THE HIGH COURT

[2022] IEHC 505

[Record No. 2016/10822 P]

BETWEEN

PAT KEATING

PLAINTIFF

AND

SHANNON FOYNES PORT COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 2nd day of September 2022.

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Introduction

1. In these proceedings, the plaintiff, who is the Chief Executive Officer ('CEO') of Shannon Foynes Port Company, the defendant herein, seeks as his primary relief a declaration that he is entitled to performance related payments ('PRP') for the period 2010-2016 pursuant to clause 8.3 of his service agreement with the defendant. He claims that he is entitled to the payments, the amounts of which were approved by the remuneration committee of the defendant in each of those years, but which the board of directors of the company declined to authorise for payment.

2. There is no argument between the parties as to the standard of the plaintiff's performance of his role as CEO. The defendant acknowledges that the plaintiff took over the role as interim CEO of the defendant in 2006, and has presided since that time over the transformation of what was a troubled entity in severe financial difficulty into the thriving enterprise that it is today. Indeed, the opening sentence of the defendant's written legal submissions acknowledges that the plaintiff had "…performed the duties and functions of CEO of the defendant since 2008 [when the defendant was appointed on a permanent basis] in an exemplary fashion".

3. The difficulties between the parties arise from the view taken by the board that it should decline to discharge PRP in respect of the plaintiff for the period 2010-2016

on the basis of a stated policy on the part of the Minister for Tourism, Transport and Sport, which policy was intimated to the defendant in 2011 and remains in place to this day, that performance related payments should not be made to CEOs of companies which are in effect entities of the State. As the defendant company's shares are owned by the Minister for Transport and the Minister for Public Expenditure and Reform, who pursuant to s.19 of the Harbours Act 1996 are entitled to exercise the rights and powers of a holder of such shares, the company has considered itself constrained to abide by the wishes and stated policy of the shareholders, notwithstanding that it has been of the view, year after year, that the plaintiff has earned a high level of PRP as envisaged by his service agreement.

4. The plaintiff contends that the withholding of his PRP each year from 2010 to 2016 is unlawful. The defendant company, notwithstanding that its stated position throughout this period was that it would have preferred to discharge the PRP to the plaintiff, stands over its decision not to pay, in circumstances which I shall consider in some detail below.

5. The hearing before me lasted four days, with evidence given by both sides. The issues were complex, and both sides proffered lengthy written submissions in that regard. Cliona Kimber S.C. for the plaintiff and Peter Ward S.C. for the defendant also made very helpful submissions at the hearing. In considering these issues, I have reread the voluminous papers in the matter, together with the transcript of the entire hearing. I have also consulted the digital audio recording of the hearing where necessary.

The parties

6. In his evidence to the court, the plaintiff set out his background prior to assuming the role of CEO. He qualified from UCC in the late 1980s with a BA degree in economics and maths. He then joined one of the leading accountancy firms,

qualifying as a chartered accountant in 1993. After taking up a number of senior positions in the financial services sector, the plaintiff obtained the position of financial controller with the defendant company in 2002. He occupied this position until October 2006, when he was appointed interim CEO of the defendant company. The defendant formally advertised the role of CEO in 2008, and conducted an open competition for that position. The plaintiff was offered the position, and accepted it in May 2008.

7. The plaintiff, as CEO of the defendant company, also gave evidence in relation to the genesis and development of the defendant. Shannon Foynes Port Company was formed in 2000 with the merger of Shannon Estuary Ports Company and Foynes Port Company. The initial period after formation of the new company appears to have been turbulent; there was a number of High Court cases, and the company itself suffered accumulated losses up to 2007 of roughly €7.7m on the balance sheet. As Mr Keating put it "…the merger itself had not bedded in". Mr Keating set about addressing this situation on his appointment as interim CEO in 2006.

8. The plaintiff explained that the defendant comprises a corporate structure which is "totally self-funding", and which "does not rely on state funds at all". Mr Keating characterised the defendant as "a commercial semi-state company", and stated that, since 2015, the company has been paying dividends back into the Exchequer. He described the defendant as "totally autonomous, self-funding, self-financing from the State". [Transcript Day 1, p.33, lines 1-21].

9. The status of the defendant ('the company') is set out expressly in s.4 of the "Harbours Acts, 1996 and 2000 (Transfer of Functions of Foynes Port Company and Shannon Estuary Ports Company) Order 2000" (SI no. 283/2000) as follows: -

"4. The transferee company shall be known as the Shannon Foynes Port Company which shall be formed and registered as a private company under the Companies Acts, 1963 to 1999."

10. The plaintiff's written submissions describe the port as being "a Tier 1 Port of national significance in the National Ports Policy, effectively designating the Shannon Estuary as a commercial watercourse of international and national strategic significance. The trade turnover handled by the defendant is €8.5 billion per annum which supports over 3,900 jobs…". Mr Keating states in his evidence that the company "plays a huge role in the national supply chain…it's a key…strategic asset…a key component in [the] national supply chain…" [day 1, p.34 line 26 to p.35 line 18]. In its 2020 annual report, which was presented in evidence to the court, the company, in describing its "principal activities", states as follows: -

"The business purpose of the group is to facilitate the flow of goods and attended tracking information throughout the Shannon Estuary. With this purpose in mind, the group provides the infrastructure, facilities, services and accommodation necessary to cater for the efficient transfer of goods between land and sea transport. Revenue in connection with the provisions of these facilities is generated from vessel and goods dues, stevedoring, rent and the ancillary services provided."

11. The Harbours Act 1996, which governs the defendant company, states as follows in relation to the objects and powers of the company:

"11. - (1) The principal objects of a company shall be stated in its memorandum of association to be -

(a) to take all proper measures for the management, control, operation and development of its harbour and the approach channels thereto,

(b) to provide such facilities, services, accommodation and lands in its harbour for ships, goods and passengers as it considers necessary,

(c) to promote investment in its harbour,

(d) to engage in any business activity, either alone or in conjunction with other persons, that it considers to be advantageous to the development of its harbour,

(e) to utilise and manage the resources available to it in a manner consistent with the objects aforesaid.

(2) Nothing in this section shall prevent or restrict the inclusion among the objects of a company as stated in its memorandum of association of all such objects and powers as are reasonably necessary or proper for or incidental or ancillary to the due attainment of the principal objects aforesaid and are not inconsistent with this Act.

(3) A company shall have power to do anything which appears to it to be requisite, advantageous or incidental to, or which appears to it to facilitate, either directly or indirectly, the performance by it of its functions as specified in this Act or in its memorandum of association and is not inconsistent with any enactment for the time being in force.

(4) Without prejudice to the generality of subsection (3), a company may -

(a) take such steps either alone or in conjunction with other persons as are necessary for the efficient operation and management of its harbour,

(b) appropriate any part of its harbour to the use of any person for the purposes of any trade or profession in consideration of the payment to it of such charges as the company considers reasonable,

(c) promote leisure activities that may be carried on in its harbour or which relate to the marine generally,

(d) engage either alone or in conjunction with other persons in activities outside the State (related to its functions in respect of its harbour) which, in its opinion, will promote the interests of trade or tourism in the State."

12. The Harbours Act 1996 also provides that the defendant company is to have regard to government or nationally agreed guidelines in relation to certain matters: -

"37. - (1) (a) Without prejudice to any other provision of this Act, a company shall be required to employ –

(i) a harbour master,

(ii) such and so many other employees as it considers to be necessary for the due performance of its functions.

(b) …

(2) Without prejudice to the requirements of section 39 , a company, in determining the remuneration or allowances for expenses to be paid to members of its staff, including the chief executive, or the terms or conditions subject to which such members hold or are to hold their employment, shall have regard to Government or nationally agreed guidelines which are for the time being extant, or to Government policy concerning remuneration and conditions of employment which is so extant and, in addition to the foregoing, a company shall comply with any directives with regard to such remuneration, allowances, terms or conditions which the Minister may give to the company with the consent of the Minister for Finance."

The pleadings

The Statement of Claim

13. As the statement of claim and defence in the proceedings set out the nature of the dispute between the parties, it is proposed to set out their terms in some detail.

14. The plaintiff contends that, when he was offered the position of CEO in June 2008, the defendant issued him with a draft contract. The finalisation of the contract appears to have taken place only in March 2010, and involved "extensive discussions" on aspects of the contract. The plaintiff pleads however that at no point during those discussions did the defendant or any other party "…indicate that there was any difficulty with the specific provisions therein providing for payment of a bonus for performance of up to 35% nor was the payment of such bonus highlighted as a concern by the Defendant or any other party". The plaintiff pleads that the inclusion of bonus payments was

> "…a fundamental term of the contract from the perspective of the Plaintiff as the salary offered for the post of CEO was only nominally ahead of the Plaintiff's then financial controller's salary despite the substantial additional duties and responsibilities of the CEO role. The performance bonus payable was therefore a deferred portion of the increased salary payable in consideration for the substantial additional duties and responsibilities of the post [of] CEO. The promise to pay an increased level of remuneration by way of deferred bonus was an inducement by the Defendant to enter into the contract and was relied upon by the Plaintiff in that regard, in the knowledge and on the understanding that bonus payment for performance had been paid to him in his role as interim CEO."

15. The plaintiff and the defendant entered into a written service agreement signed on 18th March, 2010, backdated to 3rd June, 2008. The plaintiff pleads that this written

service agreement contained an "…entitlement to a 35% performance payment if so voted by the Remuneration Committee of the Defendant having reviewed his performance in the relevant period".

16. At para. 8 of the statement of claim, the plaintiff refers to clauses 8.3 and 8.4 of the service agreement. As these clauses are of central importance to the dispute between the parties, they are set out here in full.

> "8.3 In addition to the Basic Salary, the Chief Executive shall be eligible to participate in a performance related bonus scheme each year. The Committee shall determine whether the performance criteria of any such scheme shall comprise medium to long term objectives (long term shall cover a period of at least three years) and current year objectives or comprise long term objectives only. Subject to this decision by the Committee, the performance criteria which the Chief Executive must satisfy in order to be eligible for the Bonus will be agreed annually in advance by the Board and the Department of Transport in consultation with the Chief Executive.
>
> Payments under the scheme will be awarded at the exclusive discretion of the Committee if the Committee considers that the performance criteria set down by the Board have been fulfilled by the Chief Executive. The maximum amount payable by way of bonus to the Chief Executive in any one year will be 35% of Basic Salary. Where the Committee provides that both medium to long term objectives and current year objectives must be met, 25% of any such payment will be based on performance of current year objectives of the Chief Executive and 10% of any such payment will be based on performance of medium to long term objectives.

8.4 Any Bonus to which the Chief Executive is entitled will be made as soon as practicable after the end of each calendar year."

17. At para. 9 of the statement of claim, the plaintiff pleads that his basic remuneration pursuant to the service agreement was €117,500.00 per annum, and that his remuneration "is significantly less than other members of the Senior Management Team of the Defendant who directly report into him including the Financial Controller and Company Secretary, Commercial Manager, Port Services and Engineering Manager. Since 2009 the Plaintiff is the only eligible employee of the Defendant who has not received any performance payment".

18. A further written service agreement was entered into by the parties on 23rd September, 2011 for a term of four years. However, after some dispute between the plaintiff and the defendant, it was accepted by the defendant on 19th May, 2015 that, due to the length of his service, the plaintiff had become entitled to a contract of employment of indefinite duration with the defendant, and the terms and conditions of his employment on this basis are contained in the service agreement of 23rd September, 2011, which contains identical terms in relation to PRP as those contained in the service agreement of 18th March, 2010.

19. At para. 12 of the statement of claim, the plaintiff sets out the bonuses which he contends that the remuneration committee determined to be applicable in respect of the years 2010 to 2016, having evaluated his performance:

Date of Award	**Relevant Year**	**Percentage**
28/02/2011	2010	25
15/03/2012	2011	27.92
12/08/2013	2012	32
29/03/2016	2013	34.83

29/03/2016	2014	35
29/03/2016	2015	33.5
15/12/2016	2016	32.83

20. At para. 13 of the statement of claim, the plaintiff pleads as follows: -

"The excellent performance delivered by the Plaintiff is not therefore disputed by the Defendant. This performance was evaluated formally and objectively by the Defendant and is well documented by the Defendant. In fact, the Board of the Defendants have indicated to the Plaintiff that in their view he has met the criteria for the payment of the bonus according to his contract of employment and have at all times been unanimous in their support for the plaintiff and his right to full compensation. The Board of the Defendants has also expressed the view that the Plaintiff exceeded his performance targets and that his performance was instrumental in assisting the defendant in turning record profits."

21. It is pleaded at para. 15 of the statement of claim that, notwithstanding the foregoing, the defendant "has failed to sanction the making [of] each and every payment awarded as set out hereinabove by the Remuneration Committee to the Plaintiff. No written reason has been furnished to the Plaintiff for non-payment of the said performance pay". It is agreed between the parties that the accumulated performance payment which the plaintiff claims is due for the years 2010 to 2016 is €259,769.00.

22. The plaintiff pleads that he had a legitimate expectation that he would receive the performance payments should the committee be satisfied that performance criteria were fulfilled by the plaintiff "in circumstances where he had acted to his detriment in leaving his former position of Financial Controller". He pleads that he was induced to

agree to the said service agreements on foot of the said provision for PRP, and that his remuneration as a result of the company's decisions "…has remained far below that of the Chief Executive Officers of the said sister port companies, other Tier 1 ports…" [para. 18].

The Defence

23. The gravamen of the defendant's position is set out in a lengthy paragraph in the defence as follows: -

> "4. It is admitted that the Plaintiff was provided with a draft contract in June 2008 and entered into a written Services Agreement on 18 March 2010 (with a commencement date of 3 June 2008) but all remaining matters pleaded at paragraphs 6 and 7 of the Statement of Claim are denied as if set forth individually herein and traversed seriatim. The salary figure for CEO of the Defendant was that as recommended in the Hay Report to the Department of Finance and as determined by the Minister for Transport, Tourism and Sport with the approval of the Minister for Finance at that time, as required pursuant to Section 35 of the Harbours Act, 1996. The Service Agreements entered into by the Plaintiff in 2010 and again in 2011, in particular the remuneration provisions at Clause 8.1, 8.2 and 8.3 thereof, set out clearly that the salary of the CEO of the Defendant is subject to the approval of the Minister for Transport, Tourism and Sport in consultation with the Minister for Finance. It is denied the inclusion of the bonus payments provision was a fundamental term of the contract from the perspective of the Plaintiff as alleged or at all. It is denied that there was any particular inducement or representation made to the Plaintiff as alleged or at all. It is denied that the performance related bonus scheme set out in the Service Agreements was guaranteed or could be regarded

simply as deferred remuneration as alleged or at all. Pursuant to a National Circular issued in November 2007, Commercial State Bodies were given the opportunity to provide a performance related pay scheme with the maximum possible bonus of 35%, subject to the condition that of this 35% a minimum of 10% basic pay should be applied to multi-annual objectives. The Plaintiff had a contractual entitlement to participate in the bonus scheme however, clause 8.3 of the Service Agreement is clear that *'payments under the scheme will be awarded at the exclusive discretion of the Committee if the Committee considers that the performance criteria set down by the Board have been fulfilled by the Chief Executive"*, the Committee in question being the Defendant's Remuneration Committee. The Plaintiff was not awarded his maximum bonus entitlements in 2008 as interim CEO. Further, it is denied that the Plaintiff would have been unaware of any difficulties with the specific provisions of the contract providing for payment of a bonus of up to 35% prior to entering into the written Services Agreement on the 23 September 2011 (which contained identical provisions regarding performance related bonuses as the Service Agreement entered into on the 18 March 2010, back-dated to 3 June 2008). The Plaintiff was only awarded 9% of the possible 35% bonus in 2009 due, *inter alia*, to Government Policy in relation to the payment of bonuses to CEOs of Commercial State Bodies. The Plaintiff was at all times aware of, or ought reasonably to be aware of said Government Policy, having regard to his contractual obligations set out at clause 4.4 of his Service Agreements, and the Defendant's obligations under the Harbours Act, 1996 (in particular section 37(2) thereof). The Plaintiff accepted this figure of 9% for 2009."

24. The interpretation by the plaintiff of his entitlements under the contract is strongly traversed through the defence. The defendant denies that the plaintiff became entitled to any PRP for any of the years 2010 to 2016, and without prejudice to this contention, pleads as follows: -

> "13…the Defendant was at all material times subject to a directive issued by the Minister for Transport pursuant to section 37(2) of the Harbour Act, 1996 requiring the Defendant to comply with Government Policy not to pay bonuses to CEOs of Commercial State Bodies, including the Defendant. The Defendant remains under such a directive and in the circumstances, the Defendant could not, and cannot now, lawfully make the payments sought by the Plaintiff in the within proceedings."

25. In this latter regard, the defendant states that it will rely on: -

> "a. the 2006 guidelines on contracts, remuneration and other conditions of chief executives and senior management of commercial state bodies; ["the 2006 guidelines"]
>
> b. the Code of Practice for governance of State Bodies issued in May 2009 and updated in August 2016; ["the 2009 code of practice"]
>
> c. Communications from the Department of Transport, Tourism and Sport to the Defendant through the material period that made clear that government policy was against the payment of such bonus payments and that the Defendant was expected to adhere to that Policy."

26. The defendant pleads that the defendant "…was obliged pursuant to the provisions of Section 37(2) of the Harbours Act to have regard to Government or nationally agreed guidelines and Government Policy concerning remuneration and conditions of employment of the Plaintiff and the Defendant acted at all times in

accordance with its statutory obligations…" [para. 16]. It pleads that "…In the circumstances it was an entirely reasonable, [bona] *fide*, exercise of the Defendant's discretion not to pay the Plaintiff a bonus to comply with Government Policy on the issue…" [para. 14].

Evidence given to the court

The plaintiff

27. After addressing his background and the manner in which he was appointed CEO of the company, the plaintiff addressed the question of how he approached the issue of his remuneration, and stated as follows: -

> "…from my perspective…it was very clear that the performance pay, the salary, package was there, the performance piece of it, and I knew as well, you know, what had to be done but I also knew I had a fair and reasonable employer at the time that always honoured PRP in the past, even with my predecessor, myself as financial controller, with other people in the company and, in fact, other managers continue to get PRP. So, basically, again, during that time and at the time of accepting, you know, the position of CEO, the pay, as I said, and I can't stress it enough, that in my mind the pay was only going one way and that pay included, without a question of a shadow of a doubt, PRP and basic salary. Because it was the PRP element that gave the incentive almost, if you like, to move across from Financial Controller or leave that permanent position at the time, into a fixed contract." [Day 1, p. 46, line 20 – p. 47, line 7]

28. In his evidence, the plaintiff addressed the terms of the service agreement, and in particular the terms in relation to remuneration. In addition to clause 8.3 and 8.4 quoted at para. 16 above, the plaintiff referenced clauses 8.1 and 8.2, which are as follows: -

"8.1 Subject to the approval of the Minister for Transport in consultation with the Minister for Finance, the Company shall pay to the Chief Executive a gross salary of €117,500 per annum as may be increased from time to time in accordance with clause 8.2 less all lawful and necessary deductions payable monthly in arrears effective from the Commencement Date.

8.2 The Basic Salary shall be reviewed by the Company in accordance with applicable Government guidelines including government pay guidelines which shall include the Guidelines on Contract, Remuneration and other Conditions of Chief Executives and Senior Management of Commercial State Bodies and such future national Government guidelines as may be published and/or implemented. It is acknowledged by the Chief Executive that any change in salary proposed by the Company currently requires the prior written approval of the Minister for Transport in consultation with the Minister for Finance before it can be offered to the Chief Executive in accordance with Company procedures in place from time to time. The remainder of the terms of this Agreement will remain in full force and effect notwithstanding any approval, or lack thereof, or delay in approval, of any proposed increase."

29. Mr Keating stated that he was paid bonuses as interim CEO in 2006 and 2007. For the years 2008 and 2009, his bonuses were reduced to 17% and 9% respectively. Mr Keating's evidence was that, in view of the crisis in the economy, he was prepared to accept a reduction for those years at the request of the shareholders. He said that he "had conversations with our own senior managers…people had to take a hit that year, which they agreed as well…there was cognisance…of the fact that the economy was going through a crisis…" [Day 1, p.61, lines 14 to 29]. However, Mr Keating was firm

in his assertion that he never accepted that this reduction or non-payment of his PRP would continue indefinitely.

30. The plaintiff gave evidence in relation to the manner in which the company would agree strategy. The management would prepare a five-year plan with all of the objectives and strategies, both long and short term, which would be approved at the January or February board meeting each year. He described this as "…a very formalised structure of agreeing and approving objectives with the shareholder's input at Shannon Foynes, and indeed at every board meeting…a continuous…reporting back to the Board on strategy and objectives…" [day 1, p.65 lines 12-21].

31. Mr Keating described the manner in which the remuneration committee would decide on the appropriate level of PRP in respect of his performance. The committee would be presented with detailed spreadsheets setting out the objectives of the company. Mr Keating would put forward a self-assessment to the company and make a presentation in that regard. The committee would review that presentation without Mr Keating present, and then finalise and agree the figures which the committee deemed to be appropriate.

The remuneration committee

32. A considerable amount of time was spent during Mr Keating's evidence in relation to documentation concerning the deliberations of the board and the remuneration committee in relation to the issue of PRP. Mr Keating explained that the remuneration committee is a subset of the board of the company. The chair of the board is also the chair of the remuneration committee, which includes two non-executive directors, one of which is a representative of the Department of Transport who is invited to attend and discuss the remuneration committee's assessment of the CEO's performance and the proposed allocation of PRP to him.

33. The remuneration committee apparently did not operate prior to 2009. On 6th March, 2009, a meeting of the remuneration committee was held at the company's Limerick office with directors of the company, the secretary of the company and a member of the external auditors present. The minutes of the meeting note, under the heading "CEO'S SALARY" that:

- "Two SFPC managers were earning more than the Interim CEO.
- The 2006 Guidelines stated that the CEO should enjoy a salary with sufficient headroom above senior management…"

34. The reference to "the 2006 guidelines" is to a document of March 2006 entitled "Guidelines on Contracts, Remuneration and other Conditions of Chief Executives and Senior Management of Commercial State Bodies" from the Department of Finance. The guidelines set out general policies in relation to the arrangements "for the contract of employment and determination of the remuneration of newly appointed Chief Executives of commercial state bodies". Clause 1.4 of the guidelines acknowledges that remuneration is made up of basic pay and performance related pay: para. 1.8 provides that "…the contract should provide that any *subsequent* change in the remuneration package must have the prior approval of the appropriate Minister and the Minister for Finance…" [italics in original]. The guidelines deal with the determination of performance-related pay, which would "…be determined by reference to performance criteria drawn up by the Board in consultation with the parent Department…" [para. 1.10]. They provide that the board must "…ensure that the Chief Executive will not be rewarded for results which are attributable primarily to external factors such as changes in the general economic climate…" [para. 1.11]. Clause 1.12 provides that "…the payment of performance-related pay will be determined by the remuneration committee of the Board of the commercial State body, augmented for this purpose by a civil servant

nominated by the appropriate Minister. Paragraph 1.28 of the guidelines provides as follows: -

"1.28 The contract must specifically include the following terms:

- that any increase in the basic salary requires the prior approval of the appropriate Minister and the Minister for Finance;
- that the performance pay scheme, providing for payment of up to 25% of basic pay, is an integral part of the contract and that this scheme will be drawn up on the basis of medium and long-term targets;
- that the criteria for performance-related pay will be drawn up by the Board remuneration committee with the prior agreement and approval of the appropriate Department;
- that entitlement to payment under the performance-related pay scheme will be determined exclusively at the discretion of the Board remuneration committee which for this purpose will be augmented by an official nominated by the Minister and
- that payments under the performance-related pay scheme are not pensionable."

35. At para. 2.3 of the guidelines, it is stated that "…[t]he salary of senior management should also be set at a level that allows sufficient headroom between the CEO and the senior management…[i]n no circumstances should senior staff be paid at a level close to the CEO."

36. The board meeting of 27th March, 2009 considered the deliberations of the remuneration committee, and the minutes reflect that the interim CEO (*i.e.* the plaintiff) and the interim financial controller left the meeting to allow the board to consider the CEO's remuneration. The board considered a letter of 27th February, 2009 sent to all

port companies by the Minister for Transport "…in which the Minister said that bonus payments should be reduced because of the current economic crisis. He said that nobody should get the full 25% and that the Minister expected that CEO's should take a cut of one-third on a bonus of 23%". On this basis, the board agreed that Mr Keating be paid a bonus of 17.5% of salary in pursuance of the reduction sought by the Minister.

37. In 2010, the remuneration committee met on 14th July, having previously held a meeting on 14th January, 2010 at which the criteria for performance payments were discussed. At the July meeting, the representative of the Department of Transport, Mr Eddie Burke, attended. The minutes record that the chairperson made a number of statements supportive of the CEO, commenting that "several staff were better paid than he was…"; "…comparisons should be made between his remuneration and that of his equivalent in other comparable port companies…". It was suggested that the company had achieved a good performance in 2009, despite the economic background, and that "…the Board wanted to pay the CEO a bonus, recognising the Minister's request for reductions in the levels to be paid". The remuneration committee had scored the CEO at 81% of 35%, suggesting a PRP of 28%. The committee, with regard to the Minister's letter of 27th February, 2009, considered in the circumstances that a bonus of 16% to 17% was appropriate. Mr. Burke set out a number of reasons why he considered that a lower figure should be paid. He suggested that 50% of the committee's suggestion of 16-17% of PRP would be appropriate; the minutes record that Mr Burke stated that "he did not have a veto in the matter", but "could not recommend more than 50% of the suggested bonus payment".

38. The minutes record that the chairperson "…suggested 9%, stating that…the company did not wish to be in conflict with the Department". At a subsequent meeting of the remuneration committee on 24th August, 2010, at which Mr Keating was present,

the committee acknowledged the "very good performance" delivered by the CEO; however, the minutes record that "…the Department of Finance were insisting that, for reasons completely unrelated to the CEO's performance, and indeed the Company's performance, that bonus payments should be substantially reduced…on the basis that the committee accepted that the 2009 performance pay award was not a reflection of the CEO performance delivered, that the actual performance warranted a substantially higher bonus payment and given that the Department of Finance were unwilling to change their position, [t]he CEO had agreed, very reluctantly, to accept the suggested offer of a 9% performance related payment in respect of the previous year".

39. At the board meeting on 3rd September, 2010, the PRP of 9% was approved by the board.

40. As we have seen, 2009 proved to be the last year in respect of which Mr Keating was paid PRP. The minutes of the board of 28th April, 2011 record that a meeting took place with the Minister for Transport, Leo Varadkar T.D. at which the chairperson and the CEO stated that "…[t]here had been no communication from the Department to indicate that there would be any difficulty regarding payment of a bonus, subject to satisfactory performance, until the Company had invited the Department's representative to attend a meeting of the Remuneration Committee…there were contractual obligations on the company to effect such payments". The minutes record that the Minister had responded, *inter alia*, by saying that "…[t]he company should seek to have the CEO's salary increased, rather than pay a bonus". The board concluded that the company "…should write to the Department stating that it intended to pay a bonus, and, failing agreement from the Department to this, then seeking a salary review".

41. A subsequent board meeting of 12th August, 2011 indicated that there had been "a meeting with the Minister…during the previous week", in which the chairperson and the CEO had been told by the Minister that the Minister for Public Expenditure and Reform "…was insisting on holding the government line and stating that salaries would be reduced…". The minutes of the meeting noted that:-

- "The Port of Waterford had deferred a bonus payment for their CEO, but it was recorded in their annual accounts.
- The Dublin Airport Authority CEO had initially deferred a bonus payment, but then decided not to accept any such payment.
- It was agreed that there could be no bonus payment made in relation to 2010 in the current environment.
- If SFPC was regarded as one of the top three port companies, then the CEO's salary should be commensurate with his peers elsewhere.
- It was possible that the Company could face a legal challenge on the matter.
- When the CEO took the position, it was clear that he would have an annual entitlement to a performance related payment of up to 35% of his salary, subject to meeting specific performance targets.
- The Port of Cork's CEO enjoyed a salary of €180,000.00 plus extras.
- No other staff member should earn more than the CEO.
- The CEO could benefit when the departmental review of CEO salaries was completed.
- The CEO of SFPC should be properly remunerated."

42. It is fair to say that this pattern was repeated throughout meetings of the remuneration committee and the board from 2012 to 2017. The board meeting minutes

for 23rd March, 2012 state that "…[t]he Chairman noted the Board's unanimity that the performance payments should be paid and that this was a serious issue for the Company that needed to be addressed and that he would raise the matter with the Minister at the next scheduled meeting on 29th March next". There was a full discussion at the meeting of the remuneration committee on 4th May, 2012 of the company's performance. The minutes record that "…[t]he Chairperson commenced the discussion by reiterating that the Board was of the unanimous view that payment should be made for what the Board believed was an outstanding performance in the year. The Chairperson noted the critical importance of the CEO both now and to the future of the organisation…". Mr Burke, who attended on behalf of the Minister, responded by saying "…that there had been no change in Government policy regarding performance related pay for CEOs. As such, he was recommending that no such payment be made. This was not a reflection on the CEO's performance but merely a reflection of government policy on this issue…". The minutes record a general discussion in which the chairman "…informed that there was great angst at the Board regarding this matter and full support for the CEO's position…". Mr Burke confirmed that he would brief the Minister and relay the serious concerns expressed regarding the payment of performance related pay to the CEO and the proposed new salary level for future CEO's… [sic]".

43. There was a further meeting of the remuneration committee on 18th May, 2012. In the absence of the CEO, an approval of a 27.92% rating from a possible 35% was noted. The minutes record as follows: -

> "The final part of the meeting had considered the payment of performance related pay for 2011. The Chairperson commenced that discussion by reiterating that the Board was of the unanimous view that payment should be made for what the Board believed was an outstanding performance in the year. The

Chairperson noted the critical importance of the CEO both now and to the future of the organisation. The situation of last year regarding contract and the performance related pay element of same must be delivered on now. The Department representative had responded by saying that there had been no change in Government policy regarding performance related pay for CEO's [sic]. As such, he was recommending that no such payment be made."

44. The chairman (Mr Michael Collins) "…noted to the Board that it was the Board's clear responsibility to follow Government guidelines and that it would be unconscionable for the Board to contemplate contravening a Ministerial directive. In that regard, any outcome to the issue of CEO pay would require prior approval of the Minister…[t]he clear view of the Board was that the issue was very regrettable and that the frustrations of the CEO were both clear and understandable…".

45. In 2013 the pattern was repeated: Mr Burke at the remuneration committee on 16th September, 2013 reminding the committee that there had been no change in government policy regarding performance related pay for CEOs, and the board confirming to the CEO "…that the Company did not intend to pursue the matter any further with the shareholder and also pointed out that the Company was not going to honour the CEO's contract with regard to future performance payments".

46. In 2014, the remuneration committee met on 2nd April. On that occasion, Mr Keating "expressed his utmost dissatisfaction with the lack of progress on resolving his performance pay…", and that "…[o]n the basis of the ongoing performance impasse the CEO declined both the review against 2013 and the presentation of draft objectives for 2014. He felt too upset to sit through such an exercise with no progress being made towards a resolution".

47. In his evidence to the court, Mr Keating referred to his feelings at the time. He said that he was "the only person in the room taking a financial hit, and a serious financial hit. I felt that there was a certain level of complacency, you know, maybe wrongly, on my side, but I did feel that because, you know, it was coming into the fourth year, that I was the only person taking a financial hit. There was no real hardship on anybody else on this matter…". He stated that "…from my perspective…it was a bit like a broken record, you know, here we go again…". [Day 2, p.37 line 13 – p.39 line 14]. Mr Keating said however that he did not in fact decline to review the draft objectives for 2014; to the extent that the minutes of the remuneration committee quoted above suggest that he did so, he does not accept that this is accurate. As he put it himself "…did I stand back from appraising my 2013 performance? Yes, I did. But did I stand back from actually performing, setting the performance objectives? Absolutely not". [Day 2, p.41 lines 10-13].

48. One of the factors that was informing the attitude of the board was the perception that the CEO's current contract would lapse on 3rd June, 2015. As we have seen, it transpired that the parties ultimately accepted that Mr Keating in fact was entitled to a permanent contract without limitation of time. The CEO informed the board meeting on 13th February, 2015 that he had been legally advised that he was entitled to a contract of indefinite duration "and expected that this would be honoured by the Department". The remuneration position as regards PRP continued to be monitored both by the remuneration committee and by the board.

49. Ultimately in 2015 it was agreed that the contract by which the plaintiff was operating until June 2015 was one of indefinite duration. There was no change to the terms and conditions of the contract, so that the PRP situation remained the same. I asked Mr Keating why he was "…prepared to agree what was effectively an extension

of that existing arrangement when that arrangement had proved so unsatisfactory?" Mr Keating replied as follows: -

> "A.: Whilst it had proved unsatisfactory I think from my perspective, and I think from the company's perspective, there was an intent to pay. I mean, the amounts due to me have been approved, for example, in the audited annual accounts as payable. There was certainly, you know, from the Board's perspective, that the Board saw this as being more deferred, that it was going to be paid. And so, you know, that was I suppose the context that I agreed to, you know, the contract of indefinite duration from the PRP point of view.
>
> MR JUSTICE SANFEY: So your faith that the monies would ultimately be paid hadn't wavered at this stage?
>
> A.: Not at all, Judge. And I suppose it's only at around this time that I started to, I suppose, actively engage third party methods, if you like, through legal advice…" [day 2, p.58 line 14 – p.59 line 15].

50. The minutes of the board meeting of 13th May, 2016 record a "robust and detailed discussion" by the board with Mr Burke. It is recorded that "…[t]he Committee informed Mr Burke that it remained the clear and consistent view of the Board that the CEO is supported in his position to have his performance related pay honoured…". The minutes of the board reflect the recommendations of the remuneration committee in respect of the years 2013, 2014 and 2015 as 34.83%, 35% and 33.50%, each out of a possible 35%. It is recorded that "the above ratings were noted and agreed by all".

51. The remuneration committee held a meeting on 9th June, 2017, recording that "the CEO had performed exceptionally throughout 2016 and as a result the committee had at its previous meeting of 9th May agreed the rating of CEO performance as had been outlined by the CEO. A score of 32.83% was therefore agreed as a performance

rating for 2016…". It is further noted that "…Mr Burke responded to the Chairperson's comments by noting that he did not dispute the performance of the CEO during the year or the objectives set for 2017. He did however note that the Committee should consider the language used on the summary of the review which referred to "2016 Award". Mr Burke considered rating a better description than award…".

Communications from the Minister

52. As we have seen, it is pleaded at para. 13 of the defence that the defendant "…was at all material times subject to a directive issued by the Minister for Transport pursuant to section 37(2) of the Harbours Act 1996 requiring the defendant to comply with Government Policy not to pay bonuses to CEOs of Commercial State Bodies, including the Defendant". The issue of whether or not there was in fact a government policy in this regard, or if there was, whether it was applicable to the plaintiff's circumstances, whether by directive or otherwise, was a matter of some contention in the plaintiff's cross-examination. While I will return to this later in this judgment, it is appropriate at this point to see what communications of the Minister's wishes were made by correspondence to the company.

53. In this regard, the plaintiff in its notice for particulars of 18th February, 2019 sought details of "every one of the Directives referred to at Paragraph 13…". In its response of 17th April, 2019, the defendant indicated that the defendant shall be relying *inter alia* on communications issued from the Department of Transport, Tourism and Sport as follows:

- 27th February, 2009
- 28th February, 2011
- 29th July, 2011
- 8th May, 2012

- 5th June, 2012
- 24th December, 2012
- 30th May, 2014
- 28th May, 2018.

54. While I do not propose to set out the full text of each of these letters, it is important to have a sense of what each of them stated in relation to the department's wishes at the time. I have of course taken into account, for the purpose of this judgment, the full text and import of the said letters, together with the full exchange of correspondence between the Minister and the defendant company over the period covered by the above letters.

- By letter of **27th February, 2009** from Noel Dempsey T.D., Minister for Transport, to Ms Kay McGuiness, Chairperson of the defendant company, the Minister refers to "the very difficult economic circumstances prevailing…", and states "…the current economic downturn must be a paramount consideration in determining the award of bonus pay for chief executives and senior management, where such schemes apply. In this regard I believe that, in consultation with the individuals concerned, consideration should be given by the Board to achieving a significant reduction in or elimination of bonus awards payable this year and next year…I would appreciate if you would give this matter careful consideration and bring this correspondence to the attention of the Board and the Remuneration sub-Committee".
- By letter of **28th February, 2011**, Tom O'Mahony, Secretary General of the Department of Transport, wrote to Ms McGuinness stating that "…[d]ecisions on bonus payments are ultimately a matter for the Board.

However, as you are aware under the Minister for Finance's Guidelines on Contracts, Remuneration and other Conditions of Chief Executives and Senior Management of Commercial State Bodies, a representative of the Department attends and contributes views at the Remuneration Committee meeting of each body where bonus payments for Chief Executives are being considered…I wish to inform you that, following directions from the Department of Finance, the representatives from this Department on the remuneration committee will for the foreseeable future adopt the position that performance-related payments are inappropriate in the light of the very serious state of the public finances".

- By letter of **29th July, 2011**, the Minister for Transport, Tourism and Sport, Leo Varadkar T.D. wrote to Ms McGuinness, stating *inter alia* that "…my colleague the Minister for Public Expenditure and Reform has announced a review of the Performance Related Payments Scheme. I wish therefore to place on record, again, that pending the outcome of the Review, it is the Government's clear policy that no performance related payments be made, including in respect of 2010. The Government expects all State agencies to comply with this policy. Might I also note, that all other CEOs under the remit of my Department have waived or have not been paid their bonus for 2010".
- By letter of **8th May, 2012**, Minister Varadkar wrote to Mr Michael Collins, who by this time was chair of the defendant company, stating that "…while it is anticipated that the significant adjustments applied to CEO pay will, over time, give rise to corresponding adjustments to the salary levels of all staff I would request that, notwithstanding that your

company generate income through your commercial activities, cognisance is taken of Government policy on pay when considering the remuneration of all future appointments of staff and specifically to ensure the 2nd tier management remuneration is set at levels that allow for reasonable headroom between this tier and the revised levels to apply to the CEO posts".

- Following a response by the company to this letter, Minister Varadkar wrote again to Mr Collins on **5th June, 2012**, stating that "…since coming into Office, this Government has had to take a very strong line on state sector salary levels in the extremely serious prevailing economic conditions. The general thrust of these policies is to reduce CEO salary levels to a more realistic level. However, the Minister for Public Expenditure and Reform is reviewing the operation of Performance Related Award Schemes and I am hopeful that the review will be finalised shortly…while I appreciate the difficulties that these policies may give rise to, I welcome the Board's assurances that it will continue to comply with such policies".
- By letter of **24th December, 2012**, Mr Eddie Burke, Principal Officer in the Policy and Governance Co-ordination Division of the Department of Transport, Tourism and Sport, wrote to Mr Collins, stating *inter alia* that "…the Government recently concluded a review of the operation of CEO performance related award schemes and decided that, in light of the continued serious state of the public finances, the current policy not to award performance related awards schemes should be continued.

However, the government undertook to look at the matter again in the final quarter of 2013…".

- Mr Burke wrote again on **30th May, 2014** to Mr Collins in response to a letter from Mr Collins of 19th May, 2014. This latter communication from the company was very supportive of Mr Keating's position, and stated that "…the Board of Directors have at all times been unanimous in their support of Mr Keating and his right to full compensation per his Contract", and stated that the board "…has become increasingly concerned with the grave risk to the performance of business as a direct result of this prolonged and continuing impasse". In response, Mr Burke rejected a proposal of the company "for a once-off contribution to the CEO's defined contribution pension scheme…". Mr Burke rejected the defendant's view that such a contribution would fall outside s.7.3 and 7.4 of the Code of Practice for the Governance of State Bodies, citing s.35 of the Harbours Act 1996, and stated that the proposed payment would require ministerial approval and that "…[as] this approval is not forthcoming…the contribution proposed by the Board must not be made".
- A letter of **28th May, 2018** was written by the then Minister for Transport, Tourism and Sport, Shane Ross T.D., to Mr David McGarry, who by that stage was chairman of the defendant company. While this letter falls outside the period in respect of which the plaintiff seeks reliefs, it is of some significance to the issue of policies and directives purportedly issued by the Minister. The letter refers to "…the then Minister's letter in February 2009 and a subsequent letter from my

> Department's then Secretary General in February 2011…". The letter goes on to state that "…it is long-standing Government policy that the award of Performance Related Award payments for CEOs within the State commercial sector is inappropriate. This policy has been clearly articulated by my Department's representative on the Company's Remuneration Committee for a number of years and I welcome the Company's adherence to that policy in the intervening years…". The letter goes on to state as follows: "…I am writing to inform you that, having sought and received the consent of the Minister for Public Expenditure and Reform, in accordance with the provisions of section 37(2) of the Harbours Act 1996 I hereby direct the Company to continue to comply with stated Government policy in relation to the award of Performance Related Award Payments".

55. This last letter is notable because it specifically uses directive terminology "…I hereby direct the Company to continue to comply with stated Government policy…". It is the only letter of those relied upon by the defendant to use such terminology. In relation to this letter, the written submissions of the defendant state as follows: -

> "The Minister thus issued a directive for the purposes of section 37(2) of the Harbours Act. It is submitted that the Minister had in any event issued such a directive in the correspondence and communication outlined above which governed the years 2010 to 2016. Alternatively it is submitted that the defendant was in any event obliged to have regard to government policy and nationally agreed guidelines in respect of remuneration and allowances". [p. 8, para. 5.1 of the written submissions]

56. The plaintiff in his written submissions draws attention to the fact that the letter of 28th May, 2018 is the only one to contain "any express direction of any kind to the defendant company", and that the letter was issued almost two years after the commencement of the present proceedings.

57. In his cross-examination, Mr Keating did not accept that the letters of 28th February, 2011 from the secretary general and 29th July, 2011 from Minister Varadkar articulated a clear government policy. Mr Keating was of the view that a policy would be articulated in "…a clear, written document…that has considered…the impacts…and outlines the justification as well…maybe I am wrong here but I haven't seen such a policy document…" [day 3 p.36 lines 12-22].

Mr Michael Collins

58. Mr Michael Collins gave evidence in his capacity as former chair of the defendant company from 2012 to 2016. Mr Collins has spent his career prior to retirement working with multinational companies, including working as financial controller and finance director as well as chief executive officer in major capital intensive industries, central to the operations of which are large seaports. He gave evidence that he had seen how remuneration committees operated in these various businesses, and that "each of the CEOs of major operations…were on performance related pay".

59. Mr Collins was unequivocal in his praise of Mr Keating's leadership. He stated that it became clear to him after joining that "…we had an outstanding operation day by day, year by year, under the leadership of the CEO, Mr. Keating, and so on, and a very, very skilled and dedicated workforce…it was, in my humble view, an outstanding senior management team lead by a very excellent CEO…" [day 2 p.103 lines 16-26].

60. Mr Collins was particularly conscious of the need to provide appropriate remuneration to Mr Keating: he stated that

> "…obviously the role and context of the Remuneration Committee was to see how can we keep a motivated CEO on a package that makes sense relative to his job and relative to other people in similar jobs in ports in the country? And I found out, and it's there, you know, I was extremely disappointed, I understood the Government's cancellation of performance related pay. We felt for the first couple of years of my chairmanship that it could be restored, so effectively the remuneration committee worked very, very hard continuously reminding the department and the Minister of the day what needed to be done…" [day 2 p.104 line 20 to p.105 line 2].

61. Mr Collins was asked about the Remuneration Committee's assessment of Mr Keating's performance as follows: -

> Q. …The Defence that's pleaded has said that the Remuneration Committee were only scoring and not making an award. In your view, is that correct?
>
> A. No, I don't accept that at all, no. We knew there was a lot of problems there.
>
> Q. Were you making an award?
>
> A. We were making an award, very definitely.
>
> Q. And was there an intention to pay the amounts?
>
> [Counsel for defendant]: Perhaps if you would not lead the witness. This is important.
>
> A. There was an intention to pay the award. And indeed, in 2012, and maybe in 2013, based on the correspondence from the Minister, we felt that this thing could be reversed and we could get the full approval of the Department, which never came through. Despite that, effectively we felt that it would be

prudent, it was earned, it was awarded, and we actually provided for it fully in the statutory audited accounts. So I think at the end of 2016 when I left, there was something in the order of €350,000 provided for the payment of the accumulated bonus earned by the CEO based on his performance". [Day 2 p.105 line 27 to p.106 line 4].

62. Mr Collins went on to comment that "…it wasn't until maybe two years into my five years that I certainly felt for the first time seriously that we were not going to get very far with the Department. We tried a few different guises and so on to make special type payments and so on, which then we withdrew at the last minute. Because at the end of the day, we were driven by the fact, which was recorded all the time, that, you know, you had to get the Minister's approval and maybe the Minister for Finance's approval, in addition to the Minister's approval and so on. But we never saw that coming back, with all the correspondence, we never saw it coming back as a directive, you can't do this, you can't do that". [Day 2 p.106 lines 6-20].

63. In this latter regard, in relation to the status of the Minister's views, counsel for the plaintiff asked Mr Collins "…[y]ou said you didn't consider it a directive from the Minister?" Mr Collins replied "…[a]ny of the correspondence we didn't consider a directive, but, also, I recognised fully that that would have been taking it in a very legal determination type of approach, and I wanted to avoid that…" [Day 2 p.113 lines 18-23].

64. In cross-examination, Mr Collins was asked about the relevant provisions of the Harbours Act and in particular about the "Code of Practice for the Governance of State Bodies" issued by the Department of Finance in May 2009. Section 7 of these guidelines relates to "Remuneration of Senior Management and Directors' Fees", and para. 7.1 is as follows: -

> "Chairpersons and Boards of all State bodies are required to implement Government policy in relation to the total remuneration of the Chief Executive/Managing Director. Arrangements put in place by a relevant Department or the Department of Finance for determining and approving the remuneration of the Chief Executive/Managing Director must also be implemented and adhered to."

65. It was put to Mr Collins that this guideline constituted a requirement on the board to implement government policy in relation to remuneration. Mr Collins accepted this, but stated that "there has to be a level playing pitch…if salaries are the same and equitable across the board, then people think and occasionally act differently. Our CEO didn't have that opportunity…" [day 2, p.126 lines 6-28].

66. It was put to Mr Collins that "…you, as Chair of the Board, I think were clear at all times of the obligations on the Board to take account of Government policy in respect of remuneration? Mr Collins responded: "…I wouldn't call it policy…I came very close to paying [the bonuses] because I couldn't see any justice either in what we were doing and so on, but we didn't, because we did, in essence, so far, stick with the one thing that was coming out all the time, you know. Never a clear instruction or demand or anything like that, but…you must get the approval of the Minister". [Day, 2, p.127 lines 2-16].

67. It was put to Mr Collins that, contrary to what clause 8.3 of Mr Keating's contract suggested, rather than the remuneration committee exercising its exclusive discretion in relation to the award of bonuses, that committee in fact made a recommendation to the board which the board either accepted or did not. Mr Collins confirmed that this was correct. It was then put to Mr Collins that, while the board might have agreed with the assessment by the remuneration committee of the performance in

any given year, they never agreed to pay the award. Mr Collins accepted that this was correct, but stated that this was "only because of the instructions of the shareholder"; as he put it, "…[w]e provided for it fully, we made the award and provided for it fully. It's in the balance sheet today. Because we felt equity and fairness and prevarication by the Government could very well be reversed". [Day 2, p.141, lines 18 to p.142, line 11]. It was also put to Mr Collins that his view had been – as stated in the minutes – that it would be "unconscionable" for the board to defy the Minister, and Mr Collins accepted that this had been his position.

68. Mr Collins was cross-examined about the course of the deliberations of the board for the period of his tenure as chair, and the interactions between it and the Minister and his representative Mr Burke. His position, in summary, is that he considered the determination by the Revenue Commissioners of PRP in respect of Mr Keating in any given year to be an "award", recognised in the accounts of the company, which he hoped and expected would be paid at some time in the future, but which the board felt constrained not to pay, as to do so would be in contravention of the wishes of the Minister. Mr Collins expressed considerable frustration at the situation, going so far as to suggest that the board had over the years been "misled" by intimations from the Minister that the situation regarding CEO pay generally and Mr Keating's position in particular would be addressed and rectified in a meaningful way.

Mr Joe Treacy

69. Mr Joe Treacy gave evidence on behalf of the plaintiff. He is an employee of the defendant company, who served as an employee elected director on the board of the defendant from 2002-2017. Mr Treacy joined the company in 1985 as a plant fitter and has risen to the role of supervisor in the company.

70. Mr Treacy considered the board as having awarded PRP each year to Mr Keating; as he put it, "…I don't think there was ever a problem with awarding the payment. The problem came about with actually making the payment" [day 3, p.59, lines 6-8]. He expressed the view that there was a "general fear" among the political appointees on the board that "…they would be removed from the Board if they went against the Government policy at the time…". Mr Treacy's view was that the obligation of a director of the company is to "do what's right for the company". In his opinion, the "right thing to do" in respect of the PRP would have been to discharge it.

71. In cross-examination, it was put to Mr Treacy that he understood that the policy of the Government was not to make the payments, and that the board, in making a decision as to whether or not to make the payments, had to take account of that policy. Mr Treacy accepted these propositions. He also accepted that the decision of the board in respect of the years 2010 to 2016 was that if the Minister did not approve of the payments of PRP, the appropriate sums were not going to be paid.

Mr Eddie Burke

72. The only witness called on behalf of the defendant was Mr Eddie Burke, who is a Principal Officer in the Department of Transport (formerly the Department of Transport, Tourism and Sport). Mr Burke has been an official of the department since 1994, and was principal officer with the department in the policy and governance coordination division between 2010 and 2017. For that period, he was also the departmental representative on the remuneration committee of the defendant. In this regard, Mr Burke described his function on the committee as for the purpose of an appraisal of the objectives that were set, and to give his views as to whether appropriate guidelines were being observed. In this regard, he was particularly concerned with para. 7.1 of the 2009 Code of Practice for the Governance of State Bodies quoted at para. 64

above, and its requirement that chairpersons and boards of all state bodies "are required to implement Government policy in relation to the total remuneration of the Chief Executive/Managing Director".

73. Mr Burke stated that the stance which he would adopt was dictated by the letter of 28th February 2011 from the Secretary General of the department to the company, to which reference is made at para. 54 above, to the effect that "the payment of bonus payments, performance awards would be inappropriate, and that is the policy that I held in all my time on the Remuneration Committee" [day 3, p.77 lines 19-26]. Mr Burke commented that the policy set out in the Secretary General's letter was "a kind of hardening of the policy that was articulated in 2009 [*i.e.*, in the letter from Minister Dempsey of 27th February, 2009 to which reference is made at para. 54 above] …".

74. Mr Burke was asked to address Minister Varadkar's letter of 29th July, 2011, quoted at para. 54 above. He accepted that, to his knowledge, there was no public document that articulated an in-depth description of the policy to which Minister Varadkar refers in that letter. He could not say whether there was a government decision in this regard, but described the policy as "well-articulated". He stated that the policy "would have also applied to any other department that had agencies underneath their remit [and]…would have applied to all agencies across the whole public sector" [day 3, p.84, lines 21-26].

75. Mr Burke confirmed that he was on each occasion in agreement with the appraisal of the plaintiff's performance, but that the procedure followed was that the recommendation of the remuneration committee would go to the board, and that it would be a board decision whether or not to pay the PRP. His understanding, on the basis of what the board and the chair had assured him, was that "they would comply with government policy…that it wasn't going further than that; that the

recommendation was the recommendation on the appraisal rating, but no further" [day 3, p.88, lines 1-6].

76. Mr Burke gave evidence in relation to discussions in 2015, given the imminent expiry of the plaintiff's contract, as to the terms of a new contract to be agreed with Mr Keating. Mr Burke referred to certain terms agreed by the Minister, including an increase in the basic salary to €125,000.00, but stated that other terms of the existing contract such as car allowances, directors' fees and the PRP would be removed from any new contract. Ultimately, the package approved by the Minister was regarded as being less valuable than the existing package; it was then conceded in May 2015 that the plaintiff was entitled to a contract of indefinite duration, and the plaintiff opted to accept that his existing contract terms applied for an indefinite duration, rather than attempt to negotiate further in relation to a replacement contract.

77. Mr Burke was cross-examined at length in relation to the manner in which he conveyed the department's policy or stance at various remuneration committee meetings which he attended. He stated that he conveyed "in all the meetings I attended…that the Board were expected to comply and the Minister expected and they had assured me that they would comply with Government policy" [day 3, p.101, lines 4-8]. When asked by counsel for the plaintiff "…did you make it very clear that it was a decision for the Board to make?", he agreed that "yes, it was a decision for the board" [day 3, p.101, lines 12-14]. He accepted that he acknowledged in the 2010 meeting that he did not, as a representative at the meeting of the Minister, have a veto in relation to the issue. The 2010 meeting minutes record that Mr Burke said that he would "object strenuously" if a decision to discharge PRP were made. He accepted that "object strenuously" … "is not a directive" [Day 3, p.102, line 27]. He accepted also that he was noted in the 2010 minutes as stating that "guidelines are only guidelines".

78. Mr Burke accepted that, in the minutes of the March 2011 meeting of the remuneration committee, he stated that "…the committee must take its own view on this…". Those minutes also record that Mr Burke stated that "…the company must make its decision but had to be aware of the shareholders' view" [Day 3, p.106, lines 3-5]. Minutes of a meeting in 2012 record Mr Burke as adopting the position that "…he was recommending that no such payment be made…". Counsel put to him as to whether he accepted that "…there is a duty on directors in a commercial semi-state company under the Companies Act to act in the best interests of the shareholder?", to which Mr Burke replied "yes" [day 3, p.109, lines 24-27].

79. Mr Burke was cross-examined at length about the negotiation regarding the proposed replacement contract in 2015. It was suggested that the fact that the company ultimately agreed to the continuation of a contract involving payment of PRP suggested that the State accepted the legitimacy of the plaintiff's claims to payment of PRP. Mr Burke stated that it was accepted by the Minister, on the advice of the Attorney General, that the plaintiff was entitled as a matter of law to a contract of indefinite duration, which necessarily involved the continuation of the existing terms of the contract, and that as such, the position regarding PRP remained unchanged.

80. Mr Burke was questioned about his assertion that there was a duty on directors in a commercial semi-state company to act in the best interests of the shareholders. Mr Burke emphasised that he was not an expert in company law, although he agreed that that was his opinion. Counsel for the plaintiff then referred him to a document entitled "Code of Practice for the Governance of State Bodies" issued by the Department of Public Expenditure and Reform in August 2016. In the section "Role of Board Members" counsel referenced, under a side heading "Companies Act, 2014", the following paragraph:

> "Under the Companies Act 2014 there is specific statutory recognition for the fiduciary duties of directors of companies incorporated under the Companies Act, 2014 or the Companies Act, 1963-2013. Boards of State bodies formed under the Companies' Acts must adhere with the specific duties and obligations they have under the Companies Act 2014."

81. Counsel also referred to the same document which refers at p.20 of the Code of Practice to the fiduciary duty owed by board members, which states that "…[a]ll board members have a fiduciary duty to the State body in the first instance (*i.e.* the duty to act in good faith and in the best interests of the State body)…". There is then a list of "the princip[al] fiduciary duties", the first of which is "…to act in good faith in what the Board member considers to be the interest of the company…".

82. At the conclusion of Mr Burke's evidence, I pointed out to Mr Burke that the evidence from Mr Keating and Mr Collins in particular was to the effect that they considered it in the best interests of the company that Mr Keating's accrued bonuses be paid, and they gave their reasons for that conclusion. I asked Mr Burke if he would accept that, in asking the company to exercise its discretion not to discharge PRP, that was in the shareholders' interests but not in the best interests of the company? Mr Burke said that he had always taken the view that the best policy for the company was to consider the interests of the shareholders: "…the Board themselves were a very good Board, very professional in the way that they did their business, they are also a very conscientious Board, and I just took it again that they factored in all elements for consideration and they came to the conclusion that they did, that they would continue to abide by the policy". Mr Burke stated that the other board members "had taken issue with the policy and how that policy impacted on the company, but, again, even though

they didn't agree with the policy, they took consideration of it as part of their decision" [day 4, p.25, line 25 to p.29, line 14].

83. Mr Burke was also questioned closely by counsel for the plaintiff as to how specifically he was aware that the policy remained unchanged throughout his period of tenure on the remuneration committee. Counsel put it to Mr Burke "…that it is absolutely extraordinary that in none of the five volumes of discovery…is there…anything in writing which constitutes government policy, other than these letters that you had written or the Minister had written, nothing whatsoever, no memo, no Cabinet decision, no piece of paper, other than just letters written either by you or signed by the Minister?" Mr Burke replied that he would be "…very surprised if there's not something in the Department…we were informed of the outcome of the review [carried out by the Government in 2014], but I cannot tell you here and now how that was communicated to us" [day 4, p.18, line 14 to p.19, line 7].

Submissions generally

84. There is little dispute between the parties as to the facts of the matter. The correspondence and other documentation is by and large agreed, and their terms are not in dispute. There is however very considerable dispute in relation to what those facts, correspondence and documentation mean. Much of the examination and cross-examination of witnesses was directed towards eliciting particular interpretations of Mr Keating's contract or the documentation surrounding it. I had occasion more than once during the trial to remind counsel and witnesses of the well-established principle that, while evidence in relation to the factual background of the making of a contract is admissible, evidence as to what the parties considered to be its meaning is not.

85. As I have mentioned, the parties made lengthy and very helpful submissions, both written and oral, as to the interpretation of the plaintiff's contractual arrangements.

The pleadings, which I have summarised above, set out the main contentions of both parties. I propose to set out the main submissions of both sides briefly, before setting out an analysis of those submissions in the context of the proven facts. While this summary is not exhaustive, I have considered all submissions made by both sides, both oral and written.

The plaintiff's submissions

86. The plaintiff, at part 2 of its written submissions, summarises the issues before the court as follows: -

> "(a) Did the Defendant breach the Plaintiff's contractual terms and conditions of employment by refusing to pay the Performance Related Payments?
>
> (b) Is it a defence for the Defendants to breach of the Plaintiff's contract of employment to state that a third party, in this case the Minister of the State, has given it a directive to breach the contract?
>
> (c) As a matter of fact, was such a directive in fact given?
>
> (d) If there was no Directive, is a requirement to have regard to on government policy a defence to the Defendant's breach of contract?
>
> (e) Does the Plaintiff have a legitimate expectation to receive the performance related payments?"

87. The plaintiff argues that his service agreements of 15th March, 2010 and 23rd September, 2011, the latter of which was deemed ultimately to be a contract of indefinite duration, provide for basic pay and PRP, and that the PRP element is an intrinsic and fundamental part of his remuneration. It is suggested that this is acknowledged in the 2006 guidelines, which also acknowledge that there should be "sufficient headroom between the CEO and the senior management…". However, the defendant's decision not to discharge PRP has resulted in a situation whereby his

remuneration is less than other senior members of management who report to him, all of whom have had any entitlements in their contracts to PRP discharged. The plaintiff states that, if he had remained as financial controller, his remuneration would have been higher than his remuneration has been since becoming CEO.

88. The plaintiff contends that the discretion of the defendant to pay PRP "is constrained by the four corners of the contract", and is not a "discretion at large". A number of cases to which I refer below are cited in this regard. It is suggested that the award of PRP is at the exclusive discretion of the remuneration committee if it considers that the performance criteria set down by the board have been fulfilled.

89. As regards the issue of whether a ministerial directive – if there was such – could determine whether or not PRP should be discharged, the plaintiff submits that the requirements of s.37(2) of the Harbours Act 1996 are "forward facing"; *i.e.* the company must have regard to government or nationally agreed guidelines, but only at the time of entering a contract. The plaintiff argues that his established contractual rights represent a constitutionally protected property right which cannot be removed by an ambiguous interpretation of s.37(2), and that the "forward facing" interpretation is the only one which respects his vested contractual rights. As such, s.37(2) cannot permit a unilateral variation of the plaintiff's contract.

90. The plaintiff contends, that as a matter of law, the directors of the company owe fiduciary duties to the company – not to the shareholders. Those duties also require the company to have regard to the interests of its employees pursuant to s.224 of the Companies Act 2014. It is suggested that, if the Oireachtas had intended to give the Minister the power to cancel or vary the terms of the contract of employment, it should have stated this unambiguously.

91. It is further submitted that, as a matter of law, an employer cannot unilaterally withdraw a performance related payment scheme, and that even where the scheme involves exercise of the company's discretion, that discretion must be exercised in good faith in a manner directed towards whether the employee has earned the PRP according to his contract. A number of authorities are cited to this effect.

92. It is in any event contended that, as a matter of fact, no directive as such was actually given by the Minister to the defendant company, and particular reliance is placed on the decision of Kearns J in *Gunning v Coillte Teoranta* [2015] IEHC 44 in that regard. It was submitted that the letters relied upon in the replies to particulars as constituting directives – with the exception of the final 2018 letter from Minister Ross – do not constitute directives when properly construed.

93. The plaintiff contends that the defendant is not under an obligation to comply with government policy, but merely to have regard to it, and that this obligation does not permit the company to alter unilaterally terms and conditions of employment. The plaintiff also relies on what he contends is a legitimate expectation to receive PRP; it is submitted that he acted to his detriment and relied on the provisions of his service agreements in relation to PRP when leaving his position as financial controller. It is suggested that, in the premises, the defendant is estopped from denying the plaintiff the payments to which he is entitled pursuant to the defendant's own assessments.

The defendant's submissions

94. While detailed written submissions were proffered on behalf of the defendant, the essence of the defendant's position is set out with admirable concision in the introduction to those submissions as follows: -

> "1.7 Most fundamentally, it is submitted that at no time, in respect of any year in dispute, did the Defendant make a decision to award payment to the Plaintiff

of a bonus, as required under the terms of his contract of employment. Therefore no entitlement to receive such a payment arose.

1.8 Without prejudice to the foregoing, the decision of the Defendant not to award the Plaintiff bonus payments for the years in question was made in accordance with clear and unequivocal government policy and/or under Ministerial directive within the meaning of section 37 of the Harbours Act, 1996, which policy and/or directive the Defendant was at all times obliged to follow.

1.9 Without prejudice to the foregoing and/or in the alternative it is submitted that the decision of the Defendant's not to award the payment was a lawful and permissible exercise of its discretion under clause 8.3 of the Plaintiff's contract of employment properly construed, and was a *bona fide*, rational and reasonable exercise of its discretion in all of the circumstances.

1.10 Without prejudice to the generality of the foregoing and/or in the alternative, it is submitted in respect of the years 2013, 2014 and 2015, that the establishment of the criteria against which the Plaintiff's performance was to be assessed did not occur 'annually in advance' as required by the contract of employment and/or the Plaintiff did not participate in the setting of these criteria and/or the assessment of his performance in each of these years, as required under the terms of his contract and thus the contractual pre-requisites for payment of the bonus were not met for those years".

95. Particular reliance is placed on the terms of clause 8.3 of the service agreements, which provide that the CEO will be "eligible to participate" in a PRP scheme; that the "performance criteria which the chief executive must satisfy in order to be eligible for the Bonus will be agreed annually in advance" by the board and the department in

consultation with the chief executive; and that "payments under the scheme will be awarded at the exclusive discretion of the Committee if the Committee considers that the performance criteria set down by the Board have been fulfilled by the Chief Executive". It is emphasised that "…any bonus paid to [the CEO], and the precise amount (if any) is at the exclusive discretion of the Defendant". [Paragraph 3.1 written submissions].

96. The defendant refers to and relies upon the guidelines and correspondence referred to at paras. 25 and 53 to 55 above, and draws upon the minutes of remuneration committee and board meetings from 2010 to 2017. At para. 7.3 of the submissions, the defendant sets out various grounds which it contends distinguish the present case from the situation in *Gunning*.

97. It is submitted that "…it is clear that the discretion of the Remuneration Committee is restricted in that (1) it must have regard to applicable government guidelines and government policy and (2) it is bound to comply with any directives which the Minister may give to the defendant (with the consent of the Minister for Finance), on remuneration, allowances, terms and conditions of staff, including that of the CEO. It is submitted that it is material that there are external factors which can impact and interfere with the Remuneration Committee's exercise of its discretion and it is submitted that the plaintiff has at all times been aware of those restrictions". In this regard, the defendant relies on the decision of the UK Employment Appeal Tribunal (Kerr J) in *Ostilly v Meridian Global VAT Services (UK) Limited* [2020] IRLR 945, to the effect that "…the wording of a Bonus clause could not be considered in a commercial vacuum…Kerr J held that in the absence of words to the contrary, the respondent was entitled to consider its financial position in exercising its discretion inherent in the Bonus Clause…" [para. 9.3].

98. As regards legitimate expectation, the defendant submits that the plaintiff "could have no expectation, legitimate or otherwise, that the only matters that would be considered by the Defendant regarding payment of bonus would be his performance and that in fact the Defendant has consistently had regard to government policy in determining whether a bonus should be awarded…" [para. 10.2].

99. In oral submissions, counsel at the outset suggested that there were "two issues for the court to determine…". The first is whether or not a directive has issued for the purposes of section 37(2) of the Harbours Act…secondly, …if the court is against me on that, and if the court decides that there was no directive and the company was not covered by a directive, then the question…will be one for the court to determine…whether or not the company in exercising its discretion not to make payment of the bonus in each of the seven years was acting in a manner that no reasonable board could do and that it was not open to it to make that decision not to pay because that is a decision that no reasonable board could make" [day 4, p.71, line 12 to p.72, line 15].

Clause 8.3 of the contract

100. The clauses dealing with remuneration in Mr Keating's contract are clauses 8.1 and 8.2, quoted at para. 28 above, and para. 8.3 and 8.4, quoted at para. 16 above.

101. Clauses 8.1 – 8.2 provide for an increase in the "basic salary", which is defined in clause 1.1.1 of the contract as "…the salary of the Chief Executive as provided for in Clause 8.1 and as may be increased from time to time". Clause 8.2 is very prescriptive as to the circumstances in which the basic salary "shall be reviewed"…. The review is to be "in accordance with applicable Government guidelines, including Government pay guidelines…any change in salary proposed by the Company currently requires the

prior written approval of the Minister for Transport in consultation with the Minister for Finance before it can be offered to the chief executive…".

102. Unlike clause 8.2 in relation to "basic salary", clause 8.3 does not state that the PRP is subject to government guidelines or ministerial approval. It sets out the manner in which the performance criteria are to be determined, which criteria "…the Chief Executive must satisfy in order to be eligible for the Bonus…". The payments under the scheme "…will be awarded at the exclusive discretion of the Committee if the Committee considers that the performance criteria set down by the Board have been fulfilled by the Chief Executive…".

103. It is not clear from the wording of the clause whether the "exclusive discretion" relates to the consideration of the CEO's performance by the committee, so that payment automatically follows a positive evaluation by the committee ("…8.4 Any bonus to which the CEO is entitled will not be pensionable…" [emphasis added]), or whether there remains a residual discretion whether or not to pay the bonus, notwithstanding a positive evaluation. If, as the defendant contends, the exclusive discretion of the committee is whether or not to "award" payment, even where the performance criteria have been met by the CEO, there is no indication in clause 8.3 or 8.4 as to the circumstances in which the committee might consider it appropriate not to make payment of the bonus to a CEO who had met the criteria.

104. It seems to me that the key phrase in clause 8.3 is "…[P]ayments under the Scheme will be awarded at the exclusive discretion of the Committee if the Committee considers that the performance criteria set down by the Board have been fulfilled by the Chief Executive". While a case can certainly be made for the plaintiff's interpretation of this clause, it seems to me that it is the "payments" – the possibility of which can only arise if the CEO has met the performance criteria – which are the subject of the

"exclusive discretion" of the committee, and that the committee therefore has a discretion whether or not to make such payments, even where the performance criteria have been met.

105. The implementation by the remuneration committee of its role under clause 8.3, and the subsequent intervention by the board of the defendant in each year, have added very considerably to the confusion surrounding the performance related bonus scheme. Clause 8.3 makes it clear that assessment of the CEO's performance and the award of payments are to be made by the remuneration committee. This is in accordance with clause 1.12 of the 2006 guidelines, which provides that "…the payment of performance-related pay will be determined by the remuneration committee of the Board of the commercial state body, augmented for this purpose by a civil servant nominated by the appropriate Minister". As we have seen, Mr Collins was of the view that the remuneration committee "…were making an award, very definitely…there was an intention to pay the award…" [see para. 61 above]. However, Mr Collins accepted in cross-examination that, notwithstanding the board's agreement each year with the assessment of the remuneration committee, it declined each year to pay the award "…only because of the instructions of the shareholder…", although his view was "…we made the award and provided for it fully…". In practice therefore, it is clear that the remuneration committee carried out the assessment of the CEO's performance, but the decision whether or not to pay was each year made by the board.

106. Notwithstanding that clause 8.3 provides that payments "will be awarded at the exclusive discretion of the Committee…", the terms of reference of the committee itself provides some justification for PRP having to be approved by the board: -

> "1.4 The primary responsibility for determining the remuneration of the Chief Executive rests with the board of Shannon Foynes Port Company. The Board of

> Shannon Foynes Port Company have delegated responsibility for determining the Chief Executive remuneration to the Remuneration Committee.
>
> 1.5 All recommendations made by the Remuneration Committee have to be approved by the Board of Shannon Foynes Port Company. Changes to contractual terms and remuneration must also have prior approval of the Minister of Transport and the Minister of Finance…
>
> 6.9 The payment of Performance Related Pay to the CEO is determined by the Remuneration Committee, recommended by the Board, agreed by the Department of Transport and approved by the Department of Finance in any given years prior to payment being made."

107. If the correct contractual interpretation of clause 8.3 is that there existed an "exclusive discretion" whether or not to pay PRP – notwithstanding that the CEO had established that he had earned it – and that this discretion was exercised by the board rather than its sub-division the remuneration committee, there is little or no assistance in the contract as to how that discretion is to be exercised.

108. As clause 8.3 of the contract does not in its terms require reference to be had by the parties to guidelines or a code of conduct as regards payment of PRP, the only basis on which the defendant justifies having regard to such factors is the provisions of s.37(2) of the Harbours Act 1996, quoted at para. 12 above. This in turn would require the court to conclude that s.37(2) is applicable to consideration of the plaintiff's yearly claim for PRP, and is not, as the plaintiff contends, merely applicable to the negotiation of the terms of a contract before those terms are concluded; in the words of the plaintiff, "forward facing".

109. The plaintiff contends that the PRP was an intrinsic part of the plaintiff's wages or salary and is not a "bonus" as such. He points out that clause 1.4 of the 2006 guidelines provides that

> "1.4 Remuneration is made up of two elements
>
> - Basic pay,
> - Performance-related pay."

110. The plaintiff also relies on the provisions of clause 2.3 of the 2006 guidelines, which provides: -

> "…[t]he salary of senior management should also be set at a level that allows sufficient headroom between the CEO and the senior management. In determining the size of any headroom account should be taken of practice in the private and public sector. In no circumstances should senior staff be paid at a level close to the CEO…".

111. As against that, the defendant, in addition to relying on s.37(2) of the Harbours Act 1996 quoted at para. 12 above, relies on clause 7.1 of the 2009 Code of Practice, which states as follows: -

> "7.1 Chairpersons and Boards of all State Bodies are required to implement government policy in relation to the total remuneration of the Chief Executive/Managing Director. Arrangements put in place by a relevant Department or the Department of Finance for determining and approving the remuneration of the Chief Executive/Managing Director must also be implemented and adhered to."

112. The defendant also relies on the 2016 version of the Code of Practice in relation to remuneration and superannuation, which states that: -

"Chairpersons and Boards of all State bodies are required to implement Government policy in relation to the total remuneration package (including basic salary, allowances and all other benefits in cash or in kind), and in relation to other provisions for superannuation and termination benefits, of the CEOs/Managing Directors of the State bodies…the Board should adhere to Government policy on the payment arrangements for CEOs…"

113. In relation to "commercial State bodies" these 2016 guidelines further state:

"1.9 Remuneration of CEOs: The Government reserves the right to vary the CEO's remuneration over the terms of their contracts by virtue of the application of public sector pay policy. While matters relating to the terms and conditions of new CEOs, or changes in the terms and conditions of sitting CEOs, are properly subject to discussion by the Board and each commercial State body, these must be authorised by the relevant Minister, in consultation with the Minister for Public Expenditure and Reform, in advance of any offer being made to the CEO. No sanction of approval will be given in respect of an offer of remuneration to the CEO unless it is line with Government policy and in accordance with the relevant guidelines on the permissible range and limits of CEO pay. This applies to the recruitment of a new CEO and to any change in remuneration subsequent to the signing of a contract."

Directive from the Minister?

114. The defendant's first line of defence to the plaintiff's claim is that its decision not to discharge PRP to the plaintiff from 2010 to 2016 "…was made in accordance with clear and unequivocal government policy and/or under Ministerial directive within the meaning of section 37 of the Harbours Act, 1996, which policy and/or directive the Defendant was at all times obliged to follow". [Paragraph 1.8 written submissions].

115. The court requires to determine whether, as a matter of fact, there was a "clear and unequivocal policy" or a "ministerial directive", and if so, whether the company in the circumstances was obliged to exercise its discretion in accordance with s.37 of the Harbours Act 1996 not to pay to the plaintiff PRP which the remuneration committee had found he had earned.

116. A perusal of the correspondence between the department and the Minister on the one hand, and the company on the other, summarised at para. 54 above, suggests that the requirement of adherence to government policy was never expressed in directive terms in the years 2010 to 2016. While there was a clear expectation that there would be compliance with the government's wish that PRP would not be paid to CEOs, there was repeated acknowledgment that, as the department's letter of 28th February, 2011 put it "…[d]ecisions on bonus payments are ultimately a matter for the board". The phraseology used throughout this period is in marked contrast to that used by Minister Ross in his letter of 28th May, 2018, in which he specifically invokes section 37(2), and states "I hereby direct the company to continue to comply with stated Government policy in relation to the award of Performance Related Award payments".

117. Mr Burke's evidence, in particular as summarised at para. 77 above, makes it clear that he did not see his role on the remuneration committee as being to ensure enforcement of a directive, and while he would express a forceful view in favour of adherence to the government's wishes, compliance or otherwise was "a decision for the board".

118. It was submitted on behalf of the defendant that the cumulative effect of the correspondence was such that it should be regarded as a directive for the purpose of s.37(2). In *Gunning* a similar instance of a letter of 8th April, 2013 sent by the Minister for Agriculture, Food and the Marine pursuant to s.36 of the Forestry Act 1988, by

which the Minister purported to issue a "directive" for the purpose of that section intended "to forfeit and confiscate accrued entitlements" [p.7 of judgment], Kearns J stated: -

> "At the outset it strikes the Court as extraordinary that a letter with such far reaching consequences from Mr Gunning's point of view (given that it purported to forfeit confiscate accrued entitlements) stopped short of describing the Minister's letter as a 'directive' as required by s.36 of the Act itself. Nor has there been any evidence to show that this decision or directive was arrived at or issued with the consent and agreement of the Minister for Finance as required by the terms of the section." [p.7 of judgment]
>
> "…[h]aving regard to the penal nature of the measure sought to be imposed upon the plaintiff, the letter would have to have been expressed as a directive and would further require to be accompanied by some evidence that the same had been issued with the consent of the Minister for Finance…" [p.10 of judgment].

119. I would adopt similar views in relation to the correspondence from the Minister and the Department on which the defendant relies in the present case. They expressed their views and expected compliance with what they considered to be government policy. However, the evidence clearly indicates that no directive was given by the Minister to the company in accordance with s.37(2) of the Harbours Act 1996.

"Government policy concerning remuneration and conditions of employment"

120. While there was no directive issued by the Minister pursuant to s.37(2), it remains to be considered whether there was a "government policy concerning remuneration and conditions of employment" to which, according to the defendant, the company was bound under s.37(2) to have regard. In his evidence, Mr Keating strongly

contended that there was no such policy: see para. 57 above. As against that, the term "policy" has been used consistently in correspondence on behalf of the Minister or the department to describe the government's decision in principle that CEOs not be paid PRP: see for instance the letters from Minister Varadkar of 29th July, 2011 and 5th June, 2012, the letter of 24th December, 2012 from Mr Burke, and the letter from Minister Ross in which he refers to "the long-standing Government policy", all quoted at para. 54 above.

121. A policy is essentially a principle or plan of action which a body decides will govern certain situations or activities in the future. Where a government is concerned, it will often be the product of prolonged departmental investigation and research, culminating in a report with written recommendations to the Minister as to the appropriate course. However, that will not always be the case, and the term "policy" may justifiably be used to describe any position consistently advocated which governs a given set of circumstances which may occur in the future.

122. In the present case, I accept as a matter of fact that there was a government policy, at least from the date of Mr O'Mahony's letter of 28th February, 2011, that PRP should not be paid to CEOs of commercial semi-state bodies. Whether the State was in a position to insist on implementation of its policy, or merely recommend that it be followed, is a separate matter which requires careful consideration.

123. Mr Keating makes a number of points in relation to the operation of the policy. In particular, he points out that the policy has a number of effects in its application to him, including

- that the principle of 'headroom' between his salary and senior management set out in clause 2.3 of the 2006 guidelines has been consistently ignored, so that senior management who report to him have

all had their PRP discharged and actually, under the current circumstances, are paid more than he is;

- the justification for the policy expressed in Minister Varadkar's letter to Mr Collins of 5th June, 2012 ("…this Government has had to take a very strong line on state sector salary levels in the extremely serious prevailing economic conditions. The general thrust of these policies is to reduce CEO salary levels to a more realistic level…") might be considered to no longer subsist, given Ireland's strong economic performance over the last several years;
- the 2006 Guidelines provide at clause 1.11 that the board must "…ensure that the Chief Executive will not be rewarded for results which are attributable primarily to external factors such as changes in the general economic climate…". Mr Keating points out that the converse proposition does not apply: notwithstanding that the company did extremely well under his stewardship when the economy was in difficulties, Mr Keating has not only not been rewarded accordingly, but in fact has received no PRP at all;
- the policy did not take account of the fact that Mr Keating had a low salary compared to CEOs of other ports, and that his remuneration was heavily incentivised, so that he was particularly reliant on PRP, and has been in his view disproportionately affected by the policy.

124. Notwithstanding these points, I do not think that it is part of this Court's function to examine the wisdom of the policy or whether it was justified in all the circumstances. Mr Keating does not in fact seek relief in this regard; while he does not accept that there was a policy as such – a conclusion with which I do not agree – his position is, that if

there was an obligation to have regard to policy, that obligation "…is not a defence for the Board to refuse to comply with legally binding contractual obligations…" [written submissions, conclusions para. 4].

125. Having decided that there was such a policy, it is necessary to consider the company's interaction with it. It is clear that the board and Mr Collins in particular considered that they could not act in contravention of the Minister's policy, notwithstanding their repeated view that Mr Keating was entitled to the payments and their repeated entreaties to the Minister to find a mechanism to enable the discharge of that entitlement. The letter of 24th May, 2012 from Mr Collins to Minister Varadkar in particular articulated this position. Mr Collins reiterated in his evidence his view that it would be "unconscionable" to disregard the Minister's wishes, notwithstanding his view that an "award" had been made in each year to Mr Keating which entitled him to payment, and that the decision not to pay had been made "only because of the instructions of the shareholder…" [see para. 67 above].

126. It is clear from the evidence of Mr Collins and Mr Treacy that they each considered that the best interests of the company would have been served by making the payments to Mr Keating. Mr Burke's position was that his role on the remuneration committee was to advocate and recommend adherence to the government's policy, and his opinion was that there was a duty on the directors to act in the best interests of the shareholders, although he readily conceded that he was not an expert in company law.

Nature of the discretion: case law

127. Both parties made submissions as to the nature of the discretion referred to in clause 8.3 of the contract. In *Clark v Nomura* [2000] 1 IRLR 766, the plaintiff's contract of employment provided for a discretionary bonus scheme. The plaintiff was dismissed by the defendant and not given any bonus, which the defendant argued was justifiable

on the basis of an exercise of discretion under the scheme. The High Court (Burton J) held that the provision in the contract for a "discretionary bonus scheme which was not guaranteed in any way and is dependent upon individual performance" contained a legal obligation on the part of the defendant to pay a bonus by reference to the claimant's "individual…contractual performance as a senior trader, with all its responsibilities…", and not upon other factors relied upon by the defendant; as the court stated "…the Defendant had two contractual obligations, to assess the bonus dependent upon individual performance by the Claimant, and not to do so irrationally or perversely (or capriciously). There is therefore room for abuse of the discretion, *i.e.* if in whole or in part discretion was exercised other than 'dependent upon individual performance', quite apart from the general concept of perversity or irrationality or capriciousness to which I have referred above…" [para. 41 judgment].

128. In *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942, the Court of Appeal of England and Wales considered the construction of a contractual "discretionary" bonus clause in the plaintiff's employment contract with Cantor Fitzgerald International ('CFI'). Potter LJ noted that the clause in that case was "one contained in a contract of employment in a high-earning and competitive activity in which the payment of discretionary bonuses is part of the remuneration structure of employers…" [para. 46]. The court found that "…the provision is necessarily to be read as intended to have some contractual content, *i.e.* it is to be read as a contractual benefit to the employee, as opposed to being a mere declaration of the employer's right to pay a bonus if he wishes, a right which he enjoys regardless of contract". [Paragraph 46].

129. The court had at length and with approval cited the judgment of Burton J in *Clark v Nomura* and, addressing the discretion provision in the instant case, Potter J at para. 47 of the judgment stated as follows: -

> "…This provision emphasises the obligation of CFI to consider the question of payment of a bonus (and amount) as a rational and bona fide, as opposed to an irrational and arbitrary, exercise when taking into account such criteria as CFI adopt for the purpose of arriving at their decision. Failure so to construe it would strip the bonus provision in clause 3(b)(ii) of any contractual value or content in respect of the employee whom it is designed to benefit and motivate. It would fly in the face of the principles of trust and confidence which have been held to underpin the employment relationship."

130. In *Cleary v B&Q Ireland Limited* [2016] 1 IR 276, the High Court (McDermott J) had to consider the entitlement of employees to bonus payments in circumstances where the employer had discontinued the bonus scheme. The appellants' contracts of employment contained a common clause which provided that "all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time". The factual situation in *Cleary* is therefore somewhat different to that in the present case, which contains no such clause. Nonetheless, it is worth noting that McDermott J stated as follows: -

> "I am satisfied that in the circumstances of this case the overall discretionary nature of the bonus scheme does not extend to a withholding of the bonus due in respect of that period, in respect of which the bonus was quantified and payable under the scheme subject to compliance with the eligibility provisions. I am satisfied that the contract of employment and bonus scheme must be interpreted reasonably. The discretion to withdraw the bonus scheme at any time, in my view, was always intended to apply *in futuro* and attached to the conferring of bonuses, as yet unaccrued, under the terms of the scheme. The

payment of the bonus crystalised as a contractual obligation once it was "earned" in accordance with the terms of the scheme as operated…" [para. 63].

131. The defendant asserts, without prejudice to its other various contentions, that the decision of the defendants not to award payment "…was a *bona fide*, rational and reasonable exercise of its discretion in all of the circumstances…" [para. 1.9 written submissions quoted at para. 94 above]. To that extent, the defendant does not disagree with the principles set out in *Clark*, *Horkulak* and *Cleary*. The defendant however submits that the discretion of the remuneration committee must be exercised in accordance with the constraints of s.37(2) of the Harbours Act 1996. The defendant submits "…that it is material that there are external factors which can impact and interfere with the Remuneration Committee's exercise of its discretion and it is submitted that the Plaintiff has at all times been aware of those restrictions…" [written submissions, para. 9.2].

132. In this regard, the defendant refers to the decision of the Employment Appeal Tribunal (Kerr J) in *Ostilly v Meridian Global VAT Services (UK) Limited* [2020] IRLR 945. In that case, the employee received in 2000 a letter of appointment which stated "as from 1st January 2001 you will be entitled to a maximum annual bonus of 20% of your salary which will be tied to your own performance and that of your market region. Further details on the bonus system will be forwarded to you shortly". In fact, no further details were ever provided to the claimant.

133. The claimant worked on developing and selling new software products and received substantial bonuses, so that in 2010 his bonus was almost 50% of his salary, despite the ceiling of 20% set out in the bonus clause. Ultimately the corporate group as a whole made a loss between 2011 and 2016, and the respondent made a decision to pay no bonus in March 2018 in respect of 2017. The claimant asserted that he was

entitled to a bonus. The UK Employment Tribunal held that the claimant was contractually entitled to a bonus, but held that the respondent was entitled to take into account the company's financial position as a whole, and its position regarding its creditors.

134. The appeal by the claimant was unsuccessful. As Kerr J put it at para. 41 of his judgment: -

> "The fundamental issue is whether the employer, exercising its discretion under clause 8, can treat its own financial position and performance as a relevant consideration when considering the issue of bonus for the claimant. In my judgment, in the absence of clear contrary words, that proposition is to be regarded as inherent in the language of the clause. To displace it, I look for express words and find none."

135. The defendant relies on this paragraph, and on the following dicta of Kerr J in *Ostilly*:

> "42. The words 'maximum annual bonus' confer a discretion which, as the next following words make clear, must be exercised having regard to the claimant's performance and that of his market region (if he has one). But I do not agree that the phrase 'tied to your own performance and that of your market region' must be read as requiring that discretion to be exercised as an abstract exercise, in a commercial vacuum…
>
> 48. The claimant's restricted interpretation would, in my judgment, be uncommercial and not in accordance with the well-known principles of construction set out in Lord Hoffman's speech in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] WLR 896… in reaching that conclusion, I do not get as far as considering the question of

whether any term can be implied into clause 8 of the letter of appointment. No added term needs to be implied beyond the exercise of attributing to the clause its true meaning, as a matter of construction in the narrower sense."

Subsection 37(2) generally

136. The plaintiff has much to say about the extent to which s.37(2) of the Harbours Act 1996 does or does not influence the construction or exercise of the discretion in clause 8.3 of the contract. His contentions in this regard may be summarised as follows:

(1) Section 37(2) is applicable only to the determination of the terms and conditions in respect of remuneration at the time of entering the contract, and is not intended to govern ongoing issues relating to remuneration;

(2) the subsection is ambiguous, and any law purporting to interfere with constitutional rights must be unambiguous in this regard;

(3) the plaintiff's contractual rights as regards payment of PRP are constitutional property rights;

(4) the subsection requires, pursuant to the "double construction rule" recognised in *McDonald v Bord na gCon* [1965] IR 217, an interpretation which is constitutional;

(5) Section 37(2) does not permit unilateral variation of agreed terms of a contract.

137. It does not appear to be seriously contested by the defendant that the contractual rights of the plaintiff to PRP set out in clauses 8.3 and 8.4 of his contract are constitutional property rights. The plaintiff relies on the dicta in *Dellway v National Asset Management Agency* [2011] 4 IR 1 at 287 of Hardiman J, who stated as follows:

"…[t]he property rights of the citizen are not limited to land or 'real property' to which one holds the title nor to the right to money or monies worth to which

> one is entitled. It has been recognised for a long time as being more extensive, and extending to established contractual rights, to the right to earn a living, to the rights to one's entitlements under an appointment to an office or under a contract of employment, and to rights to pensions, gratuities or other emoluments for which one has contracted, or has earned."

138. The plaintiff points out that clause 28 of both of his service agreements provides as follows: -

> "The Chief Executive hereby acknowledges that from time to time it may be necessary to amend the terms and conditions of his employment and he agrees to consider all reasonable amendments or variations notified by the Company to him from time to time".

It is not disputed that no such proposed amendments were notified to the plaintiff.

139. The plaintiff also relies on the decision of Meenan J in *O'Rourke v The Department of Education and Skills* [2019] IEHC 938. That case concerned a consideration by the court of the changes to pension rights introduced by the Public Services Pensions (Single Scheme and Other Provisions) Act 2012 and its effect on a teacher's future pension entitlements. The court held that legislation which affected property rights must be strictly construed and any change must be clear and unambiguous:

> "I accept, given its clear impact on the applicant's property rights which are protected by the Constitution, that s. 10(5) of the Act of 2012 must be strictly construed. I refer to the following passage from the judgment of Murray J (as he then was) in the decision of the Supreme Court in *Bupa Ireland Limited v Health Insurance Authority (No. 2)* [2012] 3 IR 442:

> '…where the Legislature is enacting provisions, however sound the reasons for them may be, which have potentially serious implications for legal rights, including Constitutional rights, of persons or corporations, one must expect that the intended ambit or application of such provisions will be expressed in the legislation with reasonable clarity." [Paragraph 18 of judgment]

140. The plaintiff relies upon the "double construction rule", by which, in respect of any statutory provision, where two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction. The principle was applied in *Gunning* by Kearns J in relation to s.36 of the Forestry Act 1988, a provision which bears a marked resemblance to s.37 of the Harbours Act 1996. Kearns J referred to *Cox v Ireland* [1992] 2 IR 503, in which a teacher who, as a result of a conviction in the Special Criminal Court forfeited pursuant to s.34 of the Offences Against the State Act 1939 his employment as a community school teacher and was disqualified from holding any like office or employment for a period of seven years, was held by the High Court also to have lost pension rights under the section which were already earned prior to conviction. Kearns J went on as follows: -

> "In the Supreme Court it was found that the unilateral variation and suspension of contractual rights, including rights which may involve the entitlement to a pension to which a contribution over a period has been made, constituted a major invasion of those particular property rights. The Supreme Court found that it was established that notwithstanding the fundamental interest of the State which the sections sought to protect, the provisions of s.34 of the Act of 1939

failed insofar as practicable to protect the constitutional rights of the citizen and were, accordingly, impermissibly wide and indiscriminate.

Given that s.36 does not provide in any way for the forfeiture of vested property rights, and given further that in construing s.36 the court must apply the presumption of constitutionality and in this regard must apply the double construction rule, the construction contended for by the defendant would offend Article 40.3.2 of the Constitution which requires the State to vindicate the property rights of every citizen".

141. The defendant however seeks to distinguish *Gunning* on the basis that the court's finding was that: -

"On any proper construction of s.36, it cannot be applied retrospectively so as to deprive a citizen of already accrued remuneration entitlements… It would have been a different story altogether if a directive, such as that contemplated by s.36, had been given during the currency of the plaintiff's contract of employment, with regard to as yet unearned and unpaid bonuses. There could be no complaint about a prospective measure of this sort and there clearly is a statutory basis for such an intervention."

142. The defendant urges caution in relation to the application of the principle that the words of a statute must *prima facie* be given their ordinary meaning, and refers to the dicta of Budd J in the *People (Attorney General) v McGlynn* [1967] IR 232 at p.242:

"It might be that, when regard is had to what the law was before the statute was enacted and to the defect in the law which the Oireachtas had the intention of remedying by the change in the law effected by the section, the conclusion would be reached that the real meaning of the words used was something different to their apparent literal meaning. Assuming for the moment that an

alternative construction of the section is open, the question is whether that alternative construction, for which counsel for the accused contends, is consistent with the smooth working of the system which the statute purports to regulate".

143. In truth, the foregoing submissions are primarily directed at the plaintiff's contention that the giving of directives pursuant to s.37(2) regarding a CEO's remuneration is an impermissible interference with his constitutional rights, and that the subsection must be interpreted in a manner which yields a constitutional construction. As I have found that no directive pursuant to s.37(2) has in fact been given by the Minister, I do not have to decide this issue.

Section 37(2) is "forward facing"?

144. I am however satisfied that there existed a government policy in relation to the remuneration of CEOs. The subsection states that the company "…shall have regard to Government or nationally agreed guidelines which are for the time being extant, or to Government policy concerning remuneration and conditions of employment".

145. Regrettably, it is entirely unclear as to whether s.37(2) relates only to the determination of remuneration or allowances for expenses prior to entering into the contract, or also during its currency. The subsection could be read either way. On balance, I am inclined to favour the interpretation contended for by the defendant, *i.e.* that it imposes an ongoing obligation on the company, once the terms of the contract have been agreed, to have regard to government guidelines and policy when determining remuneration or expenses. The subsection could have expressly restricted this obligation to the determination of remuneration and expenses when the company is negotiating or agreeing the terms of the contract; it does not do so. It does not seem to me unreasonable, in a commercial semi-state company owned entirely by the State,

to require the company to "have regard" to government guidelines or policies as one element in the mix of factors which the company would consider on an ongoing basis when determining remuneration or expenses, although, as we have seen, an obligation to comply with ministerial directives might give rise to difficulty if the effect of it were to give rise to an interference by an outside agency who is not a party to the contract with the vested constitutional property rights of the employee.

146. On the basis that no directive was in fact given in the present case, I am prepared to consider the matter on the basis that the plain words of s.37(2) are consistent with an ongoing obligation on the part of the company to have regard to government guidelines and policies, there being no indication in the wording that the obligation was to apply only with regard to the formation of employees' contracts.

Exercise of discretion generally

147. I am satisfied that clause 8.3 of the plaintiff's service agreement required the remuneration committee – whether subject to the board of directors or otherwise - to exercise its exclusive discretion as to whether to make a payment under the scheme "if the committee considers that the performance criteria set down by the Board have been fulfilled by the Chief Executive".

148. It is clear on the evidence that, in each of the years 2010 to 2016, the committee was satisfied that Mr Keating had complied with the performance criteria and determined the appropriate amounts of PRP as set out at para. 19 above. It is also clear, on the evidence given to the court and the dealings of the board and the committee as set out in the respective minutes of their meetings, that the board considered the determination of the amounts as establishing the entitlement of Mr Keating to payment of those amounts. Mr Collins placed significance on the fact that provision for payment of those amounts has been included in the company's accounts; while no evidence from

an accountant was adduced at the hearing, it is in my view more likely that such a provision does not constitute an acknowledgement by the company of the amounts as debts, but rather is a provision against the possibility of an award to Mr Keating, according to prudent accounting principles.

149. I should say that I do not accept the submission of the defendant at para. 1.10 of the written submissions, quoted at para. 94 above. The defendant is not entitled to rely on its own non-adherence to procedures in respect of the 2013, 2014 and 2015 PRP. The remuneration committee was satisfied to evaluate the PRP for those years at one sitting, and did so, determining the level of Mr Keating's PRP for those years. The company cannot now rely on some procedural infirmity on Mr Keating's or indeed its own behalf to assert that the determination was flawed and should not be regarded as valid.

Directors' duties under the Companies Act

150. In considering whether the directors exercised their "exclusive discretion" under clause 8.3 of the plaintiff's contract of employment appropriately, it is necessary to consider what the Companies Act 2014 has to say about how directors should carry out their fiduciary duties.

151. Section 227(1) of the Companies Act 2014 ('the 2014 Act') provides as follows:

> "(1) Without prejudice to the provisions of any enactment (including this Act), a director of a company shall owe the duties set out in section 228 (the 'relevant duties') to the company (and the company alone)."

Subsections 227(4) and (5) state as follows: -

> (4) The relevant duties (other than those set out in section 228 (1)(b) and (h)) are based on certain common law rules and equitable principles as they apply in

relation to the directors of companies and shall have effect in place of those rules and principles as regards the duties owed to a company by a director.

(5) The relevant duties (other than those set out in section 228 (1)(b) and (h)) shall be interpreted, and the provisions concerned of section 228 shall be applied, in the same way as common law rules or equitable principles; regard shall be had to the corresponding common law rules and equitable principles in interpreting those duties and applying those provisions."

152. It has long been the position at common law that directors stand in a fiduciary relationship to their company and accordingly owe duties to the company. The rationale for directors being in a fiduciary relationship to the company is that they are agents of the company, and the relationship of agent and principal will give rise to fiduciary duties. Section 227(1) of the 2014 Act confirms this position, while emphasising that the duties are owed "to the company (and the company alone) …".

153. Section 228(1) lists the "principal fiduciary duties" of directors. Section 228(1) provides *inter alia* that a director of a company shall "…(a) act in good faith in what the director considers to be the interests of the company…".

154. There are circumstances in which the 2014 Act permits the directors to have regard to the interests of persons other than the company. Section 224 of the 2014 Act is as follows:

"224. (1) The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.

(2) Accordingly, the duty imposed by this section on the directors shall be owed by them to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed by a company to its directors."

155. Also, s.228(1)(h) provides that:

> "(1) A director of a company shall
>
> …(h) in addition to the duty under section 224 (duty to have regard to the interests of its employees in general), have regard to the interests of its members."

156. Section 228 goes on to set out the circumstances in which a director may have regard to the interests of a particular shareholder of the company: -

> "(3) Without prejudice to the director's duty under subsection (1)(a) to act in good faith in what the director considers to be the interests of the company, a director of a company may have regard to the interests of a particular member of the company in the following circumstances.
>
> (4) Those circumstances are where the director has been appointed or nominated for appointment by that member, being a member who has an entitlement to so appoint or nominate under the company's constitution or a shareholders' agreement".

Thus, a director appointed to the board of directors by the Minister would be entitled to have regard to the interests of the Minister in carrying out his fiduciary duty as a director. However, as Courtney comments in 'The Law of Companies', 4th Edition, 2016, Bloomsbury Professional, para. 16.030:

> "The statutory duty that directors should have regard to the interests of the company's employees and members is of dubious value to its intended beneficiaries. Truly, in the case of s.224, what the legislature gives by subs (1) to employees, it takes away by subs (2), and what s.228(1)(h) gives to members, s. 227(1) takes away. The net effect of s.224 and 228(1)(h) may be said to be: directors are obliged to have regard to the interests of employees and

members *but* the recipients of the statutory favour may not themselves enforce the directors' duty."

157. The principle that directors' duties are owed to the company and not to its shareholders is of some antiquity. The leading authority is *Percival v. Wright* [1902] 2 CH 421, the facts and effect of which are summarised at para. 16.008 of Courtney as follows: -

> "In that case the plaintiff shareholders sold their shares to three directors of the company. They discovered later that the directors intended to sell the entire of the company's undertaking to another person at a greatly inflated share price to that received by the plaintiffs. Although the sale never proceeded, had it done so, the directors would have profited handsomely. The plaintiffs alleged that the directors were in breach of their fiduciary relationship to the plaintiffs as shareholders through not disclosing the fact that it was proposed to sell the company at a greater price. Swinfen Eady J held that no fiduciary duty was owed to the shareholders in such circumstances, that the directors had the power to negotiate the sale of the company and that the shareholders were deemed to be aware of the powers of the directors. Accordingly, the directors were under no obligation to disclose their negotiations to the plaintiff shareholders."

Exercise of discretion in the present circumstances

158. While clause 8.3 of the plaintiff's contract does not itself require the remuneration committee to have regard to government guidelines or policy, it seems to me that s.37(2) of the Harbours Act 1996 requires the company, and thus the directors who control the company, to "have regard to Government or nationally agreed guidelines which are for the time being extant, or to Government policy concerning remuneration and conditions of employment which is so extant…". The company can

do so either in the formation or negotiation stage of a contract with the CEO or employee, or during the currency of the contract where the company is required to determine the remuneration of such CEO or employee.

159. However, the discretion must be exercised in the best interests of the company. While this position is emphatically confirmed in the 2014 Act, the duty being owed "…to the company (and the company alone)…", I am satisfied that the position was no different prior to the enactment of the 2014 Act, and that the principle set out in *Percival v Wright* – that the directors do not have a fiduciary relationship to the shareholders and do not owe them fiduciary duties – applies to the present case. The company's obligation under s.37(2) is to "have regard to" government guidelines or policy; it is but one factor that goes towards the exercise of the committee's discretion under clause 8.3 of the contract, and the primary fiduciary duty of the directors in exercising this discretion is to "act in good faith in what the director considers to be the interests of the company…". It cannot be the case that s.37(2) requires the directors to ignore their statutory (since 2014) fiduciary duty to act in good faith in the interests of the company.

160. One can easily see how legitimate regard might be had by directors, in exercising their discretion under clause 8.3 of the contract, to the requirement in s.37(2) to have regard to government guidelines and policy. When negotiating a contract with a CEO or other employee, the policy that PRP not be discharged to CEOs would inform the negotiation of a contract with a CEO so that remuneration might be structured in a way which did not include PRP, so as to accord with the policy.

161. Where the company is required to exercise its "exclusive discretion" in determining the remuneration of a CEO pursuant to clause 8.3, the authorities (*Clark, Horkulak, Cleary*) require the directors to exercise discretion in a manner that is not irrational, perverse or capricious. As Potter LJ put it in *Horkulak*, there must be "a *bona*

fide and rational exercise [by the employer] of their discretion as to whether or not to pay [the employee] a bonus and in what sum".

162. In my view, the duty of a director exercising discretion under clause 8.3 includes a duty not to take into account irrelevant matters or matters which, properly viewed, should not inform the exercise of that discretion. One can envisage a situation where the interests of the company might require a refusal to discharge PRP to a CEO who had otherwise established his entitlement to it. For instance, if it were the case that discharge of PRP to a CEO would put the company in a position in which there were insufficient funds in the company to discharge trade liabilities, or that taxation liabilities would not be met, one could understand the directors concluding that PRP should not be discharged in such circumstances, as it would not be in the interests of the company to do so. Indeed, Kerr J. in *Ostilly* – an authority relied upon by the defendant - held that the company's own "financial position and performance" was in that case a relevant consideration for the company in deciding whether or not to award a bonus: see paras. 133-134 above.

163. In the present case, the clear evidence before the court is that the directors considered the interests of the company to lie in discharging the PRP to which Mr Keating had established his eligibility. Year after year, the directors expressed their strong wish to discharge Mr Keating's PRP, which they considered he had earned and which had been "awarded" by the remuneration committee. The only basis on which the PRP was not awarded was that the directors considered that they could not go against the clearly expressed wishes of the shareholders. They therefore exercised their discretion not to pay the CEO's PRP, notwithstanding his established eligibility for the payments, and all of the factors set out at para. 123 above, and in particular the

government's own principle that there be "headroom" between the CEO's salary and those reporting to him.

164. Although the wishes of the Minister and the department, expressed in correspondence and by Mr Burke at the meetings of the remuneration committee, were strongly advanced, they were not couched in terms that would constitute them a "directive" for the purposes of s.37(2). The policy not to discharge PRP was advocated by the Minister as shareholder of the company. The Minister is not a party to the contract between the company and Mr Keating. In exercising their discretion not to pay PRP to Mr Keating year upon year, the directors were taking a course of action which they themselves considered was not in the best interests of the company, solely on the basis that this was what the shareholders wanted.

165. As I have mentioned at para. 99 above, counsel for the defendant submitted that the court should determine "…whether or not the company in exercising its discretion not to make payment of the bonus in each of the seven years was acting in a manner that no reasonable board could do and that it was not open to it to make that decision not to pay because that is a decision that no reasonable board could make…". It might be thought that, in exercising its discretion, the board of a semi-state company could not ignore the strongly expressed wishes of its shareholders. Certainly, given the terms of s.37(2), the policy and guidelines were a matter to which the directors required to have regard in the exercise of their discretion.

166. However, in circumstances where the directors were under a duty to act in the best interests of the company, a decision not to do so due to a policy on the part of the directors, year upon year, of unquestioning adherence to the wishes of the shareholders cannot constitute a valid exercise of the directors' discretion. It cannot be a reasonable exercise of discretion by the directors for the board to ignore its duty to the company.

The State chose a corporate structure subject to the provisions of the Companies Acts as the vehicle which would carry out the functions which are currently the responsibility of the defendant company. This arrangement has worked well, with the company becoming very profitable and returning dividends to the Exchequer since 2015. However, the State must as part of this arrangement accept the duties imposed on the directors by this corporate structure; it cannot expect the directors, in the exercise of their fiduciary duties, to ignore their fundamental duty to act in the best interests of the company.

167. In this regard, it must be remembered that, in formulating a policy such as that relating to discharge of PRP to CEOs of semi-state companies, the Minister is not acting with regard to the interests of the company. It is clear from the correspondence from Minister Varadkar in particular that the policy that PRP for CEOs should not be discharged by semi-state companies was formulated in the national interest and given the extreme economic conditions of the time. It was a measure "across the board", and was not formulated in relation to the circumstances of any individual company or industry, much less the defendant company.

168. It is not part of the function of this Court to address the merits of the policy, which was no doubt formulated for good and valid reason. The fact remains however that the policy was not intended to address the company's individual circumstances, much less its best interests, but rather those of the nation and the economy in particular.

169. In exercising their discretion to abide by the government's policy and the wishes of the shareholders, and in doing so to ignore the best interests of the company, the directors as a board have failed to observe their fiduciary duties to the company. In exercising their "exclusive discretion" under clause 8.3 of Mr Keating's employment contract, they have given undue weight to the wishes of the shareholder.

170. I cannot accept that the directors were discharging their duties to the company by following slavishly the wishes of the shareholder. The directors were certainly in a difficult situation, between their obligations to the company and their contractual obligations to Mr Keating on the one hand, and the clearly expressed wishes of the State shareholders on the other. However, in no sense can it be justly said that it would have been "unconscionable" for the directors to do their duty to the company and discharge amounts to the CEO which they had concluded were earned by him and which they also considered were genuine liabilities of the company. While it might have been understandable if the directors, in the interests of harmony in the company's relationship with the shareholder, had allowed the situation to persist for a year or two while a solution was being worked out – one thinks of Minister Varadkar's proposed "review" in this regard – to allow the situation to drag on year upon year without any meaningful attempt to resolve the situation was particularly regrettable, and unfair to Mr Keating.

Conclusions

171. Given the length of this judgment, it is appropriate to summarise the main findings. As regards the facts of the matter, the court is satisfied that: -

- The remuneration committee and/or the board was satisfied in each of the years 2010 to 2016 that Mr Keating was eligible for PRP, and duly determined the amount of each such payment;
- throughout the period 2010 to 2016, the board supported Mr Keating's claim for PRP and considered that it should be discharged;
- it is clear from the evidence of Mr Collins and Mr Treacy, and from the minutes of the meetings of the remuneration committee and the board of directors, that

the consistent position of the board from 2010 to 2016 was that it was in the best interests of the company that the CEO's PRP be discharged;

- the board considered that it was constrained in the exercise of its discretion regarding the CEO's PRP to act according to the expressed policy of the Minister as set out in correspondence and advocated at meetings of the remuneration committee and the board by Mr Burke; in the words of Mr Collins, the board exercised its discretion not to discharge Mr Keating's PRP "…only because of the instructions of the shareholder…" [see para. 67 above];
- the Minister's position that PRP should not be discharged to CEOs of commercial semi-state companies was a "government policy concerning remuneration and employment" for the purpose of s.37(2) of the Harbours Act 1996, and was advocated by or on behalf of the Minister for the period 2010 to 2016;
- the Minister did not at any stage issue a "directive" for the purpose of s.37(2).

172. As regards the application of law to the facts, I am satisfied that: -

(1) The directors of the defendant company were entitled to exercise discretion in relation to whether or not to make payment of the determined PRP remuneration in the years 2010 to 2016;

(2) in exercising their discretion, the directors were entitled, given the provisions of s.37(2) of the Harbours Act 1996, to have regard to the government's policy on payment of PRP to CEOs of commercial semi-state bodies;

(3) however, the directors, in exercising that discretion, were subject to a fiduciary duty to the company to act in good faith and solely in the interests of the company;

(4) the discretion was required to be exercised *bona fide* and in a manner which was not irrational, perverse or capricious;

(5) in addition, the fiduciary responsibility of the directors to the company included a duty not to take into account irrelevant matters or matters which should not inform the exercise of this discretion;

(6) in refusing to exercise their discretion to make payment of Mr Keating's PRP, the directors were cleaving to the wishes of the shareholders, notwithstanding their view that the PRP should be paid, and that to do so was in the best interests of the company;

(7) in doing so, the directors were in breach of their fiduciary duty to the company to act in its best interests.

173. The inevitable conclusion from these findings is that, if the directors had exercised their discretion in a manner consistent with their fiduciary duty, they would have authorised payment to Mr Keating of the PRP determined by the remuneration committee to be due to him in the period 2010 to 2016. That fiduciary duty is of course owed by the directors to the company – not to Mr Keating. However, the statement of claim pleads as follows: -

> "15…in breach of the said Service Agreement and/or the Plaintiff's contract of indefinite duration, the Defendant has failed to sanction the making [of] each and every payment awarded as set out herein above by the Remuneration Committee to the Plaintiff. No written reason has been furnished to the Plaintiff for non-payment of the said performance pay.
>
> 16. As a result of the breach of contract on the part of the Defendant, the Plaintiff has sustained loss, damage and expense."

174. It seems to me that, in circumstances where the Remuneration Committee was obliged under clause 8.3 of the contract to exercise a discretion whether or not to make payment of PRP, a failure by the directors to exercise their discretion appropriately, particularly in circumstances where a discretion exercised in the best interests of the company would have resulted in payment of the PIP which Mr Keating had earned , constitutes a breach by the company of the contract which has caused damage and loss to Mr Keating.

175. For the sake of completeness, I should say that, in view of my findings, it is not necessary to consider the plaintiff's contention that he had a legitimate expectation that he would receive the PRP if the performance criteria were fulfilled. In any event, given my finding that the company had a discretion whether or not to pay the PRP notwithstanding that the eligibility criteria had been satisfied, I am doubtful as to whether or not the doctrine of legitimate expectation would be applicable.

Orders

176. In the statement of claim, the plaintiff seeks a declaration that he is "entitled to payment of performance related payments for the period of 2010-2017 pursuant to Clause 8.3 of his Service Agreement with the Defendant as approved and awarded by the Remuneration Committee".

177. The reason for the reference to 2017 rather than 2016 is that, by the time the statement of claim was delivered, the remuneration committee had evaluated the plaintiff's performance for 2017 and concluded that he was entitled to a bonus of €38,094.00 in respect of that year. The plaintiff's position is that, if the court finds that he is entitled to PRP bonuses for the years 2010 to 2016, he must also be entitled to a bonus for the year 2017 on the same basis. Accordingly, judgment is sought in the sum

of €297,863.00, which I understand is the cumulative total of PRP bonus from 2010 to 2017.

178. It seems to me that the plaintiff is entitled to the declaration sought at para. 1 of the reliefs. It may be that the defendant accepts that, if it is liable for payment of PRP for the years 2010 to 2016, it must also be liable for the bonus for 2017 on the same principle. It seems to me that the plaintiff is entitled to judgment, whether the sum to be paid is characterised as damages for breach of contract or otherwise, and that the costs of the proceedings should follow the event.

179. I would ask the parties to attempt to agree the appropriate orders within three weeks of delivery of this judgment. If that is not possible, I will list the matter early in the new term so that the parties may have an opportunity to address the court as to the orders which should be made.