concerned a statutory requirement for a checkpoint to be authorised in writing before the checkpoint took place. In this case there exists no prescribed pre-condition to the exercise of a power to require weighing on landing and the power may be exercised randomly.

II. Whether the Authority is entitled to require that any quantity of fisheries products first landed in that Member State be weighed in the presence of officials before being transported elsewhere in circumstances where a derogation to the general obligation to weigh on landing exists by virtue of Article 61(1)

75. Under Article 60(1) of the Control Regulation it is a matter for the national competent authorities to approve the weighing systems and the Commission’s role under the sub-article is confined to the separate matter of approving the methodology of a sampling plan. The default position, provided for under Article 60(2), is that weighing shall be carried out on landing. This is subject to a derogation whereby Member States may permit fisheries products to be weighed on board the fishing vessel subject to a sampling plan under Article 60(3). While this derogation is not relevant to the issues in these proceedings the default position in Article 60(2) is also stated to be “*without prejudice*” to any other special provisions.

76. In practical terms, the regime established therefore contemplates that unless otherwise provided for by way of specific provisions, that the fishery products, upon being unloaded or discharged from a fishing vessel, are weighed, following which they may they be transported elsewhere for preservation, processing, and sale. While this is clearly the default position, Article 61 of the Control Regulation then makes provision for the possibility of a derogation whereby fisheries products may not be weighed on landing. Critically, this derogation is subject to approval by the Commission. More specifically, the relevant Member State must have adopted a “*control plan*” which has been approved by the Commission. Thus, Article 61(1) of the Control Regulation provides for derogation from the general provision outlined in Article 60(2) and allows Member States to permit fisheries products to be weighed after transport from the place of landing if they are transported to a destination on the territory of the Member State concerned and that the relevant Member State has adopted a control plan approved by the Commission in the manner outlined therein.

77. It is of particular significance in my view that Article 61(1) of the Control Regulation operates as a derogation from the default position under Article 60(2) but does not provide a derogation from Article 60(6) of the Control Regulation. In fact, no express provision is made under the Control Regulation for a derogation from Article 60(6) which is not a replica of Article 60(2) providing as it does for weighing under supervision. From my reading of the statutory scheme, Article 60(6) exists in parallel with the duty to weigh under Article 60(1), 60(2) and 60(3) and empowers weighing in the presence of officials before transport irrespective of whether a derogation is in place or not and irrespective of whether weighing has occurred on a vessel or not. Articles 78 and 79 of the Commission Implementing Regulation are instructive. While they do not obviously add anything to the primary provisions of Articles 60(2) and 61(1) of the Control Regulation, the use of mandatory language regarding the requirement to weigh on landing subject to permissive provision for weighing following transport supports a conclusion that any deviation from a requirement to weigh on landing as a derogation from the default position does not supplant the power to require a monitored weighing on landing under the Control Regulation.

78. The Applicants refer to the existence of the Control Plan which created specific provision in the State for the weighing after transport in approved facilities of fishery products under Article 61(1) as if the Control Plan somehow precludes the exercise of powers under Article 60(6) of the Control Regulation. As a matter of law, this proposition cannot be correct. Firstly, the Control Plan could not lawfully tie a power provided for in primary legislation absent due authority for same in primary EU law. Nothing in the terms of the Control Regulation permitting the adoption of a Control Plan to permit weighing following transport by way of derogation provides a legal basis for the circumvention of control powers provided for under Article 60(6) for a monitored weighing on landing. Were the effect of the Control Plan to purport to circumvent those powers without a legal basis for same being provided under the Control Plan or otherwise, it seems to me that this would open to challenge as an *ultra vires* abdication of powers properly vested under the Control Plan by means of secondary legislation.

79. Furthermore, however, looking at the terms of the Control Plan and the language used, I am satisfied that the derogation provided for under its terms did not purport to derogate from Article 60(6). The Control Plan seeks only to provide in permissive terms for weighing post transportation to an approved centre unless weighing is otherwise required on landing. The fact that the power to authorise weighing post transportation in the manner provided for under

the Control Plan was permissive, not mandatory, is clear from the language used in providing that compliance “*may be achieved*” rather than “*shall be achieved.*” Indeed, in its terms the Control Plan explains that the aim of the measures provided for by agreement with the Commission was to minimise risk of non-compliance with CFP in those cases where transportation prior to weighing was to be permitted. The Control Plan does not purport to require that weighing only take place in all cases post-transportation.

80. Accordingly, insofar as the Control Plan provided for validation of the accuracy of post transport weighing on a “*risk-based sample of transport consignments*” in a manner which involved the weighing of all or some of the fishery products, after separation of water/ice where relevant, prior to transport in the presence of the Authority followed by a monitored weighing of the same fishery products post-transport, does not preclude other control measures such as a monitored weighing on landing under Article 60(6). From the language used and its context the risk-based sample referred to was not intended to replace or substitute for a power under Article 60(6) to require a monitored weighing on landing but was designed as an additional safeguard against risks of non-compliance in cases of factory weighing. Put otherwise, it was a control measure agreed as a condition of the derogation. It was not intended to replace existing powers to require a monitored weighing on landing and does not in its terms purport to supplant the power of the State authority to require a monitored weighing on landing under Article 60(6) of the Control Regulation. It was in ease of buyers/operators in most cases when the Control Plan was in place by way of agreed derogation because the default position became a weighing in accordance with the Control Plan recognising that a monitored weighing on landing was not usually required.

81. It is my view that the permissive power under the derogation provided for in the Control Plan co-existed with the power to require a monitored weighing on landing under Article 60(6). Indeed, it was also open to the operator/buyer to simply elect to perform a weighing on landing before transportation in accordance with Article 60(2) even in circumstances where fishery product was being transported to an approved facility. The co-existence of an option to weigh on landing with a weighing post transportation at an approved facility is acknowledged by the terms of the Factory permit adduced in evidence in the endorsement contained on it to the effect that if the authorisation were to be revoked it would not impact on the operator’s ability to continue to trade in fish by weighing them on landing in accordance with the Control Regulation. As noted above, under the heading, “*Permit Holder Compliance*”, the Control

Plan further provided that the permitting of weighing post-transport was designed to facilitate to the extent possible a more practical means of compliance with the weighing obligations on registered buyers but where non-compliance was suspected or detected the right to withdraw permission to weigh post transport was reserved. It continued, however, that the withdrawal of permit would not prevent the Registered buyer engaging in their normal economic activity provided they complied with the obligation to weigh all fishery products on landing. In turn, the Permit which issued under the Control Plan authorising the weighing of fishery products following transfer to the Factory was endorsed with conditions including the condition that the weighing of fishery product as stated at Article 60(6) of the Control Regulation might be conducted in the course of conducting official controls.

82. I am satisfied that the agreement of a derogation in the terms of the Control Plan did not impact on a continued exercise of a primary power provided for under Article 60(6) to require a monitored weighing on landing. The Authority was entitled to require that any quantity of fisheries products first landed be weighed in the presence of officials before being transported even in circumstances where a derogation from the general obligation to weigh on land exists by virtue of an agreement under Article 61(1). By requiring a controlled weighing on landing under Article 60(6) the Authority did not suspend the Control Plan then in place as the Control Plan never interfered with the Article 60(6) power. The Control Plan continued in tandem with the Article 60(6) power by way of derogation from Article 60(2). The derogation remained available at that time in those cases, the majority, in which a monitored weighing on landing was not required. The power to require a monitored weighing on landing was not a new power and had co-existed with the Control Plan from its inception albeit that the Authority did not in practice exercise that power prior to 2020.

III. Where there was permission for fishery products covered by an Article 61(1) derogation to be weighed following transport and this occurred, was there still a requirement to report the figures given on a controlled weighing on landing in respect of the same products

83. Articles 60 and 61 the Control Regulations provide for the potential for more than one weighing in that there may be a weighing on board, on landing in accordance with a sampling plan or following transport pursuant to a derogation but also on landing in accordance with the provisions of Article 60(6) in the company of officials. Where each weighing is accurate, it

might be expected that the results would be the same but, save in the case of a weighing on the vessel under Article 60(3), the Control Plan is silent as to which figures prevail in the event of a discrepancy or divergence. No specific or express provision is made for what happens where there is a monitored weighing on landing and a weighing at the factory post transport on foot of a control plan by way of derogation. This contrasts with the position regarding weighing on the vessel as Article 71(2) of Commission Implementing Regulations provides that when the fisheries products are weighed on board a Union fishing vessel in accordance with Article 60(3) of the Control Regulation and they are weighed again on land after landing the figure resulting from the weighing on land shall be used for the purpose of Article 60(5) of the Control Regulation. The Commission Implementing Regulation also provides specifically that in the case of fish weighed on the vessel, the landing declaration will record the weight of quantities actually landed noting that the weight may be different from that entered in the fishing logbook (as per Annex X to the Commission Implementing Regulation). It is the absence of a similar provision for a separate recording of a monitored weighing on landing and weighing post transport at an approved factory premises which is at the heart of a core issue in these proceedings.

84. Article 60(5) of the Control Regulation requires that the figures resulting from the weighing be used for the completion of the landing declaration. This is prescribed as the responsibility of the Master of the fishing vessel. The figures resulting from the weighing must also be used for the completion of any sales notes by the buyer or operator of any processing facility which acquires the fishery products from the fishing vessel. The question which arises is which weighing.

85. The Authority argued that there was only one weighing under Article 60. I cannot accept this argument as Article 60 envisages several “weighings”. There is, however, only one weighing on landing. Presuming a weighing on landing occurs (either monitored under Article 60(6) or by alternatively under Article 60(2)), there is no requirement in the legislative regime for a further factory weighing under the derogation as the obligation to weigh will have been discharged. This suggests that the first weighing which meets the requirements of the Control Regulations is the one which must be used for the completion of documentation.

86. This interpretation is consistent with Article 54 of the Commission Implementing Regulation which provides that when a weighing has occurred under an Article 61 derogation

the landing operation is regarded as completed when the fisheries products have been weighed if they were transported from place of landing before being weighed. It would seem to follow that where weighing has occurred prior to transport that the landing operation has already been completed and the requirements of Articles 23(3) and 24(1) of the Control Regulation are met on the basis of the weighing prior to transport. The clear inference to be drawn from this is that where the fish have not been transported before being weighed, the weighing on landing is used to complete the landing declaration because the landing operation is considered complete before onward transportation.

87. The requirement for timely weighing is also apparent in the legislative regime. Article 84(2) of the Commission Implementing Regulation requires that the record be completed immediately upon completion of the weighing of an individual landing and at the latest by 23.59 local time of the day of completion of weighing. Article 84(2) further requires, *inter alia*, the recording of the species of fish and the weight of each landing. The terms of Article 84(2) of the Commission Implementing Regulation serve to impress the immediacy of the obligation to weigh by providing strict time limits for same and given that the landing is treated as complete where weighing has occurred. It therefore seems clear that it is the weighing on landing which prevails over any subsequent weighing post transportation as it is the most proximate in time to the actual landing.

88. I have concluded that the requirement to report figures which arises on foot of Article 60 of the Control Regulation attaches to the weights obtained in the weighing on landing even where a derogation is in place both because the monitored weighing on landing takes precedence over the facility afforded by way of a derogation to weigh post transportation and also because the weighing on landing under Article 60(6) is concluded first in time. On its conclusion the landing is treated as complete and the obligation to report is triggered. Accordingly, where a controlled or monitored weighing on landing occurs under Article 60(6) the weights obtained are the weights which must be reported even in circumstances where there was permission for fishery products to be weighed following transportation pursuant to an Article 61(1) derogation and such weighing has occurred.

89. The requirement thereafter to use the weights obtained on landing in all documentation follows clearly from the terms of Article 60(5) of the Control Regulation which provides that

the figure resulting from the weighing shall be used for the completion of landing declarations, transport document, sales notes and takeover declarations.

90. Under the legislative regime, the onus is on the operator/buyer to provide for accurate weighing and the existence of two separate results on weighing is evidence of some unreliability in the weights submitted. It goes without saying that where weighing is properly and reliably carried out both on landing and post transportation, such discrepancies should not arise. Discrepancies of this kind naturally result in the systems in place in the State being drawn into question. It is an unfortunate consequence of systems' failures and the generation of unreliable data that indulgences in terms of agreed derogations in a control plan, which fundamentally rest on mutual trust, are withdrawn.

IV. Whether the Authority acted (a) lawfully and (b) reasonably in obliging a weighing on landing and requiring the declaration of the resultant figure, in circumstances where accurate figures could not be obtained on the weighing on landing without negatively impacting the quality of the fishery products.

91. I have already concluded that the Authority had a power to require a monitored weighing on landing under Article 60(6) of the Control Regulation notwithstanding the existence of a derogation which permitted the weighing of the fisheries products after transport to an approved factory premises. The argument presented is that the Authority was in breach of its obligations to accurately report on weights by requiring a weighing on landing which, due to the absence of dewatering, did not yield accurate weights with the result any data recorded on foot of the weighing thus conducted would be inaccurate. The Applicants' argument in this regard ignores the fact that the obligation to weigh the fish accurately does not rest on the Authority but on the Applicants. The Authority's function under the legislative regime is to monitor, verify, collect and report data but it does not have an independent duty to accurately weigh the fisheries products.

92. It is true that the obligation to report data is to report accurate data but it cannot be ignored that the only reason the figures obtained on weighing were inaccurate and failed also to meet the requirements of the Control Regulation in terms of the separate weighing of species of fish was because the Applicants failed in their respective duties to weigh the fish. Any

skewing of the results obtained occurred by reason of the Applicants not providing for the separation and sorting of fish for the purpose of the weighing on landing through their insistence, which I have found to be wrong in law, on an entitlement to weigh following transport in reliance on the derogation notwithstanding the provisions of Article 60(6) of the Control Regulation. As noted above, it is my view that Article 60(6) of the Control Regulation clearly provided for a standalone requirement to permit supervised or monitored weighing on landing regardless of the existence of a derogation from the default position whereby a weighing (as opposed to supervised or monitored weighing) must occur on landing in all cases.

93. The imperative for centralising control information to ensure effective and efficient control is clear. Article 33 imposes a duty on the State to record all relevant data expressly including data referred to in Articles 14, 23 and 68. Under Article 33(2)(a) the State is under a duty to report aggregated data each month for the quantities of each stock or group of stock subject to TACs or quotas landed during the preceding month. The evidence before me is that the Authority discharges the reporting duty under Article 33 in its role as designated single authority, even though not designated for this purpose in the domestic regulations. In circumstances where the single authority duly designated in each State is made directly responsible for recording and transmitting data by the provisions of the Control Regulation and the Commission Implementing Regulation, nothing turns on the absence of further or confirmatory designation of the Authority for the purposes of Article 33 in domestic regulations. It is noteworthy, however, that the report made under Article 33 is not exhibited in the proceedings.

94. Insofar as the Authority reported the inaccurate figures obtained following the weighing on landing conducted on the basis of the total catch and without dewatering the catch, then it accurately reported the outcome of the weighing on landing. Where it considered this data to be unreliable, it was also within the powers of the Authority to explain why this might be so and a requirement to report accurately under the Control Regulation certainly warranted some qualification of the results obtained. I do not know whether a formal qualification was communicated as part of the Article 33 return to the Commission but any inspection of the OPWR and reading of the inspection report would show that dewatering had not occurred at the time of the weighing on landing with the result that water was weighed as fish.

95. What is less clear from the records I have seen is that the distinct fish species were not sorted on the monitored weighing on landing with the result that the weight for herring given on the official OPWR was taken from the factory weighing rather than the weighing on landing. The fact that the figures from the Factory weighing were used to record the weight of the herrings landed, rather than a weighing on the pier, was not transparently documented on the papers available to me. This is undermining of the integrity of the weighing on landing and the reporting of same.

96. The duty on the Authority, on behalf of the State, to ensure that information gathered is correct has been reiterated by the judgments in *Case C-454/99 Commission v. UK* and *Case C-564/20 PF, MF v. Minister for Agriculture, Food and the Marine and the Sea Fisheries Protection Authority*. It is clear from these decisions that the duty on Member States by operation of Articles 5(5) and 109(2) and (5) of the Control Regulation is not just to transmit information but to also verify the information and where appropriate take necessary action (see para. 38 *Case C-564/20 PF, MF v. Minister for Agriculture, Food and the Marine and the Sea Fisheries Protection Authority*). I should observe in this regard that nothing on the face of the OPWR suggests that it was in anyway confirmed as correct by the Authority. The Authority did not sign it. The only signatures appearing are those on behalf of the Operator/Buyer. It is certainly arguable, however, that if the Authority verified as accurate a weighing for herring inserted on the record of a monitored weighing on landing from a weighing conducted elsewhere, then it should not have done so without qualification.

97. The accuracy of the report furnished by the Authority under Article 33 of the Control Regulation is not an issue upon which I can adjudicate in these proceedings, not least because the report is not before the Court. It is possible that a full and accurate report of the figures was given with some qualification relating to the impact of a refusal to dewater on the results on this particular landing in October, 2020 or account of what occurred on weighing the fish in Killybegs at that time. Even where there is an issue with the integrity of the results of weighing as recorded in the documentation available to me and apparently relied upon in State reporting under Article 33, I would not be prepared to grant any relief against the Authority on application of the Applicants in the circumstances of this case because this situation arose from their default.

98. Given that the industry ought to have been able to accommodate a weighing on landing which meets the requirements of the Control Regulation in October, 2020 in discharge of the State's obligations under the CFP, the apparent inability to do so at that time contributed to by a long-standing practice of not exercising this power and the failure of the Authority to ensure a separate weighing of herring on the pier for the purpose of completing the OPWR, does not in my view affect the lawfulness of the Authority's actions in requiring a monitored weighing on landing in the first place in this case. The change in practice and the legal basis for the exercise of the power had been well signalled (some ten months earlier) and ample opportunity had been afforded to put in place means of compliance.

99. Control powers are only real if they are exercised. Enforcement action on foot of suspected infringement is a necessary component of securing compliance with the rule of law including the rules of the CFP. If the exercise of control powers challenged in these proceedings served to highlight shortcomings in necessary infrastructure, which is certainly suggested on the evidence before me, then it discharged a proper control and compliance purpose by ensuring that the measures necessary to remedy the situation are taken. This does not constitute an unreasonable exercise of power even where the absence of necessary infrastructure may have been contributed to by a long-standing practice of not exercising the Article 60(6) power to require a monitored weighing on landing.

Miscellaneous Matters

100. As already observed, the papers in these proceedings were voluminous. There is some dispute of fact between the parties as to the effect on pelagic fish of dewatering and separation for the quality and value of the catch. There is some further dispute in relation to the fitness for purpose of the separator available for use on the pier in Killybegs in October, 2020. Despite the placing of expert reports and significant affidavit evidence directed to these issues before the Court, I do not consider it necessary to resolve these disputes of fact for the purpose of these proceedings.

101. It seems to me whether pelagic fish risk damage or not when subjected to dewatering and separation does not affect the power to require a weighing on landing as a control measure and as a means of minimising the risk of abuse. It also seems that the means exist to separate and de-water fish for the purpose of weighing while reducing (if not eliminating) damage to

the fish (e.g. through the use of a flow system to separate and transfer to a tanker containing RSW which has already been weighed and then re-weighing with the fish on board) but that these means had not been put in place by October, 2020. The responsibility to develop systems which allow for accurate weighing of fish on landing while minimising damage to the fish lies with the buyer/operator such that a failure to develop these systems cannot be relied upon to preclude the exercise of control powers properly vested and exercised in a *bona fide* manner.

102. Furthermore, while an issue as to the *locus standi* of the Fourth Named Applicant was identified in the pleadings and submissions, it was not pursued and no issue arises for determination with regard to the Fourth Named Applicant's *locus standi* in these proceedings. This issue has, in any event, been addressed by Simons J. in his judgment in *Pelagic Weighing Services Limited v. Sea Fisheries Protection Authority* [2021] IEHC 345 and is not ripe to be revisited.

CONCLUSION

103. No infirmity with the selection of the Vessel for a monitored weighing on landing has been established. In circumstances where I have found that the buyer/operator Applicants was subject to a duty to submit to a requirement for a monitored weighing on landing under Article 60(6) of the Control Regulation notwithstanding the then existence of a derogation but failed to comply with that duty through a refusal to dewater and sort the species of fish for weighing, the Applicants cannot now legitimately complain about any consequential inaccuracy in the information submitted arising from the weighing on landing. Any such inaccuracy arose directly from the actions taken by or on behalf of the First to Third Named Applicants and it would not be an appropriate exercise of discretion to grant the relief sought in the circumstances. The official weights which require to be recorded are the weights obtained on landing. These were the weights obtained prior to transportation to a factory premises where the first weighing occurred before transportation. Where the first weighing occurred post transport to an authorised premises in reliance on a derogation lawfully agreed with the Commission, it was permissible to use the factory weights.

104. For the reasons given, I am satisfied that the Applicants have failed to establish that they are entitled to any relief by way of judicial review. Accordingly, I will dismiss the application.

