



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 273

High Court 2008/6263P

Court of Appeal 2019/195

Costello J.

Noonan J.

Ní Raifeartaigh J.

BETWEEN/

KEVIN KIELTHY

APPELLANT

- AND -

MINISTER FOR AGRICULTURE, FISHERIES AND FOOD, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 22nd day of October, 2021

Nature of the case and background

1. This case involves a claim for economic loss arising from a number of torts allegedly committed by the respondents or their agents, including: (1) negligence by reason of a failure to issue an accurate certificate of registration in respect of the appellant's fishing vessel during

the period 2000-2005; and (2) negligent misrepresentation and/or breach of the principle of legitimate expectation in the context of the appellant's proposals to re-purpose his fishing vessel for a new purpose, namely the dumping of fish offal at sea on behalf of fish processors, during the period 2001-2005. The claim was rejected in its entirety by the High Court and this is an appeal in respect of that judgment and order. Judgment was delivered by O'Connor J. on the 5 February 2019.¹

Relevant Chronology of Events

2. The chronology of events is important in this case because the appellant maintains that there are causal connections between financial losses he claims to have suffered, on the one hand, and certain actions or omissions on the part of the respondents their servants or agents, on the other. The chronology is complicated by the fact that there were two prior sets of legal proceedings involving events relevant to the present proceedings, and that there are a total of four different issues which emerge and re-emerge across the different sets of proceedings.

3. I will use the following descriptions of each of the four issues as a short-hand description in this judgment:

- (1) The "registration certificate" issue;
- (2) The "dumping at sea" issue;
- (3) The "scallop-fishing permit" issue, and
- (4) The "decommissioning grant" issue.

¹ [2019] IEHC 163

Before addressing the relevant timeline of events in some detail, it may be helpful to give a brief overview in relation to each of these issues. The vessel in question was the MFV Morgensonne, which the appellant and two others purchased in the late 1990s, and in respect of which he became sole owner in the early 2000s, having bought out the shares of his partners.

4. *The “Registration Certificate issue”*: Every Irish fishing vessel must be entered in a Register of Vessels (which is a separate and distinct system of registration from the licensing system in respect of fishing). Between the years 2000 and 2005, various certificates were issued to the appellant which sometimes recorded the engine power incorrectly. This error had arisen because the appellant and his then fishing partners had submitted incorrect engine details to the Registrar upon their purchase of the vessel, not knowing that the previous owner had installed a new engine some years before he sold it to them. When this came to light, they sought to have a fresh and correct Registration Certificate issued to them. There is a paper trail about this matter, and this was laid before the trial court. The appellant says that the first time he received an accurate Registration Certificate was July 2005. I will return to the significance of this later, but it is a key matter upon which the appellant relies in advancing his claims in these proceedings. I should perhaps say at this early stage that it is not in dispute that, as a matter of law, a vessel must be registered as a pre-condition to obtaining a fishing licence. The disagreements between the parties arise as to (a) whether the appellant would have been fishing illegally while his Registration Certificate had a clerical error on it; and (b) whether that is relevant to the claim he makes in *these* proceedings.

5. *The “dumping at sea” issue* – From about 2001 onwards, the appellant sought to alter the vessel’s business model from one of fishing to one of dumping at sea. The appellant

maintains that he incurred loss and expense in refitting his vessel in anticipation that he would obtain a permit for dumping at sea, based on representations made and expectations created by the respondent. He says that this started with a meeting on the 23 November 2001 between the Minister of State at the Department of the Marine, Department Officials, the appellant and one of the fish processing companies to discuss the dumping at sea project. Ultimately it was recognised by the State that the proposed scheme would not be in accordance with EU law and it was abandoned. The appellant says he did not become aware that he would not get a permit until 2005 and that he incurred various losses and adverse consequences as a result, as we shall see.

6. *The scallop-fishing authorisation issue;* The industry of fishing for scallops became very competitive in the late 1990s and early 2000s for a number of reasons, as described below. At a certain point, the Minister decided there would be individual allocations or authorisations in respect of scallop-fishing. The appellant sought an authorisation in this respect, and was refused authorisation in 2006. His appeal of that decision was refused in 2007. He then issued legal proceedings in respect of that refusal (Record No. 2009/9277P) in 2008, but those proceedings were discontinued by him in January 2010. Accordingly, the present proceedings do not and cannot involve alleged loss arising from a failure to grant him a scallop fishing permit, but the issue does form part of the background from a factual point of view.

7. *The decommissioning grant issue:* In or about 2005, the Minister introduced an administrative scheme which was designed to comply with the State's obligations under EU law and was known as the Decommissioning Scheme (more fully, the "Scheme to Permanently Withdraw Capacity from the Demersal and Shellfish Sectors of the Irish Fishing Fleet"). It was

administered by Bord Iascaigh Mhara (hereinafter “BIM”). The purpose of the scheme was to reduce the size of the fishing fleet and to offer compensation to certain vessels being decommissioned. Decommissioning would involve the surrender of the fishing licence and destruction of the vessel. One of the eligibility criteria was that the vessel must have been at sea for at least 75 days in each of the two 12-month periods preceding the date of the application. From 2005 onwards, the appellant sought to obtain a decommissioning grant under this scheme. The timeline of the appellant’s application under this scheme is a complicated one. It starts with the refusal by BIM to award him the grant (1 September 2006) and ends with a Supreme Court decision in 2014.

8. When BIM refused to give him the grant, the reason given was that the appellant had failed to fulfil the above criterion for fishing in the relevant two 12-month periods. There was no mention of the registration issue in BIM’s explanation for the refusal. The appellant then brought a successful appeal to an Appeals Officer (5 September 2007) in which he was awarded compensation. The State brought judicial review proceedings seeking to quash the decision of the Appeals Officer. In those judicial review proceedings, the High Court (Hanna J.) held that the Appeals Officer had acted *ultra vires* in awarding compensation; however he refused to grant *certiorari* to the State on the ground that the State had delayed in bringing its application and the conduct of the State more generally. The Supreme Court ultimately reversed the decision of the High Court in a judgment delivered in 2014.

9. The following chart summarises the relevant chronology of events in more detail, and in particular, sets out the text of certain documents relied upon by the parties in their submissions.

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| 28.10.1998 | The appellant and his then two partners applied for a sea fishing boat licence (“SFB licence”) for the vessel, recording an engine power of 216.3 kilowatts, which later transpired to be incorrect. |
| 15.04.1999 | A SFB license was issued for the period 29.03.1999 to 30.06.2000 |
| 15.11.1999 | The Registrar of Shipping (“the Registrar”) wrote to the appellant informing him that there was a discrepancy in the engine details recorded on his application and the information that was already contained on the register. The Registrar arranged for a survey of the vessel, which was carried out on the 4th April, 2000. The appellant later learned that the previous owner had put a new engine into the vessel. |
| 04.05.2000 | The Registrar advised the appellant that he had amended the register to show the correct details of the engine, endorsed the application to register the vessel and had forwarded it to the Registrar General of Fishing Boats. The appellant was also advised to contact the licensing section of the first named respondent’s department (“Department”) to have the engine capacity amended in the licence due to the discrepancy arising. |
| 11.05.2000 | The application form, showing an engine power of 216.43 kilowatts (which was incorrect) but 500 horsepower, which equated to 373 kilowatts (the correct engine power), was forwarded by the Registrar to the Registrar General of Fishing Boats. |
| 23.05.2000 | An internal Department note was issued in respect of the error. |
| 25.05.2000 | A handwritten internal Department note was issued indicating that “an amended licence and registration should issue in this case”. |
| 26.05.2000 | An SFB licence was issued to the appellant and his partners for the vessel which had the correct engine power details. |

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| 22.06.2000 | An identical SFB licence was issued except that it referred to the old incorrect engine power. |
| 10.07.2000 | The Registrar issued a certificate of registration of the vessel as an Irish Fishing Boat with the incorrect engine details. |
| Jul-00 | The appellant claims this is the date upon which he ceased fishing. He said he was unable to draw down a grant approved to fund the purchase of safety equipment prior to the deadline (30 June 2000). |
| 09.09.2000 | Another certificate of registration was issued, also with the same incorrect engine details. |
| Early 2001 | The appellant was named by fish factories in applications for a dumping at sea permit under the Dumping at Sea Act 1996. |
| March 2001 | The appellant bought out the shares of his partners and became the sole owner of the vessel. |
| July 2001 | Publication of Guidelines re dumping at sea and giving the Coastal Zone Administration Division of the Department of the Marine the role of dealing with such applications |
| 23.11.2001 | Meeting between the Minister of State at the Department of the Marine, Department officials, the appellant and one of the processors, discussing the dumping at sea project. It noted, inter alia, that the location of a dumpsite had not yet been determined. |
| 17.12.2001 | The appellant wrote to Ms. Carmel Daly of the Coastal Zone Management Division of the Department of the Marine in connection with his proposal to change his business to dumping at sea. He said "I will also set out the main reasons why I would like you to consider the granting of a dumping permit for a longer period. The MFV Morgensonne is a licenced scallop fishing boat. The scallop fishing sector has gone through a very hard time recently and has been especially hard hit by oil prices and a reduction in scallop stocks because of the dramatic increase in fleet size. The result is that a boat of this size is no longer viable. It is vital that a reduction in fishing effort now takes place |

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| | <p>for the future of the industry. It is with this in mind that I became involved in the offal-dumping project and I am now enclosing a copy of the proposal I made to the fish factorys “(sic).</p> <p>The rest of the letter concerns his proposal and the cost of fitting out the boat of the new purpose of dumping rather than fishing.</p> <p>No reference is made anywhere in this letter to any problem with the Registration Certificate, nor is there any suggestion that he has been unable to fish because of a problem with the certificate. Indeed, the opposite, if anything, is suggested by the reference in the letter to the vessel being “ a licensed scallop fishing boat”, suggesting that it would be in a position to fish for scallops were it not for the difficulties in the scallop fishing industry described in the letter.</p> |
| 25.06.2002 | A SFB licence was issued to the appellant and his partners which referred to the incorrect engine details. |
| 15.07.2002 | Coastal Zone Management Division of the Department wrote to the appellant notifying him that a location for the dumping had been agreed. |
| 14.08.2002 | A SFB licence was issued to the appellant and his partners which referred to the correct engine details. |
| 12.11.2002 | Coastal Zone Management Division wrote to the appellant informing him that legal advice had been sought from the Attorney General’s Office due to the disparity between the Dumping at Sea Act 1996 and EU legislation which indicated that “the disposal of fish waste at sea may not be allowed.” |
| 20.11.2002 | The appellant wrote to the Department requesting a correct certificate of registration. |
| Jan-03 | Mr. Shine from Coastal Management Division gave evidence that he phoned the appellant on this date, telling him that he would not be getting a permit to dump at sea. The appellant gave evidence that he never received this phone call. |

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| 21.01.2003 | Mr. Shine emailed his superior in the Department stating that he had “advised both K. Kielthy and [another name] ... that dumping at sea is no longer allowed and given them the basic details of new EU Regs.” |
| 23.12.2003 | A SFB licence was issued to the appellant with the correct engine details. |
| 12.10.2004 | The appellant gave evidence that he wrote a letter to Mr. Ryan of the Department requesting an update in relation to the application for dumping at sea. Mr. Ryan gave evidence that he never received any such letter. The appellant was unable to produce a copy of any such letter. |
| 03.11.2004 | Dumping at Sea (Amendment) Act 2004 was enacted. It specifically amended the 1996 Act to remove the possibility of authorising dumping at sea. |
| 18.05.2005 | SI 245 of 2005 was signed into force, providing that the Minister could restrict the number of days that boats could fish for scallops through individual allocations or authorisations. |
| 20.06.2005 | <p>The appellant wrote to the Department in relation to the decommissioning scheme, pleading a special case. There is no reference here to any Registration Certificate issue, and his entire explanation for failing to meet the quota is that he was expecting to be dumping at sea and had refitted the boat for this purpose. The following is the explanation provided by the appellant himself at that time:</p> <p>“As you will be aware the impact of larger vessels being introduced in the scallop fleet has had the effect of diminishing local scallop beds on which the MFV Morgensonne was heavily dependent. After this happened the larger vessels because of their size were able to travel to fish beds off the French coast. In an effort to take some pressure off these local beds to help solve a serious problem which had arisen with the fish processors in the area with regard to the disposal there of fish waste an application was made to the Coastal Zone in late 2001 for a permit to dump at sea...The vessel had to be refitted for this new activity and this accounts for her poor track record in 03 and 04...</p> |

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| | <p>He then refers to the problems which emerged re the dumping at sea scheme and continues] ... Because it now looked unlikely that a dump permit would be issued for the MFV Morgensonne I had started to get the boat ready for scallop fishing again but this was proving to be a slow process as I had used up all my money on the other projects and the banks were not interested in financing scallop boats...A special case could be made to include [the vessel] in [the decommissioning scheme] as her lack of 75 fishing days per year in the last two years is a direct result of the delay in processing the dump at sea applications”.</p> |
| 21.06.2005 | <p>The appellant explained in a letter to another official, also in relation to a special case being made in relation to the decommissioning scheme, that he was unable to find a buyer for the vessel.</p> <p>Again there is no reference to any Registration Certificate.</p> |
| 30.06.2005 | <p>Two SFB licences were issued to the appellant, one with the correct engine details and the other with the incorrect details.</p> |
| Jul-05 | <p>The appellant applied to the Department to carry out a review of his entitlement to an authorisation to fish for scallops</p> |
| 08.07.2005 | <p>The Register of Fishing Boats for the vessel was corrected. A certificate of registration was issued in the names of the appellant and one of his previous partners.</p> |
| 28.07.2005 | <p>SI 464 of 2005 was introduced, revoking previous statutory instruments. The Regulations introduced a licencing regime for the scallop fishing industry and gave the Minister a discretion as to whether to issue an authorisation to a particular vessel. In January 2006 a policy directive (No. 1/2006) was issued which gave effect to a recommendation that the scallop fleet be ring-fenced to those vessels that had fished for at least 50 days in the two and a half years prior to the 30th June, 2005.</p> |
| 21.09.2005 | <p>The appellant, having contacted the Ombudsman regarding his dumping at sea permit, was informed that the Department had advised that dumping at sea was no longer permissible.</p> |

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| 14.10.2005 | The appellant again wrote to the Department seeking to be considered as a ‘hardship’ case in relation to the decommissioning scheme, citing the delay in the dumping at sea project as the reason he did not have a track record under the scheme. |
| 18.10.2005 | The appellant applied for compensation to decommission the vessel under “the scheme to permanently withdraw capacity from demersal and shell fish sectors of the Irish Fishing Fleet”. (“decommissioning scheme”). This decommissioning scheme, which was partly financed by the European Union, included a requirement that the applicant vessel had to have a minimum fishing activity of 75 days in each of two periods of 12 months from 01.10.2003 to 01.10.2005 according to Article 7 of Council Regulation (EC) No. 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector. |
| 16.11.2005 | BIM wrote to the appellant stating that the initial assessment of his application indicated that he has not achieved the requisite number of days for inclusion in the decommissioning scheme. However, BIM agreed to review the logbook data again |
| Jul-06 | The vessel was used to fish for scallops for 51 days without authorisation to do so. |
| 09.06.2006 | An SFB licence was issued to the appellant which recorded the incorrect engine details. |
| Jul-06 | The appellant’s application for an authorisation to fish for scallops was refused as he had not achieved the requisite number of days. |
| 01.09.2006 | The appellant’s application for compensation under the decommissioning scheme was refused |
| 26.09.2006 | The appellant appealed the refusal of his application under the decommissioning scheme. |
| 08.11.2006 | The appellant appealed the refusal to grant an authorisation to fish for scallops. |
| 20.03.2007 | The Department wrote to the appellant informing him that his appeal from the refusal to grant an authorisation to fish for scallops had been unsuccessful |

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| 20.06.2007 | An SFB licence was issued to the appellant which recorded the correct engine details. |
| 05.09.2007 | The appeal to the Appeals Officer concerning his application to the decommissioning scheme was successful and the appellant was awarded €250,000. The Department subsequently obtained leave to judicially review this decision in proceedings 2008/236 JR. |
| 23.04.2008 | An SFB licence was issued to the appellant with the correct engine details recorded. |
| 29.07.2008 | The present proceedings were issued. |
| 07.11.2008 | Proceedings bearing the record number 2008/9277 P were issued concerning the refusal to grant a scallop- fishing authorisation in 2005 to the appellant. |
| 12.03.2009 | The High Court (Hanna J) in judicial review record number 2008/236 JR, found that the appeals officer had acted <i>ultra vires</i> but refused to quash the order on the grounds <i>inter alia</i> of delay. |
| 22.04.2009 | Notice of Appeal by the Department to the Supreme Court in the judicial review proceedings 2008/236 JR. |
| 19.01. 2010 | The vessel was removed from the fishing register. |
| 26.01.2010 | A notice of discontinuance was filed in the proceedings 2008/9277 P concerning the scallop-fishing authorisation. |
| 14. 12.2011 | Statement of Claim delivered in the present proceedings. |
| 27.05.2014 | The Supreme Court allowed the appeal from the order of the High Court in the judicial review proceedings. |
| 15.05. 2015 | Defence delivered in these proceedings. |
| 6 March 2017 | Proceedings set down for trial. A change of solicitors on record took place prior to this. |

Determinations made in the course of the Decommissioning Grant proceedings

10. Despite the fact that the counsel for the appellant accepted on the record in the High Court that nothing was *res judicata*, he repeatedly emphasised in this appeal what had been said by the Appeals Officer and the High Court in their determinations concerning the decommissioning grant issue. To place this in context, it is necessary to set out what happened in those proceedings.

11. As noted, the appellant had been unsuccessful in obtaining a grant under the Decommissioning Scheme because he did not satisfy the eligibility criteria in terms of having fished for the necessary number of days within the previous two years. He appealed that refusal to an Appeals Officer under the Scheme, arguing that the reason for his ineligibility was (1) because he had not been issued with a valid Registration Certificate and (2) because he had been led to believe that he would obtain a dumping at sea permit. As we have seen, the Appeals Officer found in his favour by decision of 5 September 2007.

12. The appellant places emphasis on the fact that in the course of her decision, the Appeals Officer said that the appellant had to have a valid registration in order to fish, and that the evidence before her was insufficient to show that the appellant had been issued with a valid Registration Certificate. She said that no register had been produced to her and the only evidence was an internal note saying that a certificate “should” be issued without any written confirmation that this had actually been done. She noted the evidence of the Department that it was possible to fish without a Registration Certificate, but said she preferred the evidence of

the appellant, “in part” because, although there was evidence of an intention to issue a corrected Certificate, there was no lack of evidence that a corrected certificate had actually issued.

13. The Appeals Officer went on to consider whether she had jurisdiction to reverse the refusal decision and actually award the appellant the grant. She decided that she did have jurisdiction to do so. Regarding the dumping at sea issue, she said that the State had not written to the appellant until 2005, but that there was credible evidence by way of contemporaneous email that there had been a telephone call to the appellant in January 2003 informing him that the dumping at sea permit scheme would not go ahead. She commented that it was incumbent on the State to inform the appellant once the scheme was being discontinued and that he should not have been left under the impression that he could continue with the scheme, which was not the case. In conclusion, she held that he had fallen between entitlements and suffered financial loss, and allowed his appeal, awarding him €250,000.

14. The Minister brought judicial review proceedings in respect of the determination of the Appeals Officer. This was brought mere days before the expiration of the applicable six-month time limit. In the course of its judgment of 12 March 2009, the High Court (Hanna J.) said that there was “no serious opposition” to the proposition that because of the Registration Certificate problem, the appellant “couldn’t legally fish, and thereby meet the criterion to receive a grant”. He also noted: “Although there was some uncertainty on this point during the course of the hearing, it was broadly agreed that possession of a certificate was a necessary prerequisite for legal fishing”. He said that what was in issue before him was the question of whether, having so found, the Appeals Officer was correct in concluding that she had jurisdiction to overturn the refusal to award the grant. Hanna J. held that the Appeals Officer was within jurisdiction

in making the finding of fact that she did, namely “with regard to fault on the part of the Department”, because it was a legitimate area of inquiry leading to a finding of eligibility or otherwise, but that she had exceeded her jurisdiction in awarding compensation. He said:

“In another forum, the notice party might seek compensation for the alleged mishandling of matters pertaining to the issuing to him of a certificate; however, since I am of the view that the appeals officer acted ultra vires, the applicant has established a prima facie entitlement for an order quashing the decision.”

15. However, he refused to grant that relief on two grounds; (1) the delay of the Minister in issuing the judicial review proceedings; and (2) “the conduct of the Department in putting [the appellant] in the situation where he could not qualify for this grant”.

16. The Minister appealed the High Court decision not to grant *certiorari* of the Appeals Officer’s decision to the Supreme Court. There was no cross-appeal by the appellant on the finding of *ultra vires*. The Supreme Court dealt with the matter by way of an *ex tempore* judgment delivered by Clarke J. on the 27 May 2014.

17. It was held in the first instance that the conduct of the Department was not a valid reason for refusing *certiorari* in this case; Clarke J. said, “*If there are legal remedies available arising out of that conduct, then they (sic) are remedies which arise in a different way and in different proceedings and it does not justify a refusal to grant certiorari which would otherwise lie*”. On the issue of delay, Clarke J. said that the way the matter was handled did not reflect great credit on those who handled it, and that the way in which the appellant was treated, fell “*a very long way short*” of what a citizen is entitled to expect in terms of the reasonable and prompt dealing

with their affairs from officials of the State. However, he did not consider that this delay was such that it actually debarred the State from obtaining the relief sought. He allowed the appeal.

The pleadings in this case

The Statement of Claim

18. One of the features of this appeal was that the respondents complained that the appellant kept changing the parameters of his claims. Accordingly, it is important to examine precisely what was pleaded in the Statement of Claim.

19. The reliefs sought were as follows:-

- (1) A declaration that the respondents in failing to issue him with a certificate of registration in respect of his fishing vessel, acted in breach of their statutory duty, contrary to the relevant EU legislation and law;
- (2) A declaration that in failing to issue the certificate of registration, the respondents acted contrary to the appellant's legitimate expectation that having regard to the relevant legislation, administrative practice and representations made, a certificate would be issued;
- (3) A declaration that in failing to issue the certificate of registration, the respondents acted in breach of the appellant's constitutional rights;
- (4) A declaration that in failing to institute judicial review proceedings promptly to challenge the decision of the Appeals Officer made pursuant to the Scheme to permanently withdraw capacity from the demersal and shell fish sectors of the Irish fishing fleet made on 5th September 2007, the respondents acted in breach of the

appellant's constitutional rights and contrary to the European Convention on Human Rights;

- (5) A declaration that the respondents acted in breach of their statutory duty and contrary to the appellant's constitutional rights in failing to inform him properly of the proper operation of the 1996 Dumping at Sea Act and related legislation insofar as it concerned and affected the appellant;
- (6) Damages, including damages for breach of statutory duty, breach of constitutional rights, negligence, negligent misstatement, misrepresentation and breach of the European Convention on Human Rights and breach of legitimate expectation; and,
- (7) Aggravated and/or exemplary damages.

20. The first part of the Statement of Claim concentrates on the "dumping at sea" issue. The appellant pleaded that he applied to the first respondent in 2001 for a dumping at sea permit under the Dumping at Sea Act, 1996 for his vessel, the MVF Morgensonne. The first respondent published guidelines for entitlements to permits and the appellant attended a meeting in Dublin hosted by the then junior Minister for the Marine in 2001. He pleads that at the meeting assurances were given that as the permits could only be issued for one year without any guarantee of renewal, all entitlements as an active scallop fishing vessel would remain intact notwithstanding the issue of a permit. The appellant was led to believe that the application process would take about six months. The appellant pleads that in reliance on those representations and with a view to applying for a permit, he refitted his vessel at considerable expense and then applied for a permit. He says that the first respondent did not deal with his application, despite repeated requests and reminders. He says that in 2002, he was informed that he would be issued with a decision in writing but did not receive a response until 2005. He

says he was then informed that he could not get a permit because there had been an EU Directive prohibiting such dumping since 1994. The appellant pleads that the Department had in fact, to the best of his knowledge, issued permits to other vessels. He pleads that he was unable to use his boat for fishing or for dumping at sea between the time he refitted it in 2001 and 2005 for scallop fishing, and sustained loss as a result. He alleges that this loss was caused by the negligence and breach of duty of the respondents. In his particulars, he references matters such as negligent misrepresentation that he was entitled to a permit, that his application would be dealt with in six months as well as failing to deal with his application in sufficient time and failing to inform him that he was never entitled to a permit having regard to existing EU legislation.

21. He also pleads that the actions and representations of the respondents gave rise to a legitimate expectation on his part that he would be awarded a permit, in reliance on which he ceased fishing and incurred considerable expenditure on his boat. He pleads that he is entitled to damages for breach of legitimate expectation that he would be awarded a permit.

22. He pleads that the actions of the respondents constituted a breach of his constitutional rights and in particular, his right to earn a livelihood.

23. It may be noted that the Statement of Claim does not link any alleged inability to fish between 2000 and 2005 with the certificate of registration issue. It presents a narrative that he stopped fishing for scallops because he had refitted his vessel for the purpose of dumping at sea.

24. The second part of the Statement of Claim concerns his application for a decommissioning grant. The appellant pleads that in 2005 when he was refused a dumping at sea permit, he was obliged to refit his boat for scallop fishing again and returned to fishing for a limited period. In 2006, the first respondent introduced an EU funded scheme "*The scheme to permanently withdraw capacity from the demersal and shell fish sectors of the Irish fishing fleet*". He pleads that the aim of the Scheme was effectively to reduce the number of fishing vessels and to compensate fishermen for this. He made an application to BIM for a grant. This was refused on the 1 September 2006 on the grounds that he did not meet the requirements of the Scheme including that the applicant must be the registered owner of the vessel to be withdrawn, that the vessel must be registered under the Irish Register of Fishing Boats in the applicant's name at the date of the application, and that the vessel must have carried out fishing activity for at least seventy five days at sea in each of the two periods of twelve months from the 1 October 2003 to the 1 October 2005. The Scheme further provided that only vessels that were operational at the time the decision was taken to issue a grant were eligible. A vessel was deemed operational if on the 30 June 2005 it was registered and if the owner had a sea fishing boat licence.

25. The appellant pleads that when he applied for the decommissioning grant, he did not have a correct certificate of registration. He said that when he bought his vessel in 1999 and applied for a scallop fishing licence and registration of change of ownership, there was a disparity between his engine particulars as submitted and what was on the register. The register was incorrect, and a certificate of registration was issued, containing the incorrect engine details from the original register. It was returned to the Department to be amended. He pleads that this "continually occurred" and that it was not until July 2005 that the correct certificate

of registration was issued for the first time. He pleads that because he did not have a certificate of registration, he could not fish legally. Therefore, he pleads, that he could not fulfil the requirements to have fished for at least 75 days in each of the two periods of twelve months as described above. Accordingly, when BIM decided on the 1 September 2006 to refuse the grant to the appellant because he did not fulfil the conditions of the Scheme, the reason he did not fulfil the conditions was due to the negligence and breach of duty of the first respondent. In his particulars of negligence in this regard, he pleads that the first respondent failed to issue him with a correct certificate of registration, repeatedly included incorrect details on his certificate of registration, failed to heed his complaints and requests, negligently issued an incorrect certificate and other related particulars.

26. The Statement of Claim sets out the narrative of what happened in respect of his application for a decommissioning grant. When his application was refused, he appealed the refusal to the Appeals Officer under the Scheme on the 26 September 2006. His appeal was allowed, and the Appeals Officer held that he was entitled to the grant. This was on the basis that the first respondent had failed to issue the appellant with a correct certificate of registration and this meant that he did not fulfil the criteria to receive the grant. She also awarded the appellant €250,000.

27. On the 11 December 2007 the first respondent informed the appellant that the Minister was considering judicial review. On the 21 February 2008 he was informed that there would be an application for judicial review and this application was made on the 3 March 2008. He describes the judicial review decision of the High Court (Hanna J.), refusing to quash the

decision of the Appeals Officer, and the subsequent appeal to the Supreme Court by the State, which was successful.

28. The appellant pleads that he has not fished since 2006 and that he incurred substantial harbour charges between 2006 and 2009 which total more than €106,000. He says he could not scrap his boat because if he did, he would no longer be entitled to the grant. He says that ultimately with a view to mitigating his loss and to comply with the demands of the Harbour Master, his boat was scrapped at his own expense. He pleads loss and damage as a result of negligence and breach of duty and breach of constitutional rights and breach of legitimate expectation in respect of the EU grant of €250,000, loss of income from fishing between 2001 and 2005, harbour fees from 2006 to December 2009, scrappage fees, other expenses, refitting costs (for obtaining dumping at sea permit and to convert to scallop fishing respectively). He also claimed aggravated and/or exemplary damages by reason of the conduct of the respondents and by reason of their delay in issuing judicial review proceedings.

The Defence

29. The defence denied that the appellant himself made any application for a dumping at sea permit and pleaded that any relevant application for a permit in this regard was made by four companies involved in fish processing.

30. The defence contains various denials, including of the suggestion that the respondents gave assurances at a 2001 meeting or on any other occasion in respect of the obtaining or issuing of permits, or any assurances were given that entitlements to fish for scallops would remain intact notwithstanding the issue of a permit. It is denied that the respondents were

responsible in law for the appellant having converted or fitted his vessel for dumping at sea or for the purpose of fishing activities.

31. The defence pleads that in January 2003 the respondents informed the appellant that the relevant EU Directive did not permit the disposal of fish waste at sea and that no permits would be issued in this regard. Accordingly, from late 2002 he knew or was put on notice that the 1996 Act was at best doubtful and from January 2003 at the latest, he knew that dumping of fish waste was prohibited.

32. The respondents deny that any actions or inactions on their part were the reason for the appellant's inability to use his vessel for fishing activities between 2001 and point out that he in fact undertook fishing activities in January 2003. They plead that if the appellant did not fish between 2001 and 2005 or any part of that period, this was as a result of a commercial decision on his part and was entirely unrelated to any alleged inaccuracy in the registration details of his vessel. The converting of his vessel for dumping without applying for a permit and/or without the confirmation of a permit was misconceived and premature, and any loss arising therefrom was his own responsibility.

33. The respondents deny that any representations were made to the appellant in respect of a permit or which might have given rise to a legitimate expectation of any kind.

34. The respondents plead that the failure of the appellant to gain eligibility for the Scheme was not as a result of any failure on the part of the respondents but was solely as a result of his own decision to abandon fishing for scallops and/or to prematurely to convert his vessel for the

activity of dumping, and his subsequent failure to gain the required eligibility for fishing for scallops between the 1 October 2003 and the 1 October 2005.

35. It is denied that his application for the Scheme was refused on the grounds that his vessel was not on the Irish Register of Fishing Boats; it was in fact registered from 1999 and was not removed until the 19 January 2010.

36. They plead that the Register General of Fishing Boats wrote to the owners of the vessel on the 4 May 1999 enclosing the registration application form. A completed form was received from the appellant and three other parties on the 4 May 2000 and the vessel was registered on the 10 July 2000. The sole reason the appellant was not eligible for the Scheme was because he did not meet the mandatory requirement of fishing activity.

37. When the appellant fished in January 2003, he landed 5.25 tonnes of scallops. Any failure on his part to put to sea with his vessel and fish for scallops between the 1 October 2003 and the 1 October 2005 had no connection or relevance to what he himself purports to identify as an inadequacy or error in the registration details of his vessel. No one on the part of the respondents claimed or suggested to him that he could not fish within the relevant period due to an issue with the registration details of his vessel.

38. Regarding the appeal of the respondents to the Supreme Court in respect of the decommissioning grant issue, they plead that the Supreme Court allowed the appeal and substituted an order quashing the decision of the Appeals Officer. They deny that any delay in this matter was the fault of the respondents.

39. Regarding the claim for loss of profit, they say that the reason the appellant could not continue fishing for scallops in 2005 was that he was not granted the necessary authorisation to fish for scallops, introduced in 2005, or subsequently. This failure was the subject of High Court proceedings 2008/9277P which the appellant commenced on the 7 November 2008. Those proceedings were discontinued. The appellant is estopped from seeking to re-agitate any claims arising from his failure to obtain a scallop authorisation in these proceedings because to do so would amount to an abuse of process.

40. In general, the respondents also repeatedly plead a denial of all claims of negligence, breach of statutory duty or breach of constitutional rights and say that any loss caused to the appellant was as a result of his own decisions or actions and cannot be laid at the door of the respondents.

Outline of the evidence in the High Court

41. The Court was provided with certain excerpts from the High Court hearing by way of transcript.

42. The appellant gave evidence that he (with two others) purchased the vessel in October 1998 – January 1999. They obtained a fishing licence in April 1999 and this was for the “specific segment” of the Irish fishing fleet, which permitted them to fish *inter alia* for scallops. A central feature of the appellant’s evidence (and his case generally) was that he had to stop fishing in 2000 because of the clerical error in his Registration Certificate (described above).

He said that his fear was that he would be boarded by the Navy and arrested, if caught fishing while the error remained on the certificate. The appellant explained that he bought out his partners' interests in the vessel in March 2001. It was at this stage that he applied for the dumping at sea permit (as agent for four fish processors). He was ultimately informed that this would not be happening, but says that he was not so informed until 2005. He said that when he realized he would not be able to proceed with his dumping at sea project, he then got his boat ready for scallop-fishing and engaged in that enterprise from December 2005 to July 2006. At that point, however, he realized he could not fish for scallops without an authorisation and ceased doing so. He described how he had also applied for a decommissioning grant, but was refused. He described his appeal against the refusal to the Appeals Officer in that regard, and the subsequent judicial review in respect of that decision.

43. The appellant was adamant that the reason he tied up the boat in July 2000 and stopped fishing at that time was because he thought it was illegal for him to fish because of the Registration Certificate issue. He accepted that the local scallops fishing was depleted between 2000 and 2002 and that it was less profitable for smaller vessels like his own. However, he denied that this had anything to do with his decision to apply for the dumping at sea permit and said that it was the Registration Certificate problem that had caused his decision to stop fishing.

44. Thus, the appellant was laying the blame for his lack of fishing during the relevant years at the door of the Department. The direct result of this, he said, was not only to deprive him of profits from fishing but it also had the indirect consequence that he was not able to qualify for the decommissioning grant or the scallop-fishing authorisation, both of which were dependent on the vessel having reached certain quotas of fishing in certain set periods prior to application.

Thus, he sought to lay the blame for his being refused the decommissioning grant at the door of the Department insofar as he attributed his failure to reach the quota to their failure to issue him with a correct accurate Registration Certificate, which he said was a precondition to his being able to fish legally.

45. In cross-examination, it was bluntly put to the appellant that it was not true that he had stopped fishing because of the registration problem and that this was an *ex post facto* explanation he had come up with in order to try to get the decommissioning grant. It was put to him that he stopped fishing for his own personal reasons and the decline of the scallop fishing industry, which he denied. When presented with log books, he admitted that he had in fact engaged in scallop fishing in 2003 and 2005. He accepted that when he fished for scallops in 2005, this was without an authorisation, although he said that he was not aware that he needed an authorisation at that time. He said that what he caught at this time, he discarded. There was detailed cross-examination about this matter, among others.

46. Mr. Kevin Moriarty, principal officer in the Department of Agriculture and Registrar General of Fishing Boats, explained the system of registration. He said that in order to obtain a fishing licence for a vessel, the vessel had to be a registered vessel. He said that it was reasonably common practice for vessels to fish while awaiting their registration process to be completed, without this giving rise to any difficulties. He gave evidence that it was never suggested to his office during the relevant period by or on behalf of the appellant that the latter was not fishing because of the discrepancy between the Registration Certificate and the fishing licence. He also said that he had never heard of anyone having trouble with the naval service for this reason i.e. a typographical error on one of the documents.

47. In cross-examination, he accepted that he had been appointed in 2013 and would not have been involved with registration between 2000 and 2005. He said that in his view there was a valid fishing licence and valid Registration Certificate at all times. In cross-examination, he was also asked if the appellant was ever told that he *was* entitled to fish notwithstanding the error in the Registration Certificate, to which he replied that he did not know.

48. In re-examination, he asked if there was any document showing that the appellant ever *asked* whether he could fish in those circumstances, whether by letter or more informal inquiry, to which the answer was no.

49. Ms. Josephine Kelly, principal officer in the Sea Fisheries Policy and Management Division of the Department, gave evidence about the fishing industry and scallop fishing in particular. She explained factors such as the very large increase in the number of vessels targeting scallop fishing in the 1990s, and various EU responses to the concerns that arose. She gave details of the introduction of the system of authorisations for scallop fishing for Irish vessels. She also explained the EU Directive and the decommissioning scheme which was introduced.

50. Certain reports were admitted into evidence. Mr. Michael Armitage, accountant, of D.P.M. & Co., a firm in Co. Wexford, provided a one-page copy of the appellant's accounts for the period between December 2005 and August 2006. He extrapolated from these and, he said, information given by the appellant, that the appellant would have made a profit of €257,000 over a five-year period. Mr. Tom Murray, FCCA, CPA, of Friel Stafford, Fitzwilliam

Square prepared two reports, one in January 2017 and the other in April 2018. Evidence was given by Mr. Armitage at the trial, of which certain excerpts were provided to the Court.

The judgment of the High Court

51. O'Connor J. characterised the case succinctly in the following terms: “a claim for damages arising from the alleged negligent failure to issue a correct certificate of registration for a vessel and negligent misrepresentation about the potential to obtain permits for dumping at sea.”

52. Having set out a chronology of events, the trial judge then addressed the first claim i.e. in respect of an alleged negligent failure to issue a correct certificate of registration between July 2000 and July 2005, in respect of which the appellant was claiming (i) Damages for loss of earnings from July 2002-July 2005, which amounted to €257,000 and (ii) The sum of €250,000 as awarded by the Appeals Officer in relation to the decommissioning scheme. He posed a number of questions in relation to this claim:

- (1) Was the reason the appellant did not fish from July 2000 to December 2005 because he was afraid that he would be fishing illegally without a correct certificate of registration?
- (2) Would the appellant have been fishing illegally if the vessel had gone out with an incorrect certificate of registration?
- (3) If yes, was the Department negligent in failing to correctly register the vessel for five years?
- (4) If yes, what losses did the appellant incur?

53. The trial judge itemised the evidence relied upon by the appellant in support of his contention that he could not fish legally while awaiting a correct certificate of registration and that he tied the vessel up for fear of being arrested by the Navy if they boarded his vessel and discovered a discrepancy in the paperwork. He described this evidence in the following terms:

- i) An internal Departmental memo dated the 23 May, 2000 (Mr. Dick Heron to Mr. Dermot Donegan), which stated that the appellant needed “*an amended licence reflecting the correct certified engine capacity.*” It further stated that the appellant had “*been approved for a BIM safety grant and the final draw-down date of this grant is 30 June, 2000. However, they cannot proceed until such time as they hold a correct licence and registration certificate in their names.*”
- ii) The appellant's own contention in a letter to BIM dated the 20 February 2001, refusing the grant offer due to not having received the correct registration document.
- iii) The appellant's own contention in a letter to the Department, dated the 20 November 2002, that he could not apply for a BIM grant until the correct certificate of registration was issued.
- iv) A Departmental memo concerning the appellant's appeal regarding the refusal to grant an authorisation to fish for scallops where it stated “[i]t is true that the *Morgensonne* could not fish legally if a *Certificate of Registry* was not held.”
- v) The finding of the Appeals Officer, Ms. Emile Daly, in the appellant's appeal from the refusal of his application for a decommissioning grant, that it was a requirement under the scheme that a vessel “*was registered on the Irish Register of Fishing Boats and was in possession of a sea fishing boat licence, in force on that date, in*

the name of the owner.” The Appeals Officer noted that the appellant submitted “that he never received proof, despite requesting same, that his vessel was on the licence register.” She also stated that “a licence did issue, dated 26 May 2000 but there is nothing on the file to show that the vessel was ever registered at this time and at the oral hearing no register of vessels at this time was produced as evidence.” The Appeals Officer also noted that the Registrar General of Fishing Boats wrote to the appellant on the 22 June 2002, stating: “fishing vessels must be licensed and entered on the Fishing Boat Register before being entitled to engage in commercial fishing.” The Appeals Officer concluded that “[i]t was not possible for the Appellant to make himself eligible for the scheme because to fish the requisite days stipulated in the scheme, he would have had to be acting illegally and in contravention of both the Council Regulation and the Scheme.”

- vi) *The judgment of Hanna J. on the 12 March, 2009, where he stated that the Appeals Officer found that it “was the Department's fault that the notice party couldn't legally fish, and thereby meet the criterion to receive the grant. The Department said they never got the letter from the applicant. Although there was some uncertainty on this point during the course of the hearing, it was broadly agreed that a possession of a certificate was a necessary prerequisite for legal fishing. This is scarcely surprising given that there is a letter on the papers from Mr. Aidan Hodson, Registrar General of Fishing Boats, which is a licencing Authority, stating in bold print – and this letter is dated 22nd June 2004: A valid certificate of registry, issued under the Merchant Shipping (Registry, Lettering and Numbering of Fishing Boats) Regulations 1997 must, therefore, also be carried on board the vessel.’ This was the view taken by the appeals officer.”*

54. O'Connor J. noted that the respondents strongly disputed that the incorrect certificate of registration was the reason the appellant stopped fishing and that they denied that there was a nexus between the clerical errors and any losses alleged by him. He noted that the respondents relied, among other things, on a letter dated the 17 December 2001, where the appellant himself had said that the continuation of the vessel as a scallop fishing boat was not viable due to the increasing number of vessels and declining stock; and that his evidence that when he went back fishing from December 2005 to July 2006, he was not aware that he was fishing illegally. The respondents maintained that the real reason the appellant ceased to fish was because it was no longer commercially viable due to the relatively small size of his vessel, the declining fish stock, and the increasing number of vessels.

55. Also the respondents contended that the appellant had in fact gone fishing on a limited basis during the relevant period, as demonstrated by the production of the log books, and therefore could not have been overly concerned about the inconsistency with the certificate of registration. They also said that there was never any suggestion to him by any servant or agent of the respondents that he would have any difficulties fishing with an error in the Registration Certificate.

56. O'Connor J. noted that the court had heard evidence from the Registrar General of Fishing Boats who stated his opinion that there was a valid fishing licence and a valid certificate at all times. Further, he said it was the fishing licence that allows the vessel engage in fishing activities, whereas the certificate of registration merely states that the vessel is on the register of fishing vessels. He said that he had never heard of anyone having trouble with the Naval Services due to a typographical error either on the licence or the registration.

57. On this first claim, the trial judge then ruled as follows (paras. 10-16 inclusive):

“Paragraph 14 of the Statement of Claim pleaded that the [appellant] could not have fished legally for at least 75 days in each of the two periods of 12 months from the 1st October 2003, to 1st October 2005, due to the incorrect certificate of registration details. In trying to do justice to the remarkably difficult task which faced the [appellant's] new legal team in 2017, the Court limits its comments about the appellant's inability to appreciate that compensation is not payable by the State for business and operational decisions. The appellant may find it difficult to understand how an appeals officer's decision to award him €250,000, allowed by a High Court judge, can be set aside by the Supreme Court. Having observed the appellant in giving evidence and digested the extent of the appellant's circumstances, it is apparent that the appellant's claim for losses due to the incorrect engine details for the registration of the vessel is at best considered a misunderstanding and at the other end of the scale a ‘try-on’.

No matter what way one looks at the appellant's claim under his heading for negligent failure to issue a correct certificate of registration there is an air of unreality to same. The appellant did not fish or attempt to fish for scallops himself with the vessel in the relevant period. His evidence about fear of apprehension by Naval patrols due to incorrect engine details in the registration of the vessel is ‘fanciful’ as submitted by the respondent.

The entitlement of a sea fishing boat to fish does indeed depend upon its licence and there is also an obligation to be registered. No evidence was offered on behalf of the appellant as to whether a naval officer could or would impound the vessel upon discovery that the certificate of registration had incorrect engine details. Mr. Keating from Bord Iascaigh

Mhara gave evidence that the apparent contradiction in the documentation would not preclude the grant of funds to a vessel owner for safety equipment. The functions of those involved in sea fisheries protection relates to whether a licence and authorisation had been issued and whether the boat is registered. The respondents are correct to point out the appellant's answer to its own counsel on day 3 of the hearing to test the genuineness of the appellant under this heading:-

Q: (appellant's counsel to the appellant): when did you stop fishing?

A: In July 2006

Q: Why did you stop fishing?

A: I stopped fishing for two reasons essentially; "one was I now had 51 days' built up and my review hadn't been determined as of yet so the requirement for a 50 day track record that I thought might have helped with the review, I had my 50 days' or 51 days' and also the navy was, I believe, starting to board vessels and arrest vessels for fishing without authorisations and the skipper of the boat at the time didn't want to risk getting himself a criminal prosecution if he was arrested or anything so he wouldn't put to sea anymore."

The somewhat rambling evidence of the appellant included evidence which leads the Court to find that he makes no complaint about the way the respondent Minister had excluded him from scallop fishing at that time. The appellant singularly fails to address a requirement imposed by EU law in order to obtain the decommissioning grant.

Having listened to the appellant in particular and the submissions, this Court concludes that the reason for the appellant not to go out fishing in 2003 and 2004 had nothing to do with either the failure to obtain a dumping at sea permit or with the concern about the clerical error in his certificate of registration.

The period from December 2005 until August 2006 when the vessel was used for fishing without an authorisation does not assist the appellant in his claim whatsoever. If he had fished, he required an authorisation pursuant to SI 464 of 2005 introduced on the 28th July, 2005.

In answer to the questions posed to put a structure on the appellant's claim, the Court finds:-

(i) The appellant's reason not to fish from July 2000 to December 2005 had nothing to do with his fear of fishing illegally due to the incorrect engine size recorded on the certificate of registration and the SFB licences.

(ii) The authorisation to fish was not dependent on the correct engine size being recorded on the certificate of registration and the SFB licences.

(iii) There was no evidence of negligence on the part of the respondents in inserting the incorrect engine size.

(iv) In any event, the appellant singularly failed to establish any loss incurred by the incorrect certificate of registration and the various and intermittent inaccurate SFB licences.”

58. The second part of the appellant's claim concerned the dumping at sea issue. O'Connor J. noted the various pieces of evidence relied upon by the appellant. He said that the appellant relied upon the fact that the respondent had introduced the Dumping at Sea Act 1996, and the 2001 Guidelines, introducing a framework for dumping at sea proposals, and giving the Coastal Service Division responsibility for dealing with applications. He rejected any claim based upon negligent misrepresentation, rejecting the appellant's upon the decision in *Bates v. Minister for Agriculture, Fisheries and Food*² saying (at para. 21):-

“None of the authorities cited by counsel for the appellant supported the proposition that the respondents, in receiving the application to dump at sea and ultimately rejecting same on the grounds that such permits are unlawful by virtue of European Union law, breached a duty of care to the appellant. No matter what way one casts the appellant's claim, it cannot be considered fair or reasonable to impose liability from the limited engagement which occurred between the appellant and the relevant Department about pursuing a dumping at sea permit. It is in marked contrast to the specific advice relied upon reasonably in Bates v. Minister for Agriculture, Fisheries and Food [2018] IESC 5, (unreported, Supreme Court, 7th February, 2018), and which lead to the appellants' boat being impounded by French authorities.”

59. He then went on to deal with the claim based on legitimate expectation. He noted the appellant's argument that the Department adopted a position amounting to a promise or representation in that it was accepting applications for dumping at sea permits and that he, as agent for the four fish processors and owner of the vessel intended to be used, acted on this

² [2020] 2 I.R. 149

promise or representation. This representation was conveyed to the appellant and it caused him to enter into a transaction or relationship with the Department in relation to the permit applications and he acted on foot of the representation. This representation created an expectation, reasonably entertained, that the Department would abide by the representation and proceed with the permit applications to completion, to the extent that it would be unjust for the public authority to resile from it, even though the Department was prohibited from completing the process. The appellant further submitted that where the Department was obliged to resile, there was an onus on the Department to compensate the appellant for their failure to allow the appellant to complete the application and be in a position to obtain permits.

60. The trial judge said he was rejecting this claim in light of the Supreme Court judgments in *Cromane Seafoods Limited v. Minister for Agriculture, Fisheries and Food*.³ The respondents had made no unambiguous or unequivocal declarations that he was entitled to a permit and the respondents were precluded by European Union Law in granting the permit. He said that the appellant had not engaged at all with *Cromane Seafoods Limited v. Minister for Agriculture, Fisheries and Food*. in his submissions and relied solely on *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)*.⁴ In trenchant language, the judge commented:- “*suffice to say this claim was made in one last desperate attempt to justify the [appellant’s] inability to understand the legal process of his attempt of a try on*”.

61. In the final paragraph of his judgment, the trial judge also rejected the appellant’s attempt to quantify loss, referring to Mr. Armitage’s attempt to do so as “*yet another example of lack*

³ [2017] I.R. 119

⁴ [2002] 1 I.R. 84

of focus and reality”. He referred to the accountant called for the respondents, Mr. Murray and, in reference to the applicant’s claim, said that “*the manner adopted to calculate the losses alleged was speculative, if not disingenuous.*”

62. O’Connor J. dismissed the appellant’s claims.

Submissions on appeal

The appellant’s submissions

63. Counsel on behalf of the appellant pointed out that the appellant gave evidence that he tied up the vessel as soon as the certificate of registration with the incorrect information was issued in July 2000 because “ he was afraid that if the Navy boarded the vessel and saw the discrepancy in the paperwork he would be arrested”, and that once the correct certificate of registration issued in July 2005, he recommenced fishing again.

64. The Court’s attention was drawn to a number of Departmental memos (dated the 23 May 2000, the 13 March 2007) as well as the comments on this issue in the determination of the Appeals Officer, and of the High Court on judicial review. Notwithstanding that counsel is recorded on the trial transcript as accepting that no issue of *res judicata* arose, it was submitted to this Court that the trial judge was bound by those views at least insofar as there was a finding of fact that there was no valid licence. The memo of the 13 March 2007 is from Mr. Damien Clarke of the Seafood Policy and Development Division in the context of the appellant’s appeal concerning the scallop entitlement of the vessel. The memo refers to the vessel’s track record on scallop fishing during the relevant period and notes that the appellant presented two reasons

for not having complied with the required track record: (1) he claimed that he was awaiting the outcome of the dumping at sea permit application and that he had substantially altered his vessel in anticipation of this, which affected the vessel's suitability for scallop fishing; and (2) the delay in issuing an amended certificate of registration. On the latter issue, Mr. Clarke comments in his memo (which recommended the rejection of the appeal): "*It is true that the Morgensonne could not fish legally if a Certificate of Registry was not held. However, the Department's records show that the Morgensonne landed some 5.25 tonnes of scallops in 2003, during the period that Mr. Kielthy claims that she was without a Certificate of Registry. While no evidence has been presented to definitively prove or disprove this claim, it seems more likely that the Morgensonne did not fish for scallops to a significant extent in 2003/4 (the relevant period) because the Morgensonne had been altered for the purposes of dumping waste at sea and had effectively left the scallops fishery*". The memo of the 13 March 2007, also written by Mr. Clarke, is to a similar effect; he considers the arguments raised by the appellant, including that it was the absence of a certificate that caused the appellant to be unable to build up his track record for inclusion in the ring-fenced scallop fleet. However, he rejects this as an explanation: he thinks that the difficulties in achieving the necessary track record arose "*from his prematurely altering the Morgensonne for the purposes of a dumping waste at sea business*" and "*if he had not done so, he could have continued fishing scallops and so accumulated the necessary track record.*"

65. Counsel on behalf of the appellant pointed to para. 12 of the trial judge's judgment which says that: "*the entitlement of a sea fishing boat to fish does indeed depend upon its licences and there is also an obligation to be registered.*"

66. The appellant contended that if the requirements of law are not met for a fishing boat to fish, it is unlawful for a fishing boat to engage in fishing. Accordingly, it is contended that the analytic sequence of the trial judge was “illogical” because if an act is unlawful, the issue as to why the activity was not pursued with reference to the mindset of the appellant cannot be invoked in aid of the respondents. The example is given that if a person were being prosecuted for unlawful fishing, he would not be entitled to invoke by way of defence, his personal belief that it was lawful for him to fish.

67. The appellant submitted that the court misdirected itself in considering the following matters:

- a) By taking into account the absence of evidence as to whether a Naval Officer could or would impound the vessel upon discovery that the certificate of registration had incorrect engine details,
- b) By taking into account the opinion evidence from Mr. Keating from Bord Iascaigh Mhara,
- c) By considering that the evidence of the appellant could be instructive on the issue of whether or not he was precluded from fishing in the absence of a certificate of registration and,
- d) By taking into account the finding that the appellant made no complaint about the way the Minister had excluded him from scallop fishing at the time.

68. The appellant also submits that the respondents were wrong to refer the principles set out in *Hay v. O'Grady*,⁵ regarding determinations of fact because, he contended, this issue in the case turns on an issue of Irish law and not on issue of fact.

69. Reference was made to the evidence of Mr Kevin Moriarty, Registrar of Fishing Boats, where he disagreed with the appellant's position (that because of the inconsistency between his fishing licence and his Registration Certificate, it would have been unlawful for him to fish), saying that this witness had no involvement in the registration process between 2000 and 2005, that this was the only evidence which contradicted the appellant's evidence, and that it constituted opinion evidence on a question of fact which was for the trial judge to determine, citing *Attorney General (Ruddy) v. Kenny*.⁶

70. Seeking to refute the suggestion that he had chosen to stop fishing because this activity was no longer lucrative for him, the appellant acknowledged that scallop fishing was going through a difficult time but contended that he had made a profit when he and his partners had initially operated the boat between 1999 and 2000, and that he also made a profit between December 2005 and July 2006 when he recommenced fishing. It is said that "*regardless of the economic factors the appellant believed that he was not entitled to fish because of the incorrect registration details and stopped fishing for that reason.*"

⁵ [1992] 1 IR 210

⁶ (1960) 94 I. L.T.R. 185

71. Criticism was made that the trial judge failed to engage with the evidence as to damage because he took the view that the claim was a “try on”. Reference was made to *Healy v. Ulster Bank*⁷ on the issue of the failure of a trial judge to engage with the evidence.

72. In relation to the dumping at sea issue, the appellant contended that the trial judge misunderstood the claim. The act of applying for a licence and the act of rejecting the application were the actions that arose in consequence of a negligent misrepresentation. He argued that it was impossible to understand the trial judge’s reasoning and the court failed to identify how it was distinguishing the *Bates v. Minister for Agriculture* case, in which a representation made by the Department to a fisherman had been found to ground a successful claim of legitimate expectation. The appellant submitted that it was not clear whether the trial judge was contrasting the nature of the advice furnished by the Department in *Bates v. Minister for Agriculture* with the advice of the Department in the case before him, or whether the distinction lay in the nature of the reliance placed on the advice. In short, the appellant submitted that the trial judge had insufficiently engaged with the claim of legitimate expectation and had failed properly to explain the basis upon which he thought the appellant’s case could be distinguished from the *Bates v. Minister for Agriculture* decision.

73. Concerning the evidence of Mr. Armitage and the financial evidence, it is submitted that the trial judge’s finding contains a *non sequitur* insofar as it appears to reference the absence of tax returns for the years in question as a basis for a finding of disingenuousness. It is submitted that this fails to recognise the fact that in all cases where the damage is said to arise

⁷ [2015] IESC 106

from a failure to make an income, the evidence as to the income that might have been earned must always be speculative. It is always the function of an expert to try to quantify, within the remit of his expertise, the income that might have been earned.

74. In the course of oral submissions on appeal, counsel suggested that the appellant did not have a physical certificate of registration and that this was the reason he did not feel entitled, or was not entitled to fish. This appears to be the first time this particular issue was raised i.e. not merely that there was a question about the legal validity of the document, but that the appellant did not have a physical copy of the licence and that this was the reason he ceased fishing.

The respondents' submissions

75. The respondents made a number of preliminary points as follows. First, they submitted that the appellant put forward conflicting and inconsistent versions of events before different tribunals at different times, which culminated in a version which was a “radically new case” advanced in counsel’s opening of the case. They said this case was inconsistent with the contemporaneous record and with the case pleaded in the Statement of Claim. Secondly, they emphasised that the appellant’s evidence on very significant issues was not accepted by the trial judge. Thirdly, they submitted that he seemed to have misunderstood an important finding of the trial judge (referencing para. 49 of the appellant’s written submissions). His submission suggested that he thought that the trial judge was saying that the appellant would have been fishing illegally if the vessel had gone out without a correct certificate of registration, whereas in fact the trial judge answered that question in the negative if one looks at para. 14 of his

judgment. They said that a cornerstone of his appeal is therefore based on a fundamental misconception.

76. The respondents referenced particular examples of inconsistencies in the appellant's evidence as well as the authorities on review of findings of fact: *Hay v. O'Grady, Doyle v. Banville*,⁸ *Guilfoyle v. Farm Development Cooperative Limited*.⁹

77. The respondents contended that the appellant advanced four different explanations why he could not fish at the relevant time:

- 1) That fishing for scallops was no longer viable with his boat [see the letter of the appellant to the Department of the 17 December 2001 i.e. contemporaneous correspondence],
- 2) That the vessel had been converted for the purpose of dumping fish waste at sea and he could not afford the reconversion costs to enable him to go back to fishing for scallops in January 2003,
- 3) That he had had qualms about going to sea from summer of 2000 given the incorrect recording of the engine size on the certificate of registration [his evidence, and the pleadings in this case].
- 4) That he could not draw down grants for safety equipment because of the clerical error in the certificate of registration, he could not go to sea lawfully.

⁸ [2018] 1 IR 505

⁹ [2006] IESC 18

78. The respondents contended that nowhere in the legislation is there any suggestion that a clerical error in an otherwise valid and unchallenged certificate of registration would invalidate registration and remove the privilege of being licenced to fish. Accordingly, the appellant's claim was fundamentally misconceived.

79. The respondents said, further, that there was ample evidence that there was no nexus between the clerical error in the certificate of registration and any losses claimed, and there was no evidence at all to support the proposition that there was such a nexus.

80. The respondents referred to the appellant's confirmation in cross examination that there was a problem in the early 2000s with scallop catches, that the local scallop beds were depleting, that the bigger vessels were going to the English Channel, and that vessels like his, which were under 24 metres, were finding the fishing less profitable.

81. They said that the appellant offered no evidence as to whether a Naval Officer could impound a vessel on discovery of incorrect engine details, and that this contrasts with the evidence of Mr. Moriarty.

82. The respondents referred to the evidence of Mr. Keating, on behalf of BIM, that an apparent contradiction on the documentation would not have precluded the grant of funds for safety equipment. The owner would simply be required to show that the sum had been expended on safety equipment and was on board the vessel by submitting the invoices to BIM and the grant would then be drawn down.

83. They pointed out that the trial judge correctly referenced the fact that the appellant had made no complaint in these proceedings about being excluded from the grant of authorisations in 2005.

84. They also mentioned that the judge noted correctly that no pleas about having had issues with a certificate of registration were made in the proceedings 2008/9277P which were discontinued challenging the authorisation regime (the scallops).

85. The respondents pointed out that the boat returned to fishing in 2005-2006 illegally without an authorisation and only stopped when 50-51 days had been built up; this was relevant to the genuineness of the appellant's claim not to have fished in the relevant period due to a fear of being arrested.

86. The respondents contended that, should it be necessary to address the issue of negligence, the respondents' role at the relevant time was as regulator for the benefit of the public, and liability does not arise in the absence of abuse of office or misfeasance and it would not be just and reasonable to impose a duty of care, referencing the comments of the Chief Justice at pp. 139 to 140 of *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* and the decision in *Cromane Seafoods Limited v. Minister for Agriculture, Fisheries and Food* (Charleton J.).

87. The respondents contend that on the issue of loss, the court was clearly entitled to prefer the evidence of Mr. Murray.

88. With regard to the dumping at sea claim, the respondents disputed that a considerable amount of money was spent on converting the boat and observe that the appellant did not make any attempt in evidence to estimate cost.

89. They say that a dumping at sea permit could never have lawfully been issued at the relevant time, given the EU Directive, and there could not have been a legitimate expectation given the negative factors set out in *Lett & Co. v. Wexford County Council*¹⁰ and the judgment of Clarke J. in *Cromane Seafoods Limited v. Minister for Agriculture, Fisheries and Food*.

90. With regard to *Bates v. Minister for Agriculture*, they contended that the facts in that case gave rise to a requirement of proximity or special relationship but that those features were not present here, given the regulatory role being performed and the context of the information being given, coupled with the fact that the appellant was not even an applicant for a dumping at sea permit.

91. Additionally, the respondents maintained that the appellant had no *locus standi* to make a claim in relation to the alleged failure to issue a dumping at sea permit, as he had been merely acting as an agent for the applications by four fish processing companies.

92. They also referenced the regulatory role of the respondents and the misfeasance issue again and reference the case of *Walsh v. South Tipperary County Council*¹¹ in which *Glencar*

¹⁰ [2007] IEHC 195

¹¹ [2012] 1 IR 522

Exploration p.l.c. v. Mayo County Council (No. 2) was discussed and no duty of care was found on the facts of the case.

93. Counsel contended that the particular claim that the appellant did not fish after summer 2000 because the Registration Certificate was made for the first time when counsel opened the case in January 2018.

94. There was no prior relevant and binding finding of fact or law in existence that would have precluded the trial judge from assessing the evidence before him and the appellant's counsel had in fact explicitly accepted (as appears from the transcript) that no relevant issue was *res judicata*.

95. In oral argument, it was pointed out the appellant had for the first time at the hearing of the appeal raised an issue in connection with his not having physical possession of the certificate.

96. Counsel also contended that the work to adapt the vessel for dumping at sea consisted only of fitting cradles which did not in fact prevent the appellant from fishing for scallops.

97. Attention was drawn to the fact that the appellant claimed he had not been told there would be no dumping permit in January 2003, whereas a contemporaneous note in the Department recorded that he had been so informed at that time.

98. Counsel referred to the witness statement of Josephine Kelly who gave unchallenged evidence about the collapse of scallop fishing and a 400% increase in the number of vessels. The appellant himself had been telling the Department that it was necessary to change from scallop fishing and do something else. It was noted that he was not personally fishing; the vessel was fishing. He himself was on disability allowance.

Analysis and Decision

The claim of negligence based upon the Registration Certificate issue

99. In this part of his case, the appellant essentially maintains that he did not and could not legally fish in the period 2000-2005 because of the error on the Registration Certificate; and that this not only caused him a loss of profit but also caused him to be unable to fulfil the relevant quotas or thresholds for the decommissioning grant (as well as the scallop-fishing authorisation). He seeks damages in the ball-park of €500,000 on foot of this claim, to encompass both loss of profit and the decommissioning grant. The trial judge rejected this part of the appellant's case on the basis that he did simply not believe that the incorrect information on the Registration Certificate was the reason that the appellant had failed to engage in (much) fishing in the period 2000-2005.

100. The appeal concerning this part of the case may be broken down into two essential points: (1) that the trial judge erred in reaching the above conclusion as a matter of fact; and (2) that this question of fact is not determinative of his claim in any event, because what matters is that it would have been *unlawful* for him to fish (and therefore fulfil the relevant thresholds) while the error had not been corrected.

The finding of fact made by the trial judge

101. The starting point is of course to examine whether the finding of fact made by the trial judge should be upheld or not. This was a case in which the appellant and other witnesses gave oral evidence and where the trial judge had to make certain factual determinations. The standard of review is that set out in leading authorities such as *Hay v. O'Grady*, *Doyle v. Banville*, and *Guilfoyle v. Farm Development Cooperative Limited*. The principles are well-established and are not in dispute. The principles described clearly by McCarthy J. in *Hay v. O'Grady* are particularly pertinent in the present case, in which the trial judge formed a very unfavourable impression of the appellant's evidence. The principles were summarised by McCarthy J. at p. 217 as follows:-

- “1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.*
- 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently weighty the testimony against them. The truth is not the monopoly of any majority.*
- 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. ... I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a*

different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge.”

102. I should say at the outset that it was explicitly accepted by counsel on behalf of the appellant in the High Court that the principle of *res judicata* did not apply as regards facts found by the Appeals Officer or the High Court in the prior proceedings concerning the decommissioning grant. It is somewhat puzzling therefore, to find that the appellant throughout this appeal laid great emphasis upon the observations of the Appeals Officer and the judgments of the High Court and Supreme Court in those proceedings, as described. In my view, the trial judge was entitled to have regard to the entirety of the oral and documentary evidence and reach conclusions on the essential facts required for his determination. The views of the Appeals Officer and the High Court in the “decommissioning grant” judicial review were not determinative of the facts for the purpose of the present proceedings, and counsel having accepted that nothing was *res judicata* in the present proceedings is not entitled to argue on appeal that (in effect) it is.

103. While the trial judge made various findings of fact and law, indeed sometimes mixed findings of fact and law, in somewhat colourful terms, it seems to me that the key finding *of fact* made by the trial judge regarding this part of the appellant’s claim, stripped to its essentials, was that insofar as the appellant failed to fish during the period 2000-2005, this had nothing to do with the incorrect engine details in his Registration Certificate, nor with his fear of apprehension/arrest by the Navy based on that certificate. It will be recalled that the trial judge

described the appellant's evidence about fear of arrest by the Navy due to incorrect engine details in his Registration Certificate as "fanciful".

104. I am of the view that this Court should not interfere with the trial judge's conclusion on this factual issue. Even without the advantage of the trial judge's observation of the witnesses themselves, and the appellant in particular, from the transcript excerpts provided on appeal it appears far more likely than not that the trial judge's conclusion is the correct one on the evidence. In itself, the multiplicity of explanations offered by the appellant over time, and the evolution of his case, creates a deep sense of unease about the reliability of his evidence. Further, each of the explanations put forward at different times proved to have some difficulty; collectively, they failed to convince. Some examples will suffice.

105. For example, the appellant claimed in evidence that the decline in the scallop fishing industry had nothing to do with his failing to fish during the relevant period; but in contemporaneous correspondence with the Department, it was precisely the decline of scallop fishing that he referenced himself. This was seen (above) in his letter of 17 December 2001 to Carmel Daly that the continuation of his vessel as a scallop fishing boat was "not viable" and this was why he was pursuing the dumping at sea option as an alternative option. He also accepted in his evidence that there were difficulties with scallop fishing, although he sought to downplay it as a factor in his thinking at the time. The evidence of Ms. Josephine Kelly, principal officer in the Sea Fisheries Policy and Management Division of the Department, added considerable context to this and made it clear that the challenges for smaller vessels engaged in scallop fishing were significant. She gave details of the problems which had arisen in the scallop fishing industry at this time, and why, and how the EU had decided to deal with

it, and the national measures taken in response to it. The appellant's attempts in these proceedings to minimise the significance of the effect of this overall context on his own fishing patterns, and to attribute his turn away from scallop fishing to a typographical error in the Registration Certificate, were extremely unconvincing. It is notable that none of this contemporaneous correspondence concerning a change to dumping at sea suggested that he had to stop fishing because of a Registration Certificate error.

106. Another explanation offered by the appellant for his failure to fish during the relevant period was that his vessel had been converted in order to be able to dump at sea and as a result he could not fish. However, on closer examination, it is clear that he did engage in some fishing during the period and that all he had done was fit the vessel with "cradles" which made it more cumbersome but not impossible, to fish. Further, he had claimed in evidence that he did not fish throughout the period 2000 and 2005, whereas the log books showed that he did, whereupon he claimed in evidence that he discarded what he caught.

107. Also, it seems to me inconceivable that the appellant would not have been regularly and vociferously complaining about his inability to fish due to an incorrect figure on his Registration Certificate to the authorities during the period 2000-2005 if he genuinely wanted to fish and thought it was an obstacle to doing so. The absence of such contemporaneous complaint is very telling. Such correspondence as there is concerning the issue of the Registration Certificate lacks any sense of urgency or never complains of an inability to fish pending the certificate being corrected. This is in contrast to the appellant's considerable ability to raise many other issues in correspondence (and indeed with public representatives and the Ombudsman).

108. Further, the appellant claimed that he was afraid of engaging in an illegality by fishing without an accurate Registration Certificate; the credibility of this may be tested by contrasting this assertion in his evidence with the fact that he did actually fish for scallops in a period when he had no permit or authorisation for doing so, something which one might consider much more serious. He claimed that he was not aware of the need for a permit for scallop fishing. Given all of the circumstances, including the appellant's awareness of other aspects of the State's fishing regime (including numerous forms of grants for which he applied), this claim must be treated with considerable scepticism.

109. In that latter regard, it is of interest to contrast the appellant's evidence with that of Mr. Kevin Moriarty, Registrar General of Fishing Vessels. He accepted that in order to obtain a fishing licence for a vessel, the vessel had to be a registered vessel, but he also said that he had never heard of anyone having trouble with the naval service by reason of a typographical error on one of the documents. He said that in his view, the appellant had a valid fishing licence and a valid Registration Certificate at all times. He said there were no documents or other information suggesting that it was ever suggested to his office (during the relevant period) by or on behalf of the appellant that the latter was not fishing because of the discrepancy between the Registration Certificate and the fishing licence, nor showing that the appellant ever *asked* whether he could fish in those circumstances. I do not accept that this evidence is opinion evidence (indeed there was no sign of an objection by the appellant to the evidence being given during the trial itself); Mr. Moriarty's evidence speaks to the factual likelihood of the appellant being arrested by reason of the certificate issue and the credibility of the appellant's evidence in that regard.

110. It is also noteworthy that in the course of the appeal hearing, and for the first time, the appellant's counsel raised the issue of *physical possession* of the Registration Certificate. It was apparently being suggested that he was afraid of fishing during the relevant period because he did not physically have the certificate at relevant times. Needless to say, the late emergence of this explanation, added to the previous pile of unconvincing and shifting explanations, did not impress the Court.

111. Accordingly, the appellant has fallen far short of persuading the Court to set aside the trial judge's key factual conclusion that the appellant's failure to fish during the relevant period had nothing to do with the clerical error on the Registration Certificate.

Whether this factual conclusion is determinative of the negligence claim arising from the Registration Certificate

112. On appeal to this Court, counsel on behalf of the appellant relied heavily upon the argument that what was important was whether the appellant could *legally* fish in circumstances where there was an error on the Registration Certificate. He submitted that the above *factual* determination was not dispositive. He submitted that the trial judge erred or contradicted himself in saying, on the one hand, that the entitlement of a fishing boat to fish depends upon a licence and that there *is an obligation to register* (para. 12 of his judgment), and on the other, that the authorisation to fish was *not dependent* on the correct engine size being recorded on the certificate of registration and the SFB licences (para. 16 of his judgment).

113. I do not agree with this reading of the trial judge's comments. What I understand the trial judge to be saying is that a vessel needs to be registered before it can get a fishing licence, but that the failure to record the correct engine size did not result in an invalid registration. I do not understand him to be saying that the failure to record the correct engine size led to an invalid registration but that this did not matter.

114. The appellant sought to persuade the Court that the key question which it should decide is whether or not there was a valid registration in this case. In the course of argument, counsel suggested that if a person in the position of the appellant (i.e. with a registration certificate containing a clerical error) were prosecuted, it would be no defence to say that he thought he was entitled to fish. He submitted that a certificate was either valid or not, legally speaking, and the appellant's state of mind has nothing to do with it.

115. I do not think this is a correct analysis or analogy. This is not a prosecution for failure to have a valid certificate while fishing; it is a claim for damages arising, at bottom, from the appellant's failure to fish which he says was *caused* by the failure of the State to issue a correct certificate. This is a factual inquiry; was the State responsible for causing a state of affairs which led to the appellant sustaining financial loss. The first question to be asked is therefore precisely that which was in substance posed by the trial judge. Did the appellant in fact desist from fishing because he believed at the time that his Registration Certificate was invalid? Or was this an *ex post facto* explanation so that he could try to blame the State for something which he in fact chose to do for his own reasons, whatever they were.

116. I am in agreement with the trial judge that this factual question was key to the whole claim, and that the claim failed at the first hurdle because, on the totality of the evidence (including contemporaneous documentation, the pleadings, the evidence of all the witnesses, and the appellant's own evidence), the appellant's narrative was not credible on this key point.

117. Accordingly, I am of the view that the first part of the appellant's claim fails, and that the trial judge was correct so to find, simply because he failed to establish a basic ingredient, namely causation, between any loss he may have sustained and any omission on the part of the State. He failed to establish on the balance of probabilities that the State was responsible, by reason of the Registration Certificate issue, for his failure to fish during the relevant time period.

The claims based on the dumping at sea issue

118. The appellant's submission on the "dumping at sea" limb of his case at trial was that, by introducing the Dumping at Sea Act 1996, and in engaging in the various acts in 2001 (as set out in the detailed Chronology above), the respondents or their agents created a legitimate expectation and/or were negligent/ engaged in negligent misrepresentation, causing him loss. In essence, his case on legitimate expectation was that the Department's communications about the proposed scheme amounted to a promise or representation that he would receive a dumping at sea permit and that he, as agent for the four fish processors and owner of the vessel intended to be used for dumping, acted on this promise or representation to his detriment by incurring the financial costs of refitting his vessel for this purpose; that the representation created an expectation reasonably entertained by him that the Department would abide by the representation and proceed with the permit applications to completion; and that even though

the Department was prohibited from completing the process because of EU law, he should be compensated for their having resiled from their promises. As we have seen, his complaint on appeal is essentially that the trial judge failed to properly consider the claim and failed to explain why he considered that the case was different from authorities such as *Bates v. Minister for Agriculture*, where a claim of legitimate expectation sounding in damages was successful.

119. As to the claim in negligence, this was in essence that the Department had negligently represented that he would be entitled to a permit, that he would obtain a permit within six months, that they failed to deal with his permit in a timely manner, that they failed to inform him that he would not be getting a permit in a timely manner so that he could refit his boat for scallop fishing and return to that activity.

120. The respondents have pointed out that the application for a dumping at sea permit was made by the appellant as *agent* for four food processing companies rather than on his own behalf and submit in the first instance that he has no *locus standi* to maintain this claim. They also submitted that the appellant had in any event failed to prove the ingredients necessary to establish liability on the part of the State, whether under the doctrine of legitimate expectation or under negligence and/or negligent misrepresentation. They emphasised that this was a claim for economic loss caused by a public authority and submitted that the appellant had entirely failed to engage with the stringent requirements for achieving success in this type of claim.

121. I agree with the general point made by the respondents that bringing home this type of claim, i.e. for economic loss caused by the acts or omission of a public authority, is particularly difficult and that the principles set out in the relevant authorities must be addressed with

precision and care. In order to succeed in a claim of this nature, a litigant must navigate the obstacles to such claims identified in cases such as *Pine Valley Developments Ltd v. Minister for the Environment*,¹² *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)*, *Lett v. Wexford Borough Corporation*, *Walsh v South Tipperary County Council*, *Cromane Seafoods v Minister for Agriculture*, and *Bates v. Minister for Agriculture*. Even leaving aside the issue of *locus standi* in the present case, I am of the view that the appellant has failed to engage with the detail of these authorities and to establish that his circumstances meet the criteria for a successful claim.

122. The appellant seeks to align his case with that in *Bates v. Minister for Agriculture*. However, the facts are very different. In that case, the appellants had been issued with licences based upon a fishing plan which included a particular area in the Bay of Biscay, and had proceeded to fish there in accordance with their licence. The appellants' vessel was then warned by a French fishery patrol aircraft that it was as illegally fishing in the area and in that specific context, they sought advice from the Department. They were incorrectly advised that the ban in question applied only to British vessels; the error apparently arose because of the department had an incorrect copy of the relevant Regulation. They continued to fish based on the incorrect advice, and were subsequently charged with, and had to plead guilty to, illegal fishing. The Department accepted that it had given the specific assurances as claimed by the appellant but explained that this had been done because the Department was acting on foot of a misunderstanding of the correct legal position at the time.

¹² [1987] I.R. 23

123. Although the claim succeeded, it is important to note that this was in respect of the above facts only and on a narrow basis i.e. in respect of the prosecution and guilty plea in the French court. A wider claim, in respect of the economic loss resulting from the inability of the vessel to fish in the particular area in accordance with the fishing licence, did *not* succeed. Charleton J. said:-

“In the instant case, damages had originally been claimed by the appellants on the basis of a legitimate expectation which, it was pleaded, enabled them to lawfully fish for scallops in the relevant area of the Bay of Biscay. The trial judge rightly dismissed this head of liability, ruling that since European legislation enabled only French vessels to take a particular quota of scallops in that area, there could be no expectation legitimately held by the appellants, since that would be contrary to law; see Wiley v The Revenue Commissioners [1994] 2 IR 160. Such an expectation she held, if proved, must be legitimate in law; applying Daly v Minister for the Marine [2001] 3 IR 513. Further, since there was no right to fish in area VIIIa that inured to the benefit of the appellants, there could be no infringement by the respondent Minister of any entitlement under European law; applying Emerald Meats Ltd v Minister for Agriculture (No 2) [1997] 1 IR 1.”

124. This is a crucial point in the context of the present case. What is clear is that the Irish State authorities believed for quite some time that a “dumping at sea” scheme could be introduced along the lines that were discussed in 2001, as described by the appellant. However, it subsequently became apparent that the scheme as conceived would be in breach of EU law. It was simply not possible as a matter of EU law for the State to make good on any expectations held by the appellant in respect of it. In those circumstances, it is clear to me that the above-

cited comments of Charleton J. apply, and that there is a “negative element” (to use the language of Clarke J. in his High Court judgment in *Lett v. Wexford Borough Corporation*) preventing such a claim from succeeding, *even if* the initial three elements of a legitimate expectation claim, as identified by Fennelly J. in *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)*, had been made out by the appellants. A claim of legitimate expectation cannot succeed in respect of an expectation that the State will do something which it was prohibited from doing under EU law.

125. In any event, I am of the view that the claim under the heading of legitimate expectation would fail for other reasons too. The appellant failed to establish to the requisite standard of proof that he had incurred significant expenditure in refitting his boat for the purpose of dumping in reliance upon the alleged representations. The evidence at its height seems to have been that he installed “cradles” and that this did not make fishing impossible, merely rather more difficult. Further, it has not been suggested, as far as I can see, that the appellant was definitively led to believe that he would obtain a permit if the scheme went ahead. At best, the scheme was announced, guidelines were published, a general meeting was held at which the junior Minister explained the scheme, and he engaged in some discussions with officials. He then decided to start making some changes to his vessel in anticipation of a change of business model that he *hoped* would come about; but the situation even as described by the appellant falls well short of “*a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation*”, to use the words of Fennelly J. in *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)*.

126. Turning to the claim in negligence and/or negligent misstatement arising out of the events related to the dumping at sea permit, the particulars of negligence were essentially that the respondent had negligently misrepresented that the appellant would be entitled to a permit; that the application would be determined within six months; that he was not told in a timely manner that he was not going to receive a permit; and that the respondent's actions had caused him to refit his vessel, thereby incurring unnecessary costs. The appellant did not seek to develop how these particulars would ground a claim in negligence in any further detail. Taking a very broad brushstroke to the matter, it would seem that the claim was partly based on the fact that the Department was labouring under a mistaken view of EU law for a period of time, and partly based on an alleged unreasonable delay in informing the appellant of its mistake when it became aware of it.

127. There are various matters of detail concerning this claim which were problematic, such as the (1) appellant's evidence as to *when* precisely he was told that the permit scheme would not be going ahead (in circumstances where the department official's version, which contradicted the appellant's version, was supported by a written contemporaneous memo); or (2) the extent to which the appellant proved that he incurred significant cost in refitting his vessel for dumping. However, in my view, the appellant's claim in negligence arising out of the dumping at sea issue encounters difficulties of an even more fundamental kind in any event. The appellant failed to engage to any meaningful extent with the authorities concerning the parameters of negligence or negligent misstatement claims in respect of public authorities where the loss is said to be financial. There was little or no attempt to grapple with key issues such as (1) whether there was sufficient proximity between the parties to impose a duty of care upon the public authority or (2) whether it would be just and reasonable to impose liability in

the circumstances, or (3) the purpose of the power being exercised and whether it was for the benefit of the community as a whole or a particular class of persons which the legislation was designed to assist, being important issues which were all to the forefront of the judgments delivered in the authorities referred to earlier. The overall -and crucial-context that the dumping at sea project as originally envisaged by the Department would have been in breach of EU law was not factored into the argument of the appellant at all.

128. Even at the level of fact, one can readily see that the present case was very different to those which arose in rare cases where similar claims against public authorities were successful; such as *Bates*, where there was a specific representation to specific vessel owner in a specific situation (as described above), or *Walsh v. South Tipperary County Council*, where incorrect information was furnished in writing by a Council official in response to a specific request from a solicitor about whether a particular section of a roadway had been taken ‘in charge’ by the Council. The appellant was unable to point to anything similar in the factual matrix of his case. A duty of care was found in those cases by reason of the particular facts; whereas the appellant simply asserted a similarity between his situation and those cases, without addressing the question in any detail.

129. I am therefore of the view that the appeal concerning the “dumping at sea” part of the claim should also be dismissed as the trial judge was correct in concluding that the appellant had failed to establish either a claim based on legitimate expectation or on negligence/negligent misstatement.

130. Given that I have concluded that the appellant has not succeeded in his appeal on the liability issues, the issues relating to the calculation of alleged loss arising out of alleged negligence concerning the incorrect Registration Certificate do not arise and I will not deal with the evidence of Mr. Armitage or Mr. Murray here, as it not necessary to do so.

131. In all of the circumstances, I would dismiss the appeal.

132. As this judgment is being delivered electronically, I wish to record that Costello and Noonan JJ. have read the judgment and are in agreement with it.

133. As the respondent has been successful in this appeal, my provisional view is that the respondent is entitled to the costs of the appeal. If the appellant wishes to contend for a different order, he has liberty to apply to the Court of Appeal Office within 14 days for a brief hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, he may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the terms proposed will be made.