

No. 2

O. 58, r. 18(1)



SUPREME COURT

Record No:

13/2019

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Title of the Proceedings: [As in the Court of first instance]

The High Court

Record No. 2017 884JR

Between

Pat Fitzpatrick and Michael J. Flannery

Applicants

-v-

Minister for Agriculture Food and the Marine

and

the Sea Fisheries Protection Authority

Respondents

2. **Name of Respondent: The Sea Fisheries Protection Authority**

3. **Application to extend time:** Yes No

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

4. **Do you oppose the applicant's application to extend time:**

Yes No

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

5. **Do you oppose the applicant's application for leave to appeal:**

Yes No

The Second Named Respondent neither consents to nor opposes the application for leave to appeal

6. **Matter of general public importance:**

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely

the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

1. For the purposes of clarification and in response to the reasons pleaded by the Appellant it is pleaded as follows.
2. It is common case that these proceedings concern the Control Regulation and the Control Regulation imposes legal obligations on fishers and on the Second Named Respondent (“SFPA”). It is denied that SFPA is obliged to ensure that the catch recorded by fishers is accurate, that is the legal obligation of fishers who manually input catch figures into their electronic fishing logbooks. SFPA do have a responsibility to have systems to detect and deter inaccurate recording. SFPA’s legal obligations around data are set out at paragraphs 45 to 48 of the judgment under appeal (“the judgment”).
3. FU16 is a 68,000 square kilometre area of sea in the North Atlantic which, for conservation reasons, is subject to greater nephrops quota restrictions that the surrounding areas of sea through which fishers steam to reach it.
4. Fundamental to these proceedings is SFPA’s responsibility under the Control Regulation, as the Single Control Authority for Ireland, for reporting accurate FU16 nephrops outtake/catch figures to the First Named Respondent and the EU Commission so that they know how much nephrops has been caught and how much, if any, of the annual nephrops Quota, is left to allocate.
5. In 2017 it became clear to the SFPA that fisher’s logbook returns for their FU16 nephrops catch were grossly unreliable (the reasons for this are outlined at paragraph 25 of the judgment) and in those circumstances SFPA had a duty not to report those grossly unreliable figures to the First Named Respondent and the EU Commission and instead to establish accurate figures to report. It met this duty by developing the “time spent methodology” as described in the Notice of Appeal and reporting the figures calculated on the basis of this methodology to the First Named Respondent and the EU Commission. It is essentially the vindication of the said duty which is at issue in these proceedings and therefore this appeal, whether it is before this Honourable Court or the Court of Appeal, is a matter of general public importance which is required to be determined in the interests of justice. At no time did SFPA in any way supplant fisher’s legal obligation to input correct catch figures into their log books.
6. It is denied that the SFPA in acting as aforesaid in any way breached the Control Regulation or the State’s obligation under EU Law or interfered with the rights of any fishers either as pleaded or at all.

7. It is denied that the application of the Control Regulation by the Respondents diverges from the approach in other member states and it is noted that the High Court found that the Applicants had not provided any evidence of such divergence. (see paragraph 61 of the judgment).

Word count - 478

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Second Named Respondent respectfully repeats paragraph 7 above.

Word count - 10

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The Second Named Respondent respectfully repeats paragraph 7 above.

Word count - 10

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/a

Word count -

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing:

Yes

No

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

Word count:

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

It is not admitted that any reference is necessary but if it is then the terms in which the Appellants have drafted questions for the CJEU are inappropriate in that they are premised on the basis that the Second Named Respondent has failed to apply Regulation 1224/2009 when the true question to be asked is whether, when the electronic logbook figures logged by fishers are for good reason suspected to be grossly unreliable, the Second Named Respondent is entitled under that Regulation to employ reasonable, scientifically valid methods to determine and report the most accurate outtake figures

Word count: 97

Part II

The information contained in this part will not be published.

14. Respondent's Representatives:

If not provided in the application for leave to appeal please identify the solicitor and counsel for the respondent, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel or in the case of a respondent in person please provide contact details including telephone and email.

15. Legal Aid:

*In the case of an application by the DPP from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same. **N/a***

Signed:

Malachy Boohig

Malachy Boohig

1 Kent Street,

Clonakilty, Co. Cork

Solicitor for the Second Named Respondent

Date:

1st February 2019

To be served on: Conway Solicitors

Conway House

35 South Terrace

Cork

Solicitors for the Appellants

And

The Chief State Solicitor

Osmond House,

Little Ship Street,

Dublin 8

Solicitor for the First Named Respondent

Please file your completed Notice in:

The Office of the Registrar of the Supreme Court

The Four Courts

Inns Quay

Dublin 7

Appendix
Grounds of Opposition (and Cross Appeal)

1. **Title of the Proceedings:** *[As in the Court of first instance]*

The High Court

Record No. 2017 884JR

Between

Pat Fitzpatrick and Michael J. Flannery

Applicants

-v-

Minister for Agriculture Food and the Marine

and

the Sea Fisheries Protection Authority

Respondents

2. **Respondent's grounds for opposing an appeal if leave to appeal is granted:**

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

- | |
|---|
| <p>i. It is denied that the learned Trial Judge erred in law in finding that the Second Named Respondent was legally entitled to replace the figures reported in respect of the Nephros species caught within the fishing ground known as Functional Area 16 ("FU16") in accordance with the system prescribed for calculating fish outtake under Council Regulation (EU) No. 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (hereinafter called "the Control Regulation") with its own figures calculated on the basis of the "time spent in FU16". For the avoidance of doubt it is also denied that the learned Trial Judge made any such finding.</p> |
|---|

It is noted that throughout their grounds of appeal the Appellants instead of clearly setting out or quoting the findings of the learned Trial Judge from which they are appealing seek to put a gloss or colour on those findings so as to undermine their rationale and it is pleaded by way of the Defence that such characterisation of the findings of the High Court is inappropriate and unhelpful to the resolution of this appeal.

- ii. It is denied that the learned Trial Judge erred in law in finding that the Second Named Respondent in exercising its functions under the Control Regulation was entitled as a matter of law to disregard the outtake figures for nephrops fished in FU 16 reported in accordance with the requirements of the Control Regulation in favour of a methodology not provided for by the Control Regulation. For the avoidance of doubt it is also denied that the learned Trial Judge made any such finding.
- iii. It is denied that the learned Trial Judge erred in law in determining the correct or true interpretation of the term “data” or “information” when considering the information to be transmitted under the Control Regulation and ancillary instruments to the European Commission in respect of fishing outtake or yield.
- iv. It is denied that the learned Trial Judge erred in law in finding that the terms “data” and “information” in “*inter alia*” articles 14, 15 and 33 of the Control Regulation did not denote the figures reported by the logbook system, duly corrected in accordance with the provisions of the Control Regulation but rather would include such information as the Second Named Respondent might reasonably consider accurate.
- v. It is denied that the learned Trial Judge erred in law in interpreting the provisions of the Control Regulation by erroneously interpreting the “fundamental objectives” of the Common Fisheries Policy such as to undermine the principles of uniformity and legal certainty of European Union legislation and for the avoidance of doubt it is denied that the learned Trial Judge made any such interpretation.
- vi. It is denied that the learned Trial Judge erred in law in finding that the language of the Control Regulation was not clear enough such as to prevent the Second Named Respondent from employing its own methodology for the calculation of fishing outtake rather than applying the system provided for by the Control Regulation and it is for the avoidance of doubt denied that the Learned Trial Judge found that the

Second Named Respondent did not apply the Control Regulation either as pleaded or at all.

- vii. It is denied that the learned Trial Judge erred in law in recognising the attribution of discretion to the Second Named Respondent in its interpretation of the Control Regulation and it is for the avoidance of doubt denied that the learned Trial Judge made any such recognition and it will be submitted that the learned Trial Judge at all times properly construed the Council Regulation. It is denied that the learned Trial Judge erred in law in characterising the exercise of functions and duties prescribed by the Control Regulation as “mechanistic” and for the avoidance of doubt it is denied that the Learned Trial Judge applied any such characterisation rather the Learned Trial Judge found, at paragraph 58 of her judgment, that it would be in direct conflict with the fundamental objectives of the Common Fisheries Policy, which includes the conservation of particular species if the national authority responsible for reporting figures to the EU authorities were forced to transmit figures which the Authority itself believed, on reasonable grounds, to be grossly inaccurate. The Learned Trial Judge further stated that such an interpretation would constrain the authority to act in a mechanistic way and not to exercise its independence and expertise in the area.**
- viii. It is denied that the learned Trial Judge erred in law in finding that the legal obligation placed on the Second Named Respondent in the circumstances comprised a competence, outside the supervisory tools prescribed by the Control Regulation and ancillary legislation, to use a number of possible means of calculating fishing outtake, once the said methods were not unreasonable or irrational and it is for the avoidance of doubt denied that the learned Trial Judge made any such finding.**
- ix. It is denied that the Learned Trial Judge erred in law in finding that the Second Named Respondent was entitled to apply the provisions of the Control Regulation in the light of the opinion of Dr. Colm Lordan that the “time spent” methodology for calculating fishing outtake was “a scientifically respectable one” thereby replacing the methods prescribed under the Control Regulation for the calculation of fishing outtake. It is for the avoidance of doubt denied that the Learned Trial Judge made any such finding. The Learned Trial Judge at paragraph 59 of the judgment described the methodology as being a scientifically respectable one based on the evidence of Dr. Lordan in the context of the Appellants, who put forward no expert scientific evidence at all (see paragraph 44 of the judgment from which finding the Appellants have not appealed), having attacked the methodology as being not “scientifically grounded”.**

- x. It is denied that the learned Trial Judge erred in law in relying on scientific evidence before the Court to interpret the provisions of the Council Regulation in such a manner as to thereby replace the methods prescribed under the Control Regulation as a matter of law for the calculation of fishing outtake and it is denied that the Learned Trial Judge engaged in any such reliance.
- xi. It is denied that the learned Trial Judge erred in fact and law in finding that the enforcement powers under the European Union Common Fisheries Policy and in particular the Council Regulation could be used to arrive at global figures needed to discharge the Second Named Respondent's duties in law and that the approach of the Second Named Respondent accordingly replaces the supervisory system prescribed by the Council Regulation by correcting fishing outtake figures using its own methodology. For the avoidance of doubt it is denied that the Learned Trial Judge made any such finding.
- xii. It is denied that the Learned Trial Judge erred in fact and in law in not having regard to the standardised instruments of control established by the Control Regulation and accepted the supplanting of these instruments in the light of concerns held by the Second Named Respondent. For the avoidance of doubt it is denied that the Second Named Respondent engaged in any supplanting of the Control Regulation either as pleaded or at all and by way of Defence it is pleaded that the SFPA did not act otherwise than in accordance with the Control Regulation and related measures in employing the time spent methodology for calculating the figures caught by July 2017 in FU16.
- xiii. It is denied that the learned Trial Judge erred in law in finding that the Second Named Respondent, in returning generalised figures, which disregarded the figures reported by individual fishing vessels, did not deprive law-abiding Irish fishers of a level playing field in circumstances where the consequences of the supposed overfishing of some was visited on others by the Respondents in contrast to the methodology applied in other European union Member States. By way of Defence it is denied that the Second Named Respondent disregarded the figures reported by individual fishing vessels. It has regard to them and found them to be unreliable and therefore applied the time spent methodology to arrive at accurate figures which it reported to the EU Commission and the First Named Respondent. This ground of appeal is misconceived in that it supposes that fishers have a right to fish FU16 after the annual FU16 quota has been exhausted just because they themselves have not been

prosecuted for overfishing and therefore fundamentally misunderstands the conservation objective of the Common Fisheries Policy.

xiv. It is denied that the Learned Trial Judge erred in law and in fact in finding that the methodology conceived and applied by the Second Named Respondent for the calculation of fishing outtake for Nephrops in FU16 did not create such a lack of uniformity as to be non-compliant with the Council Regulation and the goals and purposes of the common fisheries policy.

xv. It is denied that the Learned Trial Judge erred in law in finding that the Second Named Respondent did not act otherwise than in accordance with the Control Regulation and related measures in employing the “time spent” methodology for calculating the figures for Nephrops caught by July 2017 in FU16.

xvi. It is denied that the learned Trial Judge erred in law in finding that the Second Named Respondent, having reported monthly figures to the European Commission in exercise of its functions, for the exploitation of the fishing opportunities in the fishing ground FU16 from 1st January 2017 to September 2017 could lawfully adjust those figures by reporting entirely different figures in October 2017 based on its new methodology. By way of defence it is pleaded that once the Second Named Respondent became aware that the figures previously supplied were grossly unreliable it had a duty to supply the correct figures to the European Commission.

xvii. It is denied that the Learned Trial Judge erred in law in not finding that the Second Named Respondent was not entitled to make the decision dated or on before 5th October 2017 and communicated on 5th October 2017 causing the First Named Respondent to not open FU16 for the fishing of Nephrops.

xviii. It is denied that the Learned Trial Judge erred in law in finding that the First Named Respondent did not act *ultra vires* in accepting the information furnished by the Second Named Respondent and/or making the decision to issue the impugned Fisheries Management Notice and/or making any other official communication to the European Commission based on the figures reported by the Second Named Respondent.

xix. It is denied that the Learned Trial Judge erred in law in not finding that the First Named Respondent was not entitled to make the decision dated

on or before 17th October 2017 and communicated on 17th October 2017 permitting the fishing of Nephrops in FU16.

- xx. It is denied that the Learned Trial Judge erred in law in not finding that the First Named Respondent had not performed his functions in accordance with *inter alia* Sections 12 and 13 of the Sea Fisheries and Maritime Jurisdiction Act 2006 and Articles 34 and 35 of the Control Regulation refusing to permit the fishing of Nephrops in FU 16.
- xxi. It is denied that the Learned Trial Judge erred in law in not finding that the Appellant were entitled to damages.
- xxii. It is denied that the Appellants are entitled to advance any further or other grounds beyond those which they have pleaded in their Notice of Appeal.
- xxiii. Save in so far as they are expressly admitted heretofore all the Appellant's Grounds of Appeal are denied.
- xxiv. In the premises the Second Named Respondent pleads that there are no ground for setting aside in any respect the judgment of the Learned Trial Judge, which judgment the Second Named Respondent entirely accepts and intends to fully defend in this Appeal.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

N/a

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/a

5. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

N/a