

*Fishing Vessels (Decommissioning) Scheme (NI) 2001 – application to decommission fishing vessel – meaning of bid price in Scheme – whether Department of Rural Development applied Scheme correctly.*

**Neutral Citation no. [2005] NIQB 38**

Ref: **GIRC5270**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: **05.05.05**

**2004 No. 18171**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY RICHARD JAMES  
FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE FISHING VESSELS (DECOMMISSIONING)  
SCHEME (NORTHERN IRELAND) 2001**

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**GIRVAN J**

**Introduction**

[1] In Psalm 107 the Psalmist tells us “that they that go down to the sea in ships and occupy their business in great works, these men see the works of the Lord: and his wonders in the deep.” Now they also see the less wondrous works man who by a combination of bad husbandry and greedy fishing methods has seriously depleted the fishing stocks in the waters around these islands. The problems flowing from this depletion forms the background to the Scheme which is the subject of this application, namely the Fishing Vessels (Decommissioning) Scheme (Northern Ireland) 2001 (“the Scheme”).

[2] The applicant in this judicial review application is Richard James who is a part owner of a fishing vessel, MFV Investors. In addition he is Chief Executive and Secretary of the Northern Ireland Fish Producers Organisation Limited (“NIFPO”) which represents the interests of local fisherman.

[3] The applicant applied with other members of NIFPO for a decommissioning grant in respect of his vessel under the terms of the Scheme which came into operation on 19 November 2001. The Scheme provides for a system of considering, and if appropriate, approving applications for decommissioning grants for fishing vessels. The Scheme differentiates between vessels used for fishing white fish and vessels used for fishing nephrophs (mainly prawns). The applicant's vessel is classified as a nephrophs' vessel.

[4] As a result of the over fishing of seas around Europe the European Union has formulated policies, which attempt to deal with the problems which this decline has caused. Various Schemes have been introduced including the imposition of quotas and incentives to fishermen to decommission vessels. In late 2000 the Department of Agriculture and Rural Development ("the Department") decided in principle to introduce a new fishing vessel decommissioning Scheme with the assistance of European funding under Council Regulation (EC) No. 2792/99. An expert fisheries economist, Richard Banks, was engaged by the Department to identify the best way to operate a fishing fleet decommissioning Scheme. He produced a report entitled "Outline Proposals for a Northern Ireland Fishing Vessels Decommissioning Scheme 2001". This recommended a two-tier approach with the greater proportion of the available funding allocated to the white fish fleet and the balance to the rest of the fleet predominately those vessels targeting nephrophs with a by-catch of white fish. Mr Banks's recommendations include a recommendation to adopt a novel approach to establish a fair price for the decommissioning of vessels by the use of a "strike price" mechanism. On 5 October 2001 after various discussions and reviews the Department introduced the Scheme in its final form with the approval of the Department of Finance and Personnel. The final form of the Scheme did not reflect what Mr Banks had recommended though it drew on a number of the ideas in his recommendations. While the final product revealed some confusion of thought on the part of the Department's officials as to some of Mr Banks's ideas and while the Scheme is drafted infelicitously in some respects, effect must be given to the Scheme as enacted. The real issue in this case turns on a net point of construction of its terms.

### The Scheme

[5] Article 3 of the Scheme (wrongly enumerated as Article 3(1) there being no (2)) provides that a person owning a vessel which is registered under the Merchant Shipping Act 1995 and which fulfils the conditions set out in paras. 8(a) to (g) may make an application to the Department for "grant aid" in respect of the vessel. The term "grant aid" is not defined but the term "grant" is defined as a decommissioning grant under the Scheme. Grant aid

cannot be read as anything other than a grant. The applicant's vessel fulfils all the conditions set out in paras. 8(a) to (g).

[6] Article 4 provides that the Department shall publish a notice inviting applications and specifying a closing date for such applications. An application must be in the prescribed form and include such information as the Department may require. Article 4(4) provides that the application shall be in respect of one vessel only and "shall include a bid stating the amount for which the applicant offers to scrap the vessel." The word "bid" is defined in Article 2(1) as "the amount of grant for which an applicant offers to decommission his vessel and surrender the associated fishing licence." The word clearly refers to a total global figure relating to the vessel.

[7] Article 5 of the Scheme is of central relevance and it is necessary to set out most of its contents:

"5(1) As soon as reasonably practicable after the date specified as the closing date for applications in a notice published under Article 4(1) the Department shall -

- (a) reject any application which is contrary to Article 7 of Council Regulation 2792/99;
- (b) establish a bid price per VCU, by dividing the bid by a respective VCUs;
- (c) divide the vessels in respect of which the application has been made into two classes namely (white fish and nephrophs vessels);
- (d) set a strike price for each class of vessel established under sub-paragraph (c);
- (e) announce a strike price for each class of vessel after all bids have been received; and
- (f) in relation to each such class approve each application for grant aid made under Article 3 by starting with the lowest bid price and proceeding in ascending order to highest or until the amount of money allocated to the Scheme has been exhausted.

(2) ...

(3) In relation to each class of vessel established under paragraph (1)(c) the strike price shall be set at the level of the highest bid price per VCU which relates to a vessel of that class and is determined by

the Department to be reasonable.

(4) The Department may reject any application if it considers the amount of the bid in the application to be unreasonable, having regard to the amount of money allocated to this Scheme.

(5) The Department shall reject any application if it has reasonable grounds for suspecting that there is any fixing or adjustment of the amount of a bid by, under or in accordance with any agreement (whether legally binding or not) or arrangement with another person."

[8] Under Article 6(1) the Department may determine conditions to which an approval under Article 5(1)(f) shall be subject and may amend such conditions. Under Article 6(2) the Department shall notify applicants of the results of their applications and notify applicants whose applications it has approved of any "conditions which it has determined or amended under para.(2) (sic)." The reference to para.(2) must have been intended to refer to para.(1). Under Article 6(3) it is provided:

"The amount of grant aid payable in relation to any vessel under the Scheme shall be the strike price determined in relation to the class to which that vessel belongs multiplied by the number of the VCUs for that vessel."

VCU is defined as a "Vessel Capacity Unit" which is a measure of UK fishing vessel capacity, defined by the fixed formula:  $(L \times B) + (0.45 \times P)$  (where L is the length of the vessel in metres, B is the breadth of the vessel in metres and P is the engine power of the vessel expressed in kilowatts).

[9] Applicants whose applications are approved under Article 5(1)(f) are "eligible" for payment of the grant but the grant is not paid unless the Department is satisfied that the scrapping arrangements set out in Article 8 are fulfilled and the fishing licence attached to the vessel is surrendered and the vessel is removed from the shipping register. Any person whose application has been approved under Article 6 is required to give an undertaking not to purchase another vessel other than a Northern Ireland based vessel within 10 years.

## The Department's Guidance Notes

[10] The Department produced guidance notes for those applying for grant aid under the EC grant payable under the Scheme. Paras. B6 and B7 of the guidance notes stated:

"B6. There are no fixed rates of grant. You are invited to submit a bid for the amount of decommissioning grant for which you are prepared to decommission your vessel and surrender its licence and associated entitlements. The levels of grant are limited by EU Structural Aid Rules for Fisheries (see annex A).

B7. Applications will then be considered and assessed on rates per VCUs in two vessel classes A (white fish vessels) and B (nephroph vessels)...."

B7 gives the clear impression that the applications will be considered and assessed on rates determined by reference to the VCUs. B8 and 9 provided:

"The Department will then establish your bid price per VCU by dividing bid price by respective VCUs. The Department will set a strike price within each vessel class, where the price is set at the highest reasonable bidder's price per VCU. The same VCU price will then be applied to all bids in that class. Applications for grant aid in each class will be approved starting with the lowest bid price and proceeding in ascending order to the highest or until the amount of money available has been exhausted. You will be notified of strike price when all bids have been received." (The paragraph then set out the VCU calculation formula).

B9. It is up to you to decide how to arrive at a total figure in your bid but you may want to bear in mind any costs involved in scrapping your vessel and to make enquiries into scrapping facilities before you put in your bid."

[11] The guidance notes indicate that the Department has set in place an appeal procedure. This provided for the initial provision of reasons for the decision followed by a right to submit a written appeal to the Head of the

Fisheries Division who would then have the originally decision investigated by a senior officer outside the Fisheries Department. If the applicant remained dissatisfied the matter could be referred to a fully independent panel comprising an industry representative, a senior civil servant and an independent person. The panel would then make a recommendation to the Minister who would take the ultimate decision. The guidance notes stated that if the applicant remained dissatisfied he was at liberty to seek a judicial review or appeal to the ombudsman.

#### The course of the applicant's application

[12] The applicant submitted an application from a decommissioning grant on 15 November 2001 in advance of the commencement of the Scheme as required under departmental policy. No one has challenged that policy of inviting applications in advance of the commencement of the Scheme. The VCUs of his vessel calculated under the Scheme amounted to 247.10. His bid was £100,000 thus producing a bid price per VCU of £403.71. His interpretation of the Scheme was that the highest bid per VCU in each of the two classes considered reasonable by the Department was to be announced as the relevant strike price for that class. The Department would then approve applications where the bid price was below the strike price starting with the lowest bid price and proceeding in an ascending order to the highest until the amount of available funds was exhausted.

[13] On 14 December 2001 the Department announced the strike price for nephrophs vessels at £546.69 per VCU. Since the applicant's bid price was £403.71 the applicant considered that his bid should have been accepted. However on 18 December 2001 the Department informed him that his application was unsuccessful. It appeared the Department had selected vessels for grant aid simply on the basis of lowest composite bids, not on the basis of lowest VCU bid prices.

[14] The applicant was dissatisfied with the Department's decision and appealed. He was eventually given reasons for the decision of 7 May 2001 in the following terms:

“Under the above legislation the Department considered applications in two vessel classes white fish and others based on the FQA's associated with the vessel. In each category a unit price ('a bid per VCU price') was established for each bid from which the Department determined as a strike price the highest reasonable unit price. Grant aid was then calculated by multiplying the strike price by the vessels' VCUs and application were approved starting with the lowest actual bid and preceding (sic)

in ascending order until funds were exhausted in respect of each vessel class. I would also advise that a reserve list has been compiled in the event that offers are rejected and I can confirm that at this time the Department has commenced the use of the reserve list as a number of offers have already been rejected."

[15] The applicant appealed further. Notwithstanding that an appeal was pending on a central point of the interpretation and implementation of the Scheme the Department proceeded to implement the Scheme on the basis of interpretation (which was under appeal) and thereby used up the allocated fund of £1.25 million (75 per cent of which was provided out of European funds). If the appeal was ultimately successful the Department was creating an obvious funding difficulty for itself (or rather for the tax payer). One would have expected the appeal procedures to have been expeditious but in fact the decision at the second stage did not emerge until 10 July, well over a year after the Department's decision on 7 May 2002 and over one and a half years after the decision rejecting the application. Mr Jordan, Head of Rural Payments and Inspection Division, noted that legal advice provided from the Departmental Solicitors Office confirmed the existence of "ambiguity" in the legislation but considered that the term "bid price" in Article 5(1)(f) referred to the gross bid figures. In resolving the matter he looked at the Scheme literature which included the guidance notes. He relied on para. B8. He considered that the basic purpose of the Scheme was to decommission "as many boats as possible within budget which targeted the most depleted stocks." This was considered more effective in adjusting overall fishing activity and viability than decommissioning fewer large vessels. Given that objective a selection procedure based on the bid rather than a bid per VCU was logical. He was therefore content that there was a clear policy rationale from the outset for the nature of the Scheme and its focus on smaller bids.

[16] The matter was further appealed to an independent panel. The Minister gave his decision on 22 December 2003, a full two years after the initial refusal of the application. In his letter of that date he stated that the independent panel was able to ascribe a natural meaning to the words "bid price" in Article 5(1)(f) of the Scheme. They considered that the "bid price" was the same as "bid". Having taken account of the statement, the deliberations at the various stages of the appeals process, all the legal points and to the need for a sound financial control the Minister concluded that he had no alternative but to reject the appeal.

#### The outworking of the Department's interpretation

[17] The applicant helpfully furnished the court with a number of tables which showed in tabular form the different outcomes that flowed from the Department's approach compared to the result which would have flowed on

the applicant's contentions as to the proper interpretation of the Scheme. Under the Department's approach no boat with a bid of over £80,000 was offered a grant. The total of VCUs effectively bought in was 2,157.19. The total amount expended was £1,179,314. Two larger vessels were included in the list of offers, "Meiita" and "Girl Mary". Their bids were shown as £499.05 and £875.00 respectively producing a VCU bid price of £2.33 and £3.84. It must have been obvious to all those concerned that those bids were bids of the VCU price and not the overall bid for the vessels. "Girl Mary" having submitted a bid of £875.00 for a large vessel was offered £124,433.11 but rejected it. What is clear is that an owner of a larger vessel had no hope of qualifying for the offer of a grant unless he submitted a bid calculated as if the vessel were of a much smaller size. If he submitted a bid that he considered fair and reasonable taking account of the actual size and capacity of the vessel he would inevitably fail to qualify under the approach adopted by the Department. Under the approach adopted by the applicant he would qualify because his bid price per VCU of £403.71 was below the strike price. His bid was £100,000 and, taking account of the strike price, the re-calculated price would have been £135,415.11. Under the Department's approach owners of smaller boats submitting bids producing a VCU price in excess of the strike price could still qualify whereas large a vessel producing a smaller VCU price below the strike price would not.

#### Counsels' contentions

[18] Mr Horner QC for the applicant stressed that a strict literal interpretation of the legislation supported the applicant's case and that a purposive construction likewise supported his interpretation. Further the legislation fell to be construed bearing in mind that it was intended to give effect to community law and policy and bearing in mind that Section 3 of the Human Rights Act 1998 required the Scheme to be interpreted in a manner that was compatible with the Convention rights including Article 1 Protocol 1 and Article 14. Counsel referred to Bennion 4<sup>th</sup> Edition at section 304 that points out that a purposive construction is one which gives effect to the legislative purpose by following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (what Bennion calls a purposive - and - literal construction) or applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (what Bennion calls a purposive - and - and strained construction). The approach adopted by the Department disregards the fact that in Article 5(1)(f) of the Scheme the draftsman has deliberately added the word "price" to bid. On the presumption that the legislature does nothing in vain the court must endeavour to give significance to every word of an enactment. It is to be presumed that if a word or phrase appears it was put there for a purpose and must not be disregarded. It is presumed that the drafter does not indulge in elegant variation but keeps to a particular term when wishing to convey a particular meaning. A variation on the term is taken to denote a different



meaning. The Department's approach, according to Mr Horner, totally disregards the presumption that the word "price" added to "bid" was intended to mean something other than "bid" itself. The clear policy behind the Scheme was to enable the Department to acquire VCUs an objectively determined measure of capacity, not the decommissioning of the maximum number of vessels. The Department approach to the Scheme discriminated with no reasoned or reasonable objective basis against the owners of larger vessels in favour of smaller vessels. The Department's interpretation was incompatible with Article 14 and Protocol 1 Article 1 and with the principle of community law that equivalent situations call for equal treatment.

[19] Mr Hanna QC for the Department argued that Article 5(1)(f) is clear and unambiguous. The word "price" added nothing to the word "bid". Article 5(1)(b) establishes the concept of a "bid price per VCU" which is different from "bid price" in Article 5(1)(f). The policy of the Scheme was to reduce fishing capacity in order to afford the remaining fleet capacity a reasonable chance to make a living. Mr Hanna considered that the respondent's interpretation would lead to a lower strike price being determined than would be the case under the applicant's interpretation. The owner of a vessel having a high VCU will necessarily have to submit a lower bid per VCU than would the owner of a smaller vessel if he wished to have a chance of having his application accepted because his application will only be accepted if his actual cash bid is sufficiently low to enable it to be reached under Article 5(1)(f) before the amount of money allocated to the Scheme has been exhausted. This would encourage lower bids per VCU in respect of larger vessels and this in turn will drive down the likely ultimate strike price. However, there is nothing discriminatory because owners of all vessels receive the same grant per VCU. The applicant's interpretation has a significant risk that the money which is allocated to the Scheme might not all be used up.

#### Interpretation of the Scheme

[20] It is not in dispute that the underlying rationale of the Scheme was to reduce fishing capacity in order to afford the remaining fleet capacity a reasonable chance of making a living. The purpose of the Scheme was to restructure the industry so that a smaller aggregate vessel capacity would be likely to share the available quota. The objective measure of capacity was taken as a VCU. It is not in dispute that the VCU of a smaller vessel and the VCU of a larger vessel are of equal value. The purpose of the legislation was to reach a fair and objective value per VCU to be used as a basis of calculating the grant for decommissioning. The strike price mechanism was designed to achieve this purpose. The obtaining of bids from boat owners on the objective mechanism for calculating a strike price for each VCU based on the bid formed the way in which the Department sought to arrive at a fair and objective non-collusive strike price. Having determined a strike price, which

is a strike price per VCU, it was necessary to decide which of the bidding boat owners should be selected for inclusion in the grant Scheme. The selection process would require a fair, objective and non-discriminatory basis. The legislation must be read in the light of the fact that it was an enactment in the context of the European Union fisheries regime and it should be construed in such a way that it is compatible with the principles of community law. Article 40.3 of the treaty provides that the common organisation of agricultural markets “shall exclude any discrimination between producers or consumers within the community”. In Ruckdeschel [1977] ECR 1753 the European Court of Justice stated that:

“The prohibition of discrimination laid down in the article is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified. ”

[21] Approaching the interpretation of Article 5(1)(f) in a literal way one is compelled to take account of the express inclusion of the word “price” which has been added to the word “bid”. Since “bid” is clearly and deliberately defined in Article 1(1) it can be presumed that the words “bid price” were meant to mean something different from the “bid” which is the total amount sought for the vessel. As Bennion points out it is presumed that if a word appears it is put there for a purpose. Blackburn J in Hadley v Peaks [1866] LR 1 QB 444 at 475 said:

“It has been a general rule for drawing legal documents from the earliest times, one which is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning.”

[22] If it is to be presumed that the draftsman intended to convey a different meaning by the use of the words “bid price” rather than using the defined term bid then Article 5(1)(f) cannot have been referring to the “bid”. The only other possible meaning was that it should refer to the “bid price” per VCU. Article 5(1)(b) provides for the establishment of a “bid price per VCU” by dividing the bid by respective VCUs. Reading Article 5(1)(f) as referring to a bid price per VCU makes perfectly good sense and if the word “bid” had not been defined at all the logical interpretation would have been to read bid price in para.(f) as referring back to the bid price per VCU which had already been referred to, particularly bearing in mind that immediately before in (e) the draftsman had used the word “bid” when clearly referring to the composite bid and not to bid prices. (See also Article 5(4)). Moreover in (d) and (e) the draftsman referred to the “strike price” not the strike price per

VCU but the context makes it clear that that is what it means. The fact that in Article 5(3) the reference to setting the strike price is at the level of the highest “bid price per VCU” does not detract from this interpretation of Article 5(1)(f) as Article 5(3) is making clear that the strike price is a strike price per VCU.

[23] If “bid price” in Article 5(1)(f) were ambiguous (which in my view it is not) the whole context of the legislation read in the light of the community principle of equal treatment points to the conclusion that it must be intended to refer to the bid price per VCU. Since the intention of the Scheme was to acquire VCUs and thus reduce capacity there is no objective evidence to suggest that it is more or less desirable to acquire the VCUs of a smaller boat as opposed to those of a bigger boat. The applicant contended that in some way it would make more sense, if anything, to take out the VCUs of bigger boats ahead of smaller boats but that the Department rejected this proposition. It could not, however, point to any reasoned basis for saying that the VCUs of smaller boats would in some way represent more desirable VCUs to acquire in the context of the fishing policy. The court is left with no objective evidence to justify differential treatment between the VCUs of bigger boats and those of smaller boats. Mr Hanna argued that since bigger boat owners should have known what the Scheme meant they should have known to put in deflated prices to bring down their composite bids to the level where they could effectively compete with smaller boats and thereby reduce the level of bid price per VCU. This argument (which appears to be an ex post facto rationalisation to support the Department’s approach), if it genuinely influenced the Department in the drafting of the Scheme, would reveal an amazingly “cunning plan” on the part of the Department. Indeed, Machiavelli’s advice to Raffaello Girolami when being sent as ambassador to the Emperor in 1522 comes to mind:

“If... sometimes you need to conceal a fact with words, do it in such a way that it does not become known and, if it does become known, that you have a ready defence.”

Mr Horner’s riposte to the point showed the flaw in the argument. If the wily owners of bigger vessels were to deflate their bids and drive down the VCU price, wily owners of small vessels would do the reverse. Mr Horner also demonstrated the error in Mr Hanna’s argument that the applicant’s interpretation might result in the allocated fund not being used up. Article 5(1)(f) made clear the Department works up from the lowest VCU bid price to the highest or until the money allocated to the Scheme has been exhausted. The approach adopted by the Department produced some bizarre results as discussed by Mr Horner in his submissions. A small boat owner with a higher VCU price would be bought out ahead of a larger boat owner with a smaller VCU price simply because the size of the larger boat owner’s boat results in a higher composite bid. This results in smaller boat owners

being given preferential treatment as compared to large boat owners with no objective justified basis for such an approach.

[24] In the view of my clear conclusions reached on the foregoing grounds it is not necessary to determine whether Article 14 and Protocol 1 Article 1 would in any event have forced the court to reach the same conclusion by a forced interpretation of Article 5(1)(f). Mr Hanna argued that the matter did not fall within Article 1 Protocol 1 and that Article 14 was irrelevant. Since it is unnecessary to resolve the point and since I did not receive full argument on the issue I shall leave the point open.

[25] In the result I hold that the Minister's decision was wrong in law and a decision to refuse the applicant's application was unlawful. I shall hear counsel on the final form of the order and the appropriate relief.