Neutral Citation Number: [2019] EWHC 1892 (Admin)

Case No: CO/12289/2013
CO/4422/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 18/07/2019

Before :

HHJ DAVID COOKE

- -

Between :

Nigel Mott (1) **David Merrett (2)**	**Claimants**
- and -	
Environment Agency	**Defendant**

- -
- -

Mark Beard (instructed by **Harrison Clark Rickerbys**) for the **First Claimant**
Ken Rogers (instructed by **Philip Smart & Associates**) for the **Second Claimant**
Gwion Lewis (instructed by **Environment Agency Legal Services**) for the **Defendant**

Hearing date: 29 May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ DAVID COOKE

HHJ David Cooke:

1. This judgment follows a hearing to assess the basis and quantum of compensation to be paid by the defendant Agency to the First Claimant Mr Mott in consequence of my finding at the trial of his claim that the Agency's decisions to impose conditions on his licence to fish for salmon in the river Severn using a putcher rank, limiting his permitted catch to 30 fish in 2012, 23 fish in 2013 and 24 fish in 2012, were each unlawful in the absence of compensation by reason of the interference they entailed to his rights to property under Article 1 of the First Protocol to the ECHR ("A1P1"). I made an order after the trial declaring that an award of damages was necessary to afford just satisfaction to Mr Mott for that interference, pursuant to s8 Human Rights Act 1998. The facts are more fully set out in my judgment on that claim: [2015] EWHC 314 (Admin), and I will not repeat them here.

2. My decision on the A1P1 point was upheld by the Court of Appeal ([2016] EWCA Civ 564) although my conclusion that the relevant decisions were unlawful by reason of irrationality was not. The Agency's appeal to the Supreme Court was dismissed ([2018] UKSC 10). There was no cross-appeal on the irrationality point.

3. Following the Supreme Court's decision the matter was brought back for assessment of compensation. In addition, by order of 25 July 2018 (made without a hearing but with the benefit of written submissions by all parties) I allowed an application by Mr Merrett, a joint holder with Mr Mott of the lease of the right to fish the putcher rank who had been an Interested Party up to that point, to be made the Second Claimant and advance a claim to similar effect as Mr Mott's, and directed that he file Particulars of Claim in support. The Agency filed a Defence to that claim pursuant to my order on 30 January 2019. The hearing dealt also with Mr Merrett's claim.

Relevant legal principles

4. There was considerable agreement between counsel as to the legal principles to be applied, insofar as they can be discerned from UK and Strasbourg jurisprudence. The court is directed by s 8(4) HRA as follows:

> "In determining -
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

Counsel are agreed however that the jurisprudence of the ECtHR on Art 41 is limited, largely concerned with awards for non- pecuniary losses, which have tended to be low in amount, and difficult to rationalise. UK courts have therefore been required to develop their own principles, while having regard as far as they can to the Strasbourg cases and what can be derived from them.

5. Counsel are agreed that these principles include the following:

i) The remedy in damages under the HRA is discretionary and not similar to damages in tort (per Lord Reed in *R (Sturnham) v Parole Board* [2013] 2 AC 254 at para 29)

ii) Compensation may be awarded for financial loss provided it was the direct consequence of the breach complained of, without regard to tort- based considerations of remoteness, scope of liability or reasonable foreseeability (see McGregor on Damages para 50-098). Mr Beard described this as a "but for" test of causation.

iii) The leading UK authority is the decision of the Court of Appeal in *R (Anufrijeva) v Southwark LBC* [[2003] EWCA Civ 1406 in which Lord Woolf LCJ said:

> "59. … it is possible to identify some basic principles the ECtHR applies. The fundamental principle underlying the award of compensation is that the Court should achieve what it describes as *restitutio in integrum.* The applicant should, insofar as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded."

Mr Mott's claim

6. Counsel are also agreed that in this case Mr Mott should be compensated for his financial losses attributable to the breach, and that in principle these are to be calculated based on the difference between the value of the salmon catch he was permitted to make under the decisions challenged and that which he could have made but for the infringement of his A1P1 rights. There are two issues on which they part company:

    i) Whether this difference is to be calculated as Mr Mott says from the number of fish he could have caught if no catch limit had been imposed, or as the Agency says from an assumption of a different catch limit which it could have imposed without any infringement of Mr Mott's A1P1 rights, and

    ii) Whether Mr Mott is entitled to claim for losses in years later than 2014 (the last year for which the decision to impose a catch limit is challenged in these proceedings). He makes such a claim, either on the basis that the limits set for those later years must also have been unlawful or alternatively irrespective of whether they were or were not lawful.

7. Mr Mott's calculation for the first period (2012-14) is as follows:

    i) His starting point is the average number of fish caught in the five years from 2005-9, being the last continuous five year period in which the fishery operated in full without either a voluntary agreement not to fish (for which the Agency made payments in the years 2004, 2010 and 2011) or a catch limit imposed under the challenged decisions. That average was 623.2 fish, and the "lost" catch is the difference between that figure and the catch allowed in each year (30, 23 and 24 respectively).

ii) His evidence is that the average price at which he sold fish was £98.25 in 2012, £107 in 2013 and £113.44 in 2014.

iii) From the gross loss so calculated Mr Mott deducts certain cost savings: in light of the catch restrictions he did not pay for a licence for the full number of putchers (650) he was entitled to fish, so paying a smaller fee, and he did not fish on all the days he might have, so saving some travel costs.

iv) The net loss so calculated is £187,278 for this period.

Mr Lewis does not contest this calculation in any respect, if I uphold Mr Mott's premise that the starting point should be based on the assumption there was no catch limit. He does not seek to say that any additional cost savings or other offsetting amounts should have been deducted.

8. The Agency's alternative calculation starts from an assumption, which Mr Lewis submits the court should make, that but for the catch limits actually but unlawfully set, an alternative lawful decision could and would have been taken such that Mr Mott would have been limited to a catch of not more than 60 fish in each year. That figure is not the subject of any evidence filed by the Agency, though it is accepted that the catch limits in fact set in subsequent years were 50 in 2015, 48 in 2016, 55 in 2017 and 58 in 2018.

9. Calculating the "lost" catch from a starting point of 60 fish rather than 623.2 produces a gross loss of £10,990.34 for the three year period. The Agency has not sought to deduct any cost savings from that amount. The arithmetic of this calculation is not disputed.

10. Mr Lewis's submissions in favour of this approach can be summarised as follows:

i) Restitutio in integrum requires that the claimant so far as possible be put in the position he would have been if his Convention rights had not been infringed, not as if the power relied on had not been exercised at all.

ii) Hence "just satisfaction" required compensation to restore him to the position he would have been in if a Convention compliant decision to impose a catch limit had been taken, and not to a position in which there was no catch limit.

iii) In the present case the courts at all levels (or at least in the Court of Appeal and above) had held that the defect resulting in breach of A1P1 was not the total catch the Agency sought to allow from all historic fishery licences in the Severn in the year in question (150 in 2012, for instance) but only that the method of allocation unfairly divided that total equally between the number of expected applicants, irrespective of the sizes of their fisheries.

iv) Had the Agency not allocated the total catch as it did, it would have exercised a broad judgment and allowed Mr Mott not more than 60 fish, which the Supreme Court would have found A1P1 compliant. To go further (eg by an allocation pro rata previous catch levels) would have reduced the residual catch permitted for other fisheries below levels that could be regarded as realistic.

v) Alternatively if a reallocation of the total catch would not be sufficient to avoid a breach, "just satisfaction" required "a balance to be drawn between the interests of the victim and those of the public as a whole" (*Anufrijeva* at para 56) which in the circumstances would result in a fair limit being found by "broadly doubling the sum of £10,990 … [to] £20,000."

11. The first point is, it seems, without direct authority. Mr Lewis cited no case, whether concerned with financial or non-financial loss, in which damages had been assessed on the basis of an assumption, or indeed a finding, that a particular alternative Convention compliant decision could and would have been made. At its highest, it seems to me, it is an argument that runs only because of a possible ambiguity in what was meant in *Anufrijeva* by placing the victim "in the same position as if his Convention rights had not been infringed".

12. Although Mr Lewis did not rely on them, I acknowledge that there are numerous cases in which it has been held that persons found to have been unlawfully detained, or unlawfully not released, by virtue of a decision taken (or not taken) under one power have suffered no loss of liberty because, even if that decision had been properly taken, they would inevitably have been detained (or denied release) for some other reason. One example is *R (Mormoroc) v Secretary of State for Justice* ([2017] EWCA Civ 989 at para 29) in which the Court of Appeal said that a claimant alleging unlawful failure to release him early from criminal imprisonment could not have shown loss sounding in damages because on the facts if he had been granted early release he would inevitably have been detained in any event under immigration powers.

13. Further, in *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23, itself a case of non-financial loss flowing from delay by the Parole Board in considering whether a prisoner sentenced to indefinite imprisonment for public protection (IPP) should be released, Lord Reed (with whose reasons all the other justices agreed) held (a) that it was for the claimant to establish on the balance of probabilities that if his case had been reviewed he would have been released, (b) that although the Strasbourg court rarely entered into factual disputes or made factual findings, the national courts could and should resolve disputes of fact on the evidence in the usual way, but (c) the court would not engage in speculation or make an award on a loss of a chance basis nor, if it found the claimant would on the balance of probabilities have been released, reduce his damages by reference to the degree of probability of that release. These conclusions are summarised at para 13 of the judgment, and expanded upon later, but I do not consider I need to set out what is said in detail.

14. It may be said that point (a) above requires the court to consider what decision a public body would have taken had it in fact proceeded to a decision in circumstances where its failure to do so amounted to a breach of Convention rights. But none of these cases, it seems to me, give any indication that where a decision has in fact been taken in a manner that amounts to a breach, the court for the purposes of assessing damages will in effect re- take the decision itself and reach its own conclusion as to what the outcome might have been if the decision had been taken in a Convention-compliant manner..

15. In other contexts of course the court on review emphatically will not (and holds that it has no jurisdiction to) make its own decision or consider what decision the decision taker ought to have made. In general, it is trite that if a decision is found to be unlawful it is quashed and remitted to the decision taker to be made again and the

court will not either direct the outcome or substitute the decision it would have made if the matter were before it, even if on the evidence it might have been in a position to do so. To some extent that principle is eroded by the provisions of s 31(2A) Senior Courts Act 1981 (as inserted in 2015) that:

> "The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Mr Lewis did not, I should say, suggest that this provision applies in the present case, or rely on it in support of his argument. If it had been relied on by the Agency it would have been required to set out the grounds on which it so contended; see CPR 54.8 (4)(a)(ia) (which applies to acknowledgment of service but no doubt the same would be the case in any later detailed grounds of defence). Where it is invoked, the court enters into consideration of the conclusion a decision taker should have reached only to the limited extent of enquiring whether, if some defect in the decision process (often but not necessarily of a procedural nature) had not occurred, the outcome would very likely have been essentially the same for the applicant. In that case (and save in exceptional circumstances) relief must be refused altogether. This provision is therefore no support for any more general power or requirement for the court to make findings as to a *different* decision (ex hypothesi a materially different decision) that either party contends could or should have been made.

16. It is therefore wrong in principle, in my judgment, for the court to make findings as to a counterfactual alternative decision that might have been taken but was not. In a situation in which a decision has been taken in breach of Convention rights, the comparison to be made to determine the position the claimant would have been in if his rights had not been infringed is therefore as Mr Beard argues with the situation in which the unlawful decision had not been taken at all.

17. Further, even if I had agreed with Mr Lewis in principle that the court could enter into an exploration of what alternative decision the Agency might have reached, there is no evidence before me that could be a foundation for that enquiry. The Agency filed no evidence directed to that issue at the original trial, and although very shortly before this hearing it filed a witness statement from Mr Gough, who had been directly concerned with past negotiations with Mr Mott and strategic management of salmon stocks in Wales (as to which see below) that did not address in any respect what alternative decision the Agency might have reached, or how or why it would have done so.

18. In its counter-schedule of loss, the Agency acknowledged that assessing what an alternative A1P1 compliant decision would have been was "not straightforward" but submitted that it was confident its decisions to permit 50 fish or thereabouts in subsequent years were compliant and that accordingly it could be safely assumed that a limit of 60 in the earlier period would have been similarly lawful.

19. In submissions Mr Lewis eschewed this approach which, insofar as it invited an assumption that the lawfulness of decisions in later years could be assumed, was inconsistent with his argument that it was not permissible for Mr Mott to claim damages for those later periods because the lawfulness of the limits set in those years (or unlawfulness as Mr Mott asserts) has not yet been determined. Instead he submitted that it was "inconceivable" that Mr Mott would have been allowed to fish with no catch limit and the court should do the best it could in the circumstances and assume that a limit would have been set that would not have exceeded the figure in later years by more than a modest amount.

20. All of these approaches in my view amount to no more than inviting the court to put its finger in the air and make a guess on an unprincipled basis as to what a properly acting decision maker would have decided. It would in my judgment be wrong to do so.

21. Even if the Agency had presented a reasoned case, with evidence as necessary, as to what decision it might have reached, it seems to me objectionable in principle to permit it to do so. Any such case would inevitably be compiled with hindsight and the benefit of findings made by the court as to the respects in which its earlier decision erred, enabling it to plot its way around difficulties with a view to getting back as close as it could to the effect of its unlawful decision. No doubt that may happen in a case where a decision is remitted to be retaken, but in a case where the citizen has been caused irrecoverable financial loss by an unlawful decision it would seem to me unjust to permit the state to escape from responsibility to compensate him by in effect backdating a later decision.

22. The second issue (para 10(iii) above) is in my judgment a misreading of my order and of the judgments at all levels. Neither I nor the higher courts found that the Agency had lawfully imposed a total catch limit in any of the years in question, or that the only defect in the decision to set a limit for Mr Mott arose from the manner of apportionment of that total. Indeed, as Mr Lewis accepted, there was no separate decision under the relevant statutory power to set a total limit for catches; the power is to impose a catch limit on an individual licence. The aggregate figure was arrived at as a stepping stone in the calculation of those individual limits, but was no more than that.

23. My finding was that the extent of the restriction imposed upon Mr Mott's rights was to eliminate at least 95% of their benefit and that this was closer to deprivation than control (para 96). That relates to the overall effect of the restriction, ie reducing his potential catch from (about) 600 fish to 30 or less. It was not limited to the effect of a failure to allow Mr Mott a greater share of a total catch of 150 fish (or a number of that order in 2013-4). I noted that the method of apportionment *exacerbated* the effect on Mr Mott as compared with others (para 98) but I did not say that apportionment was the only problem.

24. Indeed I found (para 99) that "even if the Agency could properly have imposed the total catch limit that it did, *the size of that limit* and the way it was apportioned meant that Mr Mott has been required to shoulder an excessive and disproportionate burden…" (emphasis added). That finding is again based on the impact of both the aggregate allowance for all licences *and* the method of apportionment of that allowance, not on apportionment alone.

25. Neither the Court of Appeal nor the Supreme Court substituted any finding that the aggregate figure was justified and infringement lay only in the apportionment. It is sufficient to refer to paras 36 and 37 of the judgment of Lord Carnwath; in the former he agrees with my characterisation of the restriction as eliminating 95% of the value of the right and notes that the impact was "exacerbated" (not *caused*) by the method of allocation chosen. He does not suggest that the only matter to be taken into account was the apportionment. In para 37 he notes that the reason for the finding in the present case is "the *severity* and the disproportion (as compared to others) of the impact on Mr Mott" (emphasis added). That is plainly a reference to the overall restriction on his previous levels of catch, not merely the apportionment of a new (and unobjectionable) lower total.

26. It follows that even if I had accepted Mr Lewis's first point, his premise as to the basis for finding what alternative decision would have been compliant is false in any event.

27. Mr Lewis's alternative argument (para 10(v) above) is in my judgment fundamentally objectionable as a matter of principle. It amounts to a suggestion that the court should make some arbitrary reduction in the compensation awarded to a citizen for financial loss caused by the unlawful exercise of state power by reason of the assumed laudable purposes that the state sought to pursue.

28. It seeks to pursue, in a modified form, the argument that in matters involving the protection of the environment, striking a "fair balance" between the interests of the state and the Convention rights of citizens cannot require compensation to be paid to citizens affected by executive action. That argument was made and was unsuccessful at all levels. It was summarised by Lord Carnwath at paras 29-30 of his judgment, and clearly rejected; see paras 33-36. If the action taken amounts to expropriation, or something closely akin to it (as I found in this case) it does not seem to me that there can be any principled basis for awarding less than the actual loss incurred, which would be in effect to require the citizen to shoulder some of the cost of the state's unlawful action against him. The required "fair balance" is struck by the court determining whether state action taken without in fact offering compensation to the citizen is disproportionate, and not by the court, if it decides that question in favour of the citizen, awarding him some amount less (on an arbitrary basis) than the amount of his actual loss. No authority was cited for any such course, nor any example of a case in which assessed financial loss had not been awarded in full.

29. It may no doubt be different where the state has in fact made some provision for compensation or other payment for deprivation of property. In such a case the court may consider whether the compensation is so inadequate that the measure as a whole does not strike a fair balance, and in doing so accord the state an appropriate margin of appreciation. On that basis, for instance, attempts to claim that the imposition on freeholders of a right of enfranchisement of leases at a value demonstrably less than a market rate amounts to a breach of A1P1 have failed. But that is not the same as this case, since no recompense of any kind was provided for the affected person, either by the statute under which the Agency acted or by the Agency itself.

30. Even if there might be some circumstances in which the court might find that a fair balance was struck by awarding only partial compensation, the basis proposed by the Agency cannot be supported. It starts from its own unjustified proposition that it should be assumed that it might lawfully have restricted Mr Mott to a catch of 60 fish, and arbitrarily (almost) doubles that figure. That starting point is wrong, for the reasons I have given above. An award of only £20,000 would leave Mr Mott to bear

almost 90% of the loss he has been caused, which in my judgment would be wholly unjust.

31. For these reasons I reject the arguments put forward for the Agency and assess the compensation payable to Mr Mott for the first period in the amount he seeks, £187,278. There is in addition a claim for interest, on which there were no detailed submissions. If not agreed this can be dealt with as a matter arising, but provisionally it seems to me that an appropriate basis would be a rate of 4% pa from the mid point of each season until the date of the order, compounded annually.

2015 and later years

32. As noted above, Mr Mott has not brought any proceedings to challenge the catch limits imposed in 2015 (50 fish), 2016 (48), 2017 (55) or 2018 (58). Mr Beard indicated that if necessary he might still seek to do so, though of course he would now be out of time unless the court was prepared to grant an extension. No such application was before me.

33. In his updated schedule of loss, Mr Mott said that licences had been obtained in each of these years, but fishing only actually took place in the first two, when the permitted catch was shared equally by arrangement between himself and Mr Merrett and both men fished up to their share of the limit. In 2017 and 2018 neither of them in fact exercised the right to fish.

34. In that schedule he contends (paras 12-14):

    i) that the limits in each of these later years were in fact unlawful as breaches of his A1P1 rights, but

    ii) it is not necessary for the court to adjudicate on that issue as the losses he suffered in these later years were the direct consequences of the limits imposed in 2012-4 that have been found unlawful, and

    iii) he is thus entitled to be compensated in respect of the later years whether or not the limits for those years were lawfully set.

35. It is not open to me to find that the decisions in these later years were unlawful, in the absence of a claim setting out a challenge to them and consideration of the merits of that challenge. The circumstances in which the limits were set may or may not be similar to those that I found in relation to the earlier years. The fact the size of those limits is only slightly greater (and so the effect on Mr Mott's right is only slightly less) than that which I found amounted to a disproportionate interference may be some indication in his favour, but it would be wrong in my view to assume that he would inevitably make out a claim if he were to pursue one.

36. Further, Mr Lewis makes the point that the time limit to make such a claim has long expired, and Mr Mott faces a hurdle that is much more than a formality if he does seek to do so now. In the absence of a successful claim, the decisions in question should be treated as lawful, or at least not open to challenge.

37. Mr Mott has not made a case on the facts that the effect of the limits in 2012-4 was to destroy his business such that he could not have resumed fishing thereafter even if there was no limit, or a limit set at a sufficient level to make it economic to do so.

There is some evidence about deterioration of the fishing baskets in the absence of maintenance, but it is not said they were so damaged that none of them could be used by 2015. Indeed he did fish in the years 2015-6, until he had reached the catch permitted, and there is nothing in his evidence to indicate he could not have carried on doing so and achieved a greater catch if he had been allowed to. He did not in fact fish in 2017-8 but has not said he would have been unable to do so if he had wished.

38. Consequently, in my view, the fact that he did not fish, or fished only to a limited extent, in the later years cannot be said to flow directly from the limits imposed in earlier years. Insofar as it was caused by the Agency's acts, it was the consequence of the limits set in those later years themselves. Any liability for compensation in respect of those years could arise only if it were established that the relevant decisions were unlawful.

39. I therefore reject Mr Mott's claim, insofar as it is based on those later years.

Mr Merrett's claim

40. As stated above I previously made an order permitting Mr Merrett, who is the joint owner of the lease to fish the putcher rank and was initially named as an Interested Party, to change his status to that of claimant and put forward his own claim. That order was made without a hearing but after written submissions by the Agency. Mr Merrett has subsequently set out his proposed grounds of claim and proposed basis of assessment of loss, to which the Agency has responded.

41. At the hearing, Mr Lewis urged on me that this decision was an error, reiterating the submissions previously made in writing by the Agency and, by inference, contending that I should in some way set aside or ignore my previous order. In my judgment he was not entitled to make that submission. There has been no appeal against my order and no proper basis is put forward on which I might revoke it. On the other hand, as I pointed out at the hearing, the order allowing Mr Merrett to be joined as a claimant does not dispense with the requirement for permission for his claim to proceed, which remains to be determined in the light of the grounds of claim he formulated and the Agency's grounds of opposition.

42. Mr Lewis sensibly conceded that in consideration of the lawfulness of the catch limits challenged, no distinction can be drawn between Mr Merrett's position and that of Mr Mott. As joint holders of the right affected, they are equally impacted and if the decision is disproportionate and unlawful as against Mr Mott it is equally so as against Mr Merrett.

43. Mr Merrett however in his Grounds put forward a different basis for assessing loss, based upon the history of payments previously made by the Agency for himself and Mr Mott to refrain from fishing in particular years, and in particular on offers that he said had been made by the Agency (but not accepted) to buy out their leasehold interest for £250,000. If their interest had been worth at least that amount when those offers were made, he submitted, compensation awarded for effectively depriving them of that interest should be no less now.

44. This produced a witness statement from Mr Peter Gough on behalf of the Agency that, inter alia, denied that any offer of £250,000 had at any time been made, stating that he had been in charge of all such negotiations and had never authorised or been told of any such offer, or of any offer exceeding £90,000. Mr Mott then filed his own

witness statement exhibiting a number of letters from agents instructed by the Agency that clearly did make an offer of £250,000, and another direct from Mr Gough himself expressly referring to an offer in that amount.

45. What Mr Gough would have said in response to this documentation I do not know, because at the hearing Mr Rogers on behalf of Mr Merrett indicated that he was content to pursue quantum on the basis advanced for Mr Mott, ie the value of fish lost in the years affected rather than the value of the leasehold interest, and in the circumstances neither counsel considered it relevant to cross examine Mr Gough.

46. It became clear from the evidence filed by both claimants that,

    i) They had operated the fishery, to which they were jointly entitled, by private arrangement between them. In most years that arrangement was that Mr Mott would work two tides and retain all the fish caught, and Mr Merrett would work the next two tides. In those years they shared the expenses. In 2012 when the first catch limit was set Mr Merrett agreed not to fish at all in return for Mr Mott giving him two fish and bearing all the costs. It appears a similar arrangement was made in 2013 and 2014.

    ii) The catch loss calculation relied on by Mr Mott is in respect of the whole loss of catch from the fishery, irrespective of whether it would have been operated by himself or Mr Merrett. It was not an estimate of the loss he personally would have suffered if he had effectively operated it for only half of the available season.

    iii) There was only ever one licence applied for and issued each season to operate the fishery. In practice Mr Mott made this application and it entitled the fishery itself to operate, irrespective of whether it was Mr Mott or Mr Merrett who collected the catch on a particular day.

    iv) There are unresolved differences between Mr Mott and Mr Merrett about the terms on which they agreed Mr Merrett would not fish in the years 2012-4, and whether as between them Mr Merrett should be entitled to any share of the compensation received. Mr Mott's position is that Mr Merrett was not prepared to take the financial risk of challenging the Agency's decision and so gave up any right to fish, and he should not be allowed to seek a share of the compensation now that the claim has turned out to be successful. I am not in a position to resolve those disputes.

47. Mr Mott was in my view, as against the Agency, entitled to put forward the claim on the basis he did, as he is a joint holder of the property right infringed. The Agency might have objected to the detail of his calculation on the basis that in practice not all the fish were sold by Mr Mott (Mr Merrett achieved slightly lower prices) but it has not. Plainly the Agency cannot justly be required to pay twice over, and Mr Mott and Mr Merrett could not both claim the whole loss. In principle, it seems to me (and bearing in mind that damages are not governed by strict application of rules applicable to torts or other claims that might be made by joint claimants) the court could in appropriate circumstances either entertain separate claims by each joint claimant for their individual losses, or make an award to one of them for the whole loss and leave it to them to agree or otherwise resolve how it should be divided between them.

48. In the present circumstances, the preferable course in my judgment is the latter. That is principally because I cannot resolve the issues between the two claimants on the material before me, and doing so in future should not hold up the conclusion of this claim as far as the Agency is concerned. Until that issue is resolved I could not make orders against the Agency for separate payments to each claimant.

49. The appropriate way to deal with this is in my view to refuse permission for Mr Merrett to proceed with his claim. No injustice to him results; it is not the case (as I was originally concerned it might be) that loss caused by interference with his interest in the fishing rights will go uncompensated if an award is made only to Mr Mott, because that award includes any element Mr Merrett might have claimed separately and he has abandoned any argument that compensation should be assessed on different principles to those advanced by Mr Mott. The question whether any part of that compensation is properly due to him rather than Mr Mott depends on their private arrangements and can be determined later, if not agreed between them.

Conclusion

50. I assess compensation due to Mr Mott at £187,278, plus interest to be agreed or determined (with the provisional indication given above). I refuse permission for Mr Merrett to proceed with his separate claim.

51. I invite the parties to agree the order. If they do, there need be no attendance when this judgment is handed down. If not agreed I will take matters arising up to 30 minutes at the handing down; if longer is required parties should contact my clerk with an agreed time estimate and available dates for a later hearing.