APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number.: 2023:137

Previous Court of Appeal Record Number: 2016:200

High Court Record Number: 2010/1592P

Neutral Citation Number [2024] IECA 30

Haughton J.
Butler J.
O'Moore J.

BETWEEN/

PATRICK SHEEHY

PLAINTIFF/APPELLANT

- AND -

THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

AS CONSOLIDATED PURSUANT TO ORDER DATED THE 12TH DAY OF JANUARY 2015 WITH RECORD NUMBER 2010/1600 P. PATRICK SHEEHY [PLAINTIFF/APPELLANT] AND BALLYCOTTON MARINE SERVICES LIMITED AND CARBERY ISLES FERRIES LIMITED [DEFENDANTS/ RESPONDENTS]

JUDGMENT of Ms. Justice Butler delivered on the 08th day of February 2024

Introduction

1. This judgment deals with the plaintiff/appellant's ("the plaintiff") appeal against an award of damages in the sum of €25,000 made to him against the defendants in proceedings bearing Record No. 2010/1592P, whom I will refer to collectively as "the respondent". These damages were awarded in respect of the loss of the plaintiff's fishing vessel, the MV Atlantic Mariner, in 2008. That award was made by the High Court (Meenan J.) on 16 December 2022 following a plenary hearing on the issue of damages only on a retrial directed by this Court in 2018 (Gilligan J. [2018] IECA 153). The proceedings were originally heard by Noonan J. in 2016. He found that the respondent was liable to the plaintiff in negligence but that other defendants in proceedings bearing Record No. 2010/1600P did not bear any liability. The findings as to liability were not appealed by the respondent. The first appeal to the Court of Appeal was the plaintiff's successful appeal against an award of damages of €100,000 made to him in respect of his loss by Noonan J.

2. The plaintiff contends that the conclusions reached by the trial judge are at variance with the evidence before him and that insufficient regard was paid by the trial judge to evidence regarding valuations of the vessel prior to its loss; to evidence of expenditure by him on the vessel which enhanced its value; to evidence of the rental value of the vessel; to evidence of the value placed by his bank on the vessel and the value for which it was insured. He also contends that the trial judge was wrong in law to hold that he could not be awarded damages for the loss of use of the vessel if he received damages equal to the value of the vessel on the date that it was lost. The respondent disputes these contentions. In particular the respondent contends that the trial judge's finding that the vessel was not in good condition was both correct and supported by evidence. As the vessel was not in sufficiently

good condition to be leased, the plaintiff had not in fact suffered any loss by virtue of being unable to use it.

3. There was no real dispute between the parties as to the general principles upon which a court should award damages in a case such as this, namely *restitutio in integrum*. In other words, the plaintiff is entitled to be compensated for the full value of the asset which he has lost, that loss is to be assessed by reference to the asset's market value, and he is also entitled to the consequential losses flowing from that loss. It was accepted by the plaintiff that he bore the onus of proving the losses claimed. There was, however, considerable dispute as to whether the plaintiff had adduced sufficient evidence to support the claims he made and, by extension, as to whether the trial judge's treatment of the evidence adduced was correct.

4. In order to understand the issues arising on appeal it is necessary to set out the factual circumstances in which the claim arises, acknowledging that the respondent did not appeal the finding of liability made in the original trial, and the procedural history which led to the matter coming before the Court of Appeal for a second time. In setting out the background I will address the evidence that was adduced before the High Court and then look at the manner in which this evidence was dealt with by the trial judge before moving to consider whether the conclusions reached by the trial judge are sustainable on the evidence and, if not, the approach to be taken by this court.

Factual Background - General

5. In addressing the factual background to this appeal, I immediately encountered a difficulty which has permeated the proceedings throughout their various stages. It will become apparent in the passages which follow that much of the plaintiff's account is incomplete, based on hearsay and unsupported by other witness evidence or documentary material. Further, for good reason, the trial judge took the view that the plaintiff's evidence

concerning valuations of the vessel and the improvements carried out to it had to be treated *"with a degree of caution"*. In a similar vein following the original trial Noonan J. held that the plaintiff's evidence as to the price he initially paid for the vessel was *"entirely contradictory and unreliable"* and that he had to treat the plaintiff's evidence of expenditure on the vessel *"with considerable caution"*.

6. That said, on the plaintiff's account he purchased the vessel in 1989 from a bank in the USA which had repossessed it and he paid approximately US$150,000. In addition, he paid off debts attaching to the boat making a total purchase price of circa US$200,000. He claims to have spent another US$200,000 carrying out improvements to the vessel at the time of its purchase. No documentary evidence was adduced to support these claims. In 1997 he brought the vessel from the USA, where he had previously fished it, and re-registered it, changing its name to the M.V. Atlantic Mariner in 1998. The certificate of registration was included in a booklet of discovered documents which was made available to the trial judge. However, the copy of the certificate is incomplete and partially illegible. What is clear is that the vessel is a steel hulled, V-shaped boat built in 1980 in Florida. There was some discussion in evidence as to whether the fact that it was built to a U.S. design affected its value.

7. There was a serious problem with the plaintiff's account of the registration of the vessel in this jurisdiction. To register the vessel the plaintiff was required under statute to provide proof of ownership. To satisfy this requirement he submitted a bill of sale dated 19 February 1997 certified by a U.S. notary public. This bill of sale, on paper headed *"Sheehy Enterprises"*, records the sale of the vessel to the plaintiff by James Sheehy of Sheehy Enterprises for the sum of US$10,000. In cross examination when this document was put to him, the plaintiff's evidence changed in material respects. He acknowledged that the vessel was not initially bought by himself personally but either by himself and his brother, James,

or by Sheehy Enterprises (presumably a company or business run by himself and his brother) or by all three (the plaintiff's evidence on this point was vague). However, he stood over his evidence as to the amount paid for the vessel. He claimed that ownership of the vessel was transferred to him, but he did not pay anything, much less the US$10,000 recorded in the bill of sale in respect of the transfer. He described the document as *"just an in-house invoice for registration purposes and that's all"* and conceded *"It was made up for the purposes of registering the boat here"*.

8. It is extremely concerning that someone should be party to what is essentially a false document, should procure the authentication of that document through a notary public and then rely on that document in a statutory registration process in this jurisdiction. For this reason, I share the views expressed by both the trial judge and by Noonan J. as to the need for caution as regards the plaintiff's evidence. Further, in the context of the trial before Meenan J. this created a real problem for the plaintiff because, apart from himself, he called only four witnesses who gave evidence on a limited number of issues. Crucially, none of them purported to provide a valuation for the Atlantic Mariner in 2008. I will return to this issue in due course.

9. The plaintiff claims that the length of the vessel originally recorded on the registration certificate was incorrect in a material respect in that the figure recorded exceeded the length of vessel which would be automatically entitled to a licence to fish for mackerel and herring (a pelagic licence). He says that following a survey this was corrected and the State granted him a pelagic licence in addition to a polyvalent licence which entitled him to fish for white fish, lobster, crab etc. It is not clear when this correction occurred – some of the bank documentation suggests it may not have been until 2008. Neither of the licences were adduced in evidence although the plaintiff relies on them as having a distinct value which in turn attached to the value of his vessel. For example, the plaintiff claimed at the time of the

re-trial (in 2022) that the pelagic licence alone was worth €1.5m. No independent evidence was adduced to support this claim and one of the plaintiff's witnesses (Mr. Nolan) suggested the much lower figure of €150,000 for the value of a tier 2 mackerel licence in 2021.

10. The plaintiff claims to have carried out improvements to the boat in Ireland in 1998. The extent of these improvements is unclear save that it involved putting in a shelter deck. The plaintiff claims to have spent an additional €200,000 on these works. No documentary evidence was provided to support this claim. The plaintiff agreed that some of the works done to the boat over the years were grant-aided by either the EU or Bord Iascaigh Mhara ("BIM") - or perhaps by the EU through BIM. No evidence was adduced as to the terms upon which such grants were paid and the extent to which they had to be repaid is unclear save that it is evident that BIM had a mortgage registered on the vessel for the repayment of some €63,000.

Fishing Licences and Quota:

11. To use the vessel for fishing the plaintiff was obliged to, and did, purchase tonnage and kilowattage for an unspecified cost. At the time she was lost the plaintiff held a sea-fishing boat licence dated 20 June 2007 for the Atlantic Mariner which confirmed that she had a gross tonnage of 127 tonnes and an engine capacity of 291 kilowatts. At this point it may be useful to outline briefly how fishing vessels are licenced in order to understand the significance and potential value of the tonnage and kilowattage attached to the Atlantic Mariner.

12. Firstly, to use a boat for sea fishing the owner must hold a licence in respect of the vessel under s.4 of the Fisheries (Amendment) Act 2003. In granting or refusing a licence, the licencing authority (currently the Minister for the Marine) may have regard to the economic and social contribution the vessel would be likely to make in light of the quotas

assigned to Ireland by the EU under the Common Fisheries Policy which, at the material time, was governed by Council Regulation 2371/2002. This has since changed, particularly in light of Brexit, but these changes are not material to the plaintiff's claim. The operation of the quota system places a limit on the amount of fish that Member States and, by extension, fishermen are allowed to land at EU ports. Members States are assigned quota in respect of different species of fish which is in turn allocated by the Member State to individual fishing enterprises. The different types of fish to which quota pertain are represented by different segments of the fishing fleet. Thus, in Ireland sea-fishing vessels must be licenced to fish within a particular segment of the total fleet. The plaintiff was granted a polyvalent licence for the Atlantic Mariner and, because it was less than 20 metres in length, was also granted a pelagic licence. There is a separate segment of the fleet dedicated to refrigerated sea-water pelagic fishing but a limited proportion of the State's pelagic quota is reserved for smaller vessels within the polyvalent fleet. It is evident from the plaintiff's licence that the Atlantic Mariner was licenced within the polyvalent fleet segment, presumably with the benefit of a tier 2 pelagic licence. As previously mentioned, no documentary evidence was adduced to support this element of the plaintiff's case.

13. The possession of a licence to fish is only part of the equation. The amount of fish a vessel is allowed to land is determined by its capacity made up of its tonnage and kilowattage (referred to here collectively as "tonnage"). Needless to say, unless a vessel is entitled to land, and by extension to sell its catch the licence to fish is of limited commercial value. Therefore, the tonnage attached to a vessel is a key element of the commercial potential of that vessel.

14. To further complicate matters, tonnage, which is necessarily limited because of EU quotas, can be traded independently of the vessel to which it is attached at any given time. Tonnage can be bought and sold and can also be leased on a temporary basis. In this case

not only did the plaintiff accept that the tonnage attached to his vessel had a separate value to the vessel itself, the tonnage had been purchased by him on bringing the vessel to Ireland in 1998 and was in fact sold by his bank in 2013 on foot of a mortgage it held over both the vessel and its tonnage.

15. Whilst it is accepted by both sides that the tonnage had a value, much of the dispute centred on whether the vessel should be valued with or without its tonnage and, if the latter, the value of the vessel without the tonnage. As is evident from the brief outline above, without tonnage a fishing vessel cannot land or lawfully sell its catch. In practice, a vessel without tonnage cannot fish unless the owner or operator has access to tonnage from another source. This has a consequent effect on the ease to which a fishing vessel can be leased without its tonnage, as distinct to the ease to which tonnage can be leased separate to the vessel to which it is primarily attached. The relevance of this is that although the plaintiff's vessel was lost in 2008, he retained ownership of the tonnage which he had purchased in 1997/1998 in order to operate her as part of the Irish fishing fleet. I will return to these issues in due course.

Chronology Continued

16. Returning to the chronology of events as disclosed in evidence, the plaintiff claims to have operated the Atlantic Mariner as a fishing vessel between 1998 and 2007. He did not fish the vessel himself and instead either leased her or employed captains and crews to fish her, there being an established and rather complex mechanism for the division of the value of a catch between the owner of the vessel, the captain and the crew. According to the plaintiff he entered into two leases of the vessel during this period, one for six months in 1998 and one for 12 months in 2005. These leases were apparently made orally, and no documentary evidence was adduced of the leases or the rent payable on them. Whilst the

plaintiff gave evidence of employing captains to fish the Atlantic Mariner, he did not give any specific evidence of the periods during which he had these types of arrangements in place nor of the income earned by him from such arrangements. In short, the plaintiff gave no evidence as to the income he had generated from the Atlantic Mariner prior to her loss in 2008 and did not provide any documentary evidence from which such information might be gleaned.

17. I should acknowledge that the plaintiff's evidence was that all of his documents were lost in a fire at his brother's fish factory either three, four, five or six years before the date on which he was giving evidence (i.e. sometime between 2016 and 2019). Even accepting that the plaintiff lost material in a fire, this does not explain the complete lack of any supporting documentation. Assuming that the plaintiff paid tax on the income earned from the Atlantic Mariner between 1998 and 2008, his revenue records should assist in providing some indication of the level of income earned. Insofar as he relies on the same fire to explain the absence of documentation to support claimed expenditure on the vessel from time to time, it would surely have been possible for him to ask for copy invoices from the persons who carried out work or supplied equipment or simply for confirmation as to the sums paid by him to them. It should also have been possible to obtain from the appropriate authorities records of any grant aid provided in respect of such works.

18. The most recent survey of the Atlantic Mariner was done by Mr. Michael Dillon of Marine Surveys Ltd. in May 2004. Mr. Dillon did not give evidence in either the original trial or the re-trial and the respondent objected to his report being adduced in evidence unless he was called as a witness and subjected to cross examination. This objection was, in my view, correctly upheld by the trial judge. Notwithstanding this ruling, the plaintiff persisted in relying on this unproven valuation of the vessel in part because it reflected the sum for which the vessel was insured (approximately €600,000) prior to its insurance lapsing for

non-payment of premium (see further below). The plaintiff also seems to have relied on this valuation when he put the vessel up for sale in 2006. He claims to have received offers of €550,000 and €570,000 for her but did not adduce any evidence supporting the contention that these offers were made. In any event, notwithstanding his worsening financial situation, the plaintiff declined the offers apparently made on the basis that he was seeking €600,000 for the vessel. The respondent pointed out that this account was inconsistent with what the plaintiff is recorded as having told his bank at the same time i.e., that there was *"no interest"* when he advertised the vessel for sale. As no supporting evidence was adduced it was unclear if the Atlantic Mariner was offered for sale with or without her tonnage.

19. The vessel had been either leased or captained on behalf of the plaintiff in 2005. However, on 29 August 2005 the engine exploded while the vessel was at sea, and it had to be towed back to Howth. There it underwent repairs including the installation of a new engine. The plaintiff ascribed a global value of €150,000 to the work done to the vessel in 2005 and seemed to believe that this figure should be added as *"improvements"* to the unproven value placed on it the previous year. This is obviously fallacious. The largest part of the €150,000 was the cost of a new engine together with its installation and associated repairs which together cost nearly €90,000. Apart from the fact that some or all of this cost was met by insurance, the vessel necessarily requires a working engine, and the earlier valuation was premised on the engine being in good condition. It is not an improvement to replace something without which the vessel could not function at all. Other works which the plaintiff claimed were done at this stage include the provision of additional equipment, notably new sonar and a headline transducer, which were apparently grant-aided, but no documentary evidence has been provided to support this element of expenditure.

20. To further compound the plaintiff's problems, it is evident from records provided in the context of a decommissioning application, that in the two years prior to the loss of the

vessel it had fished for only 65 days in 2007 and 35 days in 2006. The plaintiff apparently had difficulty sourcing and retaining reliable crew and suggested that the vessel may in fact have fished for more days than were recorded by its captain. Given that the plaintiff claims to have spent approximately €150,000 upgrading the vessel in 2005 (certainly a significant sum was spent on her in 2005 whether or not the works are properly described as upgrades) and in circumstances where a commercial fishing vessel would normally be used, on average, between 120 and 220 days per year, this is by any standard a very poor fishing record. The consensus in the evidence was that it would not be financially viable to maintain and insure a fishing vessel which was fishing on such a limited basis.

The Plaintiff's Financial Position

21. In those circumstances it is unsurprising that the financial evidence, led by the respondent based on the plaintiff's bank records, showed that the plaintiff was heavily indebted to his bank in a sum exceeding €880,000 at the time the vessel was lost. The Atlantic Mariner and her tonnage were mortgaged to the AIB and BIM also had a mortgage registered on the vessel for some €63,000. The extent of the plaintiff's financial difficulty is evident from the fact that he was unable to pay the insurance due on the vessel amounting to €40,000 per annum (payable in two half-yearly instalments) in 2007. This meant that at the time she was lost she was uninsured. In fairness to the plaintiff, it should be acknowledged that at the time of and immediately prior to these events he was struggling with some very serious health issues from which, if the vigour with which he prosecuted this appeal is any indication, he has now fortunately made a good recovery. Nonetheless, it was clear from the evidence that financially speaking in 2008 the plaintiff was not in a position to either insure or to carry out repairs to the Atlantic Mariner.

22. The plaintiff argued that this was not an accurate reflection of his position as it focussed entirely on the Atlantic Mariner without taking account of his other assets and business interests. He claimed that his financial difficulties in 2007/2008 represented a cash flow problem only and that he remained asset-rich throughout. Apart from reference to a development site which he owned in the vicinity of Baltimore (which was subsequently sold by his bank) he did not give a clear account to the High Court, much less provide supporting evidence, as to the extent or value of these assets. The plaintiff comes from a well-known fishing family and owned at least one other trawler, the MV Celestial Dawn, which sank in 2006/2007 – as it happens indirectly leading to the events giving rise to these proceedings. He seems to have been the owner or part owner of other vessels including one owned jointly with his brother in the USA but no concrete evidence of the value of these vessels or the income generated from them was given to the court. There was reference to his brother having a fish factory in Baltimore (the location of the fire in which the plaintiff's documents were destroyed) and to the fact that the plaintiff had given his brother either "a" or "the" pelagic licence in exchange for a guarantee for the plaintiff's bank debts to the extent of €280,000. It is unclear if the pelagic licence referred to is the same one attached to the Atlantic Mariner to which the plaintiff ascribed a value of €1.5m. at the time of trial.

23. All of this is relevant because the respondent argued that the plaintiff was not financially in a position to insure the vessel or to carry out the works which would have been necessary to put her into a leasable condition in 2008. In the absence of those works being done, the respondent argues that it is not realistic for the plaintiff to claim damages for loss of use. The plaintiff stated that if the boat were leased the lessee would be responsible for the insurance. There was also a significant dispute between the parties as to the state of the vessel at the time she sank and the extent and the cost of any works which would have been necessary to render her leasable.

24. In any event, having had unsatisfactory seasons in 2006 and 2007 and in circumstances where the vessel was uninsured and the plaintiff's health was poor, he decided to berth her over winter in Baltimore. Initially the Atlantic Mariner was berthed at the pier in Baltimore from October 2007 to January 2008. She was then moved to anchor in Church Bay. On 3 March 2008 she was arrested whilst at anchor on foot of a judgment debt against the plaintiff arising out of claims made following the sinking of the Celestial Dawn. Very shortly after she was arrested the Atlantic Mariner was caught in a storm on 11 March 2008 and dragged her anchor. It appears that she drifted and hit rocks. Consideration was given to whether she could be salvaged at this point but ultimately no salvage attempt was made and she was towed to a mooring. There, the boat began to list sideways and ultimately in June 2008 she foundered having been sucked into the mud to such an extent that she could not be re-floated. Although the events during this period which led the boat to be lost are no longer relevant in terms of liability, they are relevant insofar as they frame the evidence given by witnesses who either dealt with or saw the vessel while she was at pier or at anchor. Much of this evidence is in turn relevant to the condition of the vessel at the point at which she sank.

Evidence Relating to the Condition of the Vessel

25. The plaintiff acknowledged that one of the generators had been removed from the boat to be reconditioned and replaced. He denied the removal of any other electrical equipment. He also acknowledged that all fishing equipment had been removed from the deck to facilitate the replacement of the concrete screed covering the deck. According to the plaintiff the existing concrete had been dug up using a jack hammer and left loose on the desk so that the vessel *"looked rough"*. However, he maintained that her accommodation had been recently refurbished (it seems some time prior to 2004) and contended that the boat was in a

sufficiently good condition to be fished, which of course she had been up to a few months earlier.

26. Conflicting evidence was given by witnesses who saw the Atlantic Mariner at the pier in Baltimore. Captain Hopkins, a master mariner, gave evidence for the respondent. He said he saw the vessel regularly whilst it was tied up adjacent to the pier in Baltimore between October 2007 and January 2008. He did not board her nor conduct a full inspection. He described her visible condition as poor. There was obviously work ongoing as there were bits of control equipment on the deck and hydraulic pipes had been disconnected. The concrete screed on the deck was cracked which, in his view, meant that the steel underneath was corroding. Bits of equipment had been removed from the deck.

27. Captain Hopkins was subsequently part of an inspection conducted later in 2008 with a view to salvaging the vessel. At that stage the vessel was lying in Church Bay. He describes a lot of navigational equipment and control equipment (such as GPS and radars etc.) as being gone from the wheelhouse. Hydraulic hoses were disconnected on the deck where the control system would have been previously installed. The engine was in place. The concrete deck was badly cracked and there were rust stains seeping through from the steel work underneath.

28. Vincent O'Driscoll, who was engaged in the attempted salvage operations for Ballycotton Marine, gave evidence to similar effect. He did an inspection of the vessel after she had been pulled off the rocks and put on a mooring in Church Bay in March 2008. He described there being hardly any electronics being left in the wheelhouse, no doors on the companionways, bits of machinery thrown in the companionways and that insulation had been pulled from the fish hole. Overall, he described the vessel as pretty rough and as requiring a lot of work, amounting to a complete refurbishment, to put her back to sea. The plaintiff objected to this evidence on the basis that Mr. O'Driscoll's company had been a

defendant in the original proceedings although as of the re-trial Mr. O'Driscoll's company, Ballycotton Marine Services Ltd. was no longer involved in the proceedings.

29. On behalf of the plaintiff, Mr. Derry O'Donovan, described as the Spanish agent or counsel for the Spanish legion in Ireland, had been on board the Atlantic Mariner several times in Castletownbere but did not regard himself as able to give evidence as to her condition. Evidence was given by John Kearney, a diver trained by the Irish Naval Services. Like Captain Hopkins he was familiar with the Atlantic Mariner while she was at pier in Baltimore as he went across her on numerous occasions to get to his own boat which was tied up alongside her. He was of the opinion that the boat was *"in good condition"*. He did an inspection dive on the vessel in September 2011. His overall view was that she was sound in the sense of being intact as evidenced by the fact that water remained trapped in the inner hull of the vessel even when the tide was out indicating that there were no holes present. The trawling nets were still present as was the main engine, gear box and generators. Some of the concrete screed on the main deck was broken and lifting but it did not look like it had been broken up completely by a jack hammer. He saw electronic equipment in the wheelhouse but could not say whether any was missing as he did not have a list of what was supposed to be present.

30. The last witness who gave evidence of the condition of the vessel was Mr. John Finn who at the material time was an officer of Customs and Excise and registrar of shipping in the port of Skibbereen. On the instructions of the Admiralty Marshal, Mr. Finn arrested the Atlantic Mariner on 3 March 2008 whilst she was at anchor in Church Bay and boarded her for that purpose. He did not avail of the option of putting someone on board the vessel to secure it because he felt the condition of the vessel rendered it inappropriate to do so on health and safety grounds. He said that nothing appeared to be functioning on the vessel and that he and his team had to use torches to get around. There were no locks on the doors and

no machinery. There were empty spaces in the consoles in the wheelhouse where electronics would normally be present. He did not conduct a full inspection but generally thought the vessel did not look like it was capable of going to sea. Under cross examination Mr. Finn agreed that he had not started up the generator on the boat, in which case it is perhaps unsurprising that there was no light and that other services did not appear to be functioning.

Decommissioning

31. The plaintiff places significant reliance on the fact that in 2008 fishermen were offered the option of decommissioning their fishing vessels and associated tonnage in exchange for sizable lump sum payments which were grant-aided by the EU. The object of the decommissioning scheme was to reduce the size of the fishing fleet by the removal of, presumably less efficient, boats thereby releasing the amount of quota (or tonnage) attached to those boats for distribution amongst the remaining boats thus making the residual fleet more profitable. In February 2008 the plaintiff applied to decommission the Atlantic Mariner. His application was refused as the vessel had not fished the mandatory number of days in the preceding two years necessary to qualify under the scheme. The plaintiff appealed unsuccessfully and, although no clear evidence was given on the point, from the documentation it seems likely that the ultimate refusal post-dated the loss of the boat as the appeal was still live at the end of July 2008.

32. Although the plaintiff's application for decommissioning was unsuccessful, he nonetheless relied on this scheme in two respects. Firstly, he contended that had his application been allowed he would have been paid €900,000 for the vessel and its tonnage. No evidence was advanced as to the basis on which payments were calculated under the decommissioning scheme nor confirming that this figure is accurate. Consequently, in my view, little regard can be had to it. Secondly, and more importantly, the plaintiff argued that

once decommissioning had taken place, the remaining fleet, which would have included his boat had it not been lost, became more valuable. In effect, decommissioning created a shortage of boats and meant, for example, that the difficulties the plaintiff had experienced in 2006 and 2007 in hiring and retaining reliable captains and crews were reduced as crew previously attached to decommissioned boats were now available for hire. The market for boats also improved. A witness called by the plaintiff, John Nolan, the manager of Castletownbere Fishermen's Co-Op supported this proposition and gave evidence of typical earnings of fishing trawlers post-2008 and of the current value of boats of that type.

33. There is an additional issue concerning a conversation had between the plaintiff and Mr. Finn at the time of the arrest of the Atlantic Mariner which was relevant to the manner in which the trial judge approached the evidence regarding the condition of the boat. This is a matter to which I will return when looking at the High Court judgment.

Procedural History

34. The procedural history of this case has been outlined above. The plaintiff originally issued two sets of proceedings in the High Court, one (2010/1592P) against the respondent and the other (2010/1600P) against two entities involved in the unsuccessful salvage operations. These two actions were consolidated and heard together by Noonan J. in 2016. Noonan J. found against the respondent on liability but not against the other defendants. That finding was not appealed by the respondent so, since 2016, the only issue in the case is the quantum of damages sustained by the plaintiff for the now-admitted negligence of the respondent which caused the loss of the Atlantic Mariner.

35. Noonan J. awarded the sum of €100,000 as the probable value of the plaintiff's boat, excluding its tonnage at the time of its loss. He did not award damages for loss of use on the basis that before the boat could be fished again it required significant upgrading which

the plaintiff could not afford. The plaintiff appealed this award and, in 2018, he was successful in his appeal. The Court of Appeal (Gilligan J.) held that there was no evidence adduced which supported the extent to which Noonan J. had held the value of the boat would have diminished in the years immediately prior to its loss just because it was not being actively fished. Relying on the Supreme Court decision in *Doyle v. Banville* [2012] IESC 25, Gilligan J. held that the trial judge erred in his judgment in not engaging fully with the particular circumstances of the factual evidence adduced by all parties both as to the value of the boat and the consequent loss of use nor had he explained why the evidence of one party was preferred over another. Of course, because the appeal was successful on the ground that Noonan J. had not fully engaged with the evidence, the Court of Appeal did not express a view on the actual figure awarded by him. The plaintiff may nonetheless have believed that as the appeal was successful, it implicitly followed that the award should have been larger.

36. The Court of Appeal directed that the matter be returned to the High Court for retrial for *"an assessment of damages only as regards the value of the vessel on the date it foundered"* and *"an assessment of damages only in respect of the claim for loss of use"*. This was the scope of the re-trial which took place before Meenan J. in 2022.

37. Apart from the fact that liability was no longer in issue and the number of defendants was reduced, there was one other significant difference between the 2016 and the 2022 trials. At some stage after the Court of Appeal judgment the plaintiff parted company with the legal team which had represented him up to that point and, in 2022, he appeared before the High Court as a litigant-in-person. Unfortunately, this had a material bearing on the way the trial progressed. The plaintiff mistakenly assumed that the transcript of evidence given by witnesses on his behalf in the 2016 trial would be admissible as evidence in the 2022 trial even when those witnesses were not called to give evidence a second time. This was

particularly significant as regards two witnesses who had given evidence on the plaintiff's behalf in 2016, namely an expert surveyor who had examined the vessel in 2011 and provided a valuation and the plaintiff's accountant who gave evidence as to the plaintiff's earnings from the vessel.

38. The trial judge took care to ensure that when cross-examining the respondent's witnesses, the plaintiff addressed himself not just generally to the case he wished to make but also to the key elements of those witnesses' evidence which needed to be challenged in order for him to make that case. However, no amount of careful marshalling by the trial judge could overcome the difficulties the plaintiff faced by reason of the fact that he did not call expert evidence as to the value of the vessel nor evidence from an accountant to establish the income generated from the vessel between 1998 and 2008. In addition, no evidence was called by the plaintiff to support the claimed value of expenditure on the vessel either in 1998 or 2004; no evidence was called of the leases entered into in 1998 or 2005; there was no evidence of the basis on which the vessel was offered for sale in 2006 nor to support the offers allegedly received by the plaintiff for her. Thus, the case made out in evidence by the plaintiff was necessarily limited and, with certain exceptions, was dependent on the trial court accepting assertions made by the plaintiff in his evidence which were unsupported by either documentary material or other witnesses. Key areas on which the plaintiff did advance a case based on independent evidence were the condition of the vessel both before and after its sinking (Mr. Kearney); the availability of a market for the leasing of fishing trawlers (Mr. O'Donovan) and the likely earnings of such lease arrangements post-2008 (Mr. Nolan).

39. The case made out in evidence by the respondent was more complete. The respondent called an accountant who had examined the available material from the plaintiff (which was itself limited) and gave evidence that leasing the vessel was not a viable business option in light of the plaintiff's level of indebtedness. The respondent called Captain Hopkins as a

marine expert witness on the value of the vessel and Dominic Daly, an auctioneer and valuer who provided a formal valuation. Captain Hopkins and Mr. O'Driscoll gave evidence as to the condition of the vessel in 2007/2008 as did Mr. Finn in addition to giving evidence of the registration and of the arrest of the vessel.

The Judgment Appealed From

40. The key issue on this appeal is the treatment by the trial judge of that evidence. Meenan J. commenced his judgment by briefly outlining the facts and identifying the issues on which the Court of Appeal had directed a re-trial. He then outlined the evidence given by the plaintiff and the other witnesses. At para. 11 he noted the issue I have identified above, namely, the fact that the plaintiff did not call evidence from a surveyor or valuer and did not give evidence or provide documents regarding his financial status. The judgment also synopsises the evidence given by the respondent. In considering the evidence, the trial judge quoted the passage from *Doyle v. Banville* relied on by Gilligan J. to the effect that a judgment must engage with the key elements of the case made by both sides and explain why one side is preferred. Meenan J. then observed (at para. 20):

> *"I have to assess the damages to be awarded to the Plaintiff under two headings. This assessment must be based on the evidence that was given to the Court. The fact that the Plaintiff represented himself does not absolve him from the requirement to put before the Court relevant evidence. The burden is on the Plaintiff to establish the various valuations. The Plaintiff adduced no evidence from a person with the experience and qualifications to put a value on the vessel as of March/June 2008… Further the Plaintiff adduced no evidence from an accountant, nor did he put before the Court any documentation as might assist the Court in deciding what damages, if any, the Plaintiff was entitled to for loss of use of the vessel."*

41. The trial judge dealt firstly with the loss of use issue. Although he had expressed a view in the course of exchanges during the trial that damages for loss of use could not arise if the plaintiff was compensated for the value of the boat as of the date it was lost, this is not the basis upon which he approached the issue in his judgment. Instead, he treated the evidence as to the level of profit which could be earned from leasing the vessel as being dependent on the boat being in a good condition in order for it to be leased in the first place. He held that the plaintiff was not in a financial position to carry out the improvements which would be necessary to lease her. He also held that in a conversation with Mr. Finn, the plaintiff had said, presumably regardless of the outcome of the decommissioning application, that the vessel would not be going fishing again and would be scrapped. Coupled with the plaintiff's health difficulties, this led the trial judge to find that *"the Plaintiff was not seriously in the business of leasing the vessel."* Because he found as a matter of probability that the vessel was not going to be leased or used by the plaintiff, no loss was established in respect of loss of its use.

42. As regards the value of the vessel, for the reasons already identified the trial judge was cautious as regards to the plaintiff's evidence of the price he paid for the vessel and the value of improvements carried out to her. He noted that the plaintiff did not call any valuation evidence and regarded the plaintiff's own valuation at the time of the attempted sale of the vessel as being of little assistance. Crucially, he held that the value of the vessel depended on her condition. He noted the conflicting evidence as to the condition of the vessel and found the evidence that the vessel *"was not in a good condition"* was *"more comprehensive"*. He noted the evidence of Captain Hopkins and Mr. O'Driscoll in this regard and found as a matter of probability that in March/June 2008 the vessel was not in a good condition. On the basis of this evidence, he then found that *"the vessel at the relevant time had no value"*. Somewhat inconsistently with this, he then relied on the evidence of

Captain Hopkins and Mr. Daly as to the 2008 value of former fishing vessels (without tonnage) sold for use for other purposes to ascribe a value of €25,000 to the Atlantic Mariner as of March/June 2008. In circumstances where the plaintiff had successfully appealed an earlier award of €100,000 in his favour, the trial judge pointed out that his valuation was *"based on the evidence or rather lack of evidence on the part of the plaintiff before this Court"*.

Issues on Appeal

43. I have already outlined the basis of the plaintiff's appeal to this Court and of the respondent's response to it. Notably, between filing his Notice of Appeal and filing his written legal submissions the plaintiff reconnected with his legal team who presented the appeal on his behalf. This resulted in a helpful narrowing of issues. Even then, some of the grounds traversed in the written submissions – such as an alleged failure on the part of the trial judge to address a series of valuations of the vessel prior to 2007 when no evidence was adduced from any of the persons responsible for those valuations – are manifestly unstateable.

44. On a re-trial, the trial judge must proceed to determine the issues on the basis of the evidence adduced before him. Unless the parties agree otherwise, evidence given in the original trial is not evidence in the re-trial. Unless documentary evidence is agreed between the parties, which in this case it was not, it must be proved in normal course. Unproven and disputed documentary material does not constitute *"information"* which the trial judge had *"at his disposal"* nor can he be criticised for dismissing such information and preferring the evidence given by the witnesses before him.

45. Leaving aside these arguments and also grounds relating to the supposed value of improvements and other work carried out to the vessel which were largely unproven, the

plaintiff raised a number of issues regarding the manner in which the trial judge evaluated the evidence of various witnesses as to the condition of the boat and the value to be ascribed to her. He also contended that there were contradictions between the defendant's witnesses with which the trial judge did not engage – having read the transcripts of the evidence I do not agree that there any such discrepancies. The key proposition advanced in oral argument was that the trial judge had erred in valuing the vessel in 2008 without its tonnage and kilowattage, which were not disposed of until 2013.

46. The respondent's written submissions purported to identify 15 issues arising on this appeal, many of which amounted to little more than different ways of saying that the trial judge was correct which, quite frankly, was of little practical assistance. More pertinently the respondent's submission set out the law regarding appeals from the conclusions drawn by a trial judge on evidence adduced at a plenary hearing as found in *Hay v. O'Grady* [1992] 1 IR 210; *M.C. v. F.C.* [2013] IESC 36; *Emerald Isle Insurances and Investments v. Dorgan* [2016] IECA 12; *Fitzpatrick v. CAB* [2000] 1 ILRM 299; *Wright v. AIB Finance & Leasing* [2013] IESC 55; *Doyle and Banville* (above) and *Leopardstown Club Limited v. Templeville Developments* [2017] 2 ILRM 393. I will return to this issue in due course.

47. Thereafter, the respondent's submissions identified portions of the evidence to make the case that the plaintiff had not discharged the burden of proof which lay on him to establish the losses which he claimed and to contend that the trial judge's conclusions were correct, or at any event unappealable, in light of the evidence actually led. The case made in oral argument was in similar terms.

Treatment of Trial Judge's Conclusions on the Evidence on Appeal

48. There was no dispute and in fact very little discussion on the appropriate approach for an appellate court to take to conclusions drawn by a trial judge on the evidence adduced at a

plenary hearing. As the issue was not disputed, I do not propose to set out the law extensively, but I will summarise the relevant principles to frame the discussion which follows.

49. Firstly, in the trial before Meenan J. the plaintiff bore the onus of proof even though it was a re-trial directed after his successful appeal. In order to discharge this onus, the plaintiff had to adduce evidence before the trial judge and, absent agreement (which was not forthcoming), he could not rely on the transcript of evidence given by witnesses at the original hearing. Equally, the plaintiff could not rely on documentary evidence, including valuations, without calling the relevant witnesses to prove those documents. Putting the contents of unproven documents to witnesses in cross-examination does not prove those documents unless the witnesses accept not just that the plaintiff's experts had created those documents but also the contents of them. In other words, the correctness of a valuation is not established merely because a witness acknowledges that another valuer is recorded as having placed that value on the vessel. However, the plaintiff is entitled to rely on the evidence of the defendant's witnesses and, in deciding whether the plaintiff has met the burden of proof on him, the court can look to the evidence adduced as a whole.

50. On appeal, an appellate court is bound by findings of fact made by a trial judge which were supported by credible evidence regardless of the view the appellate court may take as to the weight of any contrary evidence. An appellate court should be slow to interfere with inferences drawn by a trial judge from primary facts which have been proved by oral evidence but may take a different view on an inference drawn from circumstantial evidence (*per Hay v. O'Grady* as endorsed in *M.C. v. F.C.*). The rationale for these principles is that as the trial judge has had the benefit of hearing and observing witnesses while giving evidence, he is in a better position to make findings as to the reliability of that evidence than is an appellate court which must of necessity work from a transcript of the same evidence.

51. These basic principles are subject to a number of important qualifications. Findings of fact may be disturbed where they are not supported by relevant evidence as can an inference which is not supported by the evidence from which it is drawn. Findings of fact can be disturbed where there has been a significant and material error in the assessment of the evidence or a failure to engage with significant elements of the evidence put forward (*Wright v. AIB Finance & Leasing Ltd.*). Further, the extent to which findings of fact will be immune from review on appeal will depend on the extent to which the trial judge has engaged with the evidence and has come to a reasoned conclusion on key elements of the case made by both sides (*Doyle v. Banville*). It was on this basis that the plaintiff succeeded in his first appeal.

52. It has since been clarified that to ground a successful appeal the evidence which is not engaged with *"must go to the very core, or essential validity of the findings"* (*Leopardstown Club Limited v. Templeville Developments Limited*). Again, it is not simply a question of there being contrary evidence which might support an alternate conclusion but of there being no explanation provided by the trial judge as to why certain evidence was preferred over other evidence which resulted in his reaching the conclusion under appeal. Needless to say, this imposes a high threshold on an appellant seeking to overturn factual findings made by a trial judge.

Analysis of Factual Findings

53. Bearing these principles in mind, what are the key factual findings made by the trial judge? On the issue of the value of the boat his conclusions were as follows, at para. 24 he expressly did not reach a conclusion as to the price paid by the plaintiff for the vessel nor the value of any improvements done to her, noting that the plaintiff's evidence had to be treated with caution. At para. 25 he recited the plaintiff's evidence regarding the valuation

of the vessel for insurance purposes at €600,000 in 2004 and the plaintiff's attempts to sell her at that price in 2006. He expressly held that the value placed by the plaintiff on the vessel in 2006 did not assist the court in assessing its value in March/June 2008.

54. At para. 26 of the judgment the trial judge acknowledged that the value of the vessel was dependent on its condition and that this was an issue on which there was conflicting evidence. In para. 27 he found as a matter of probability that the vessel was not in a good condition, preferring the evidence of Captain Hopkins, Mr. O'Driscoll and Mr. Finn. To support this conclusion, he relied on three factors namely the limited fishing history of the vessel; the need for improvements which financially the plaintiff was not in a position to carry out and finally he held: *"given the Plaintiff's financial and medical conditions at the time, together with views which he expressed to Mr. John Finn, I am satisfied that the Plaintiff had not maintained the vessel in good condition."*

55. In paras. 28 and 29 the trial judge stated that a potential purchaser would not buy a boat *"at a price that could not be justified"* even if there were a ready market as a result of decommissioning. He noted that the plaintiff did not adduce valuation evidence whereas the respondent did. Finally, at para. 30 the trial judge observed that he would be justified in concluding *"that the vessel at the relevant time had no value"* but went on to hold that even in a poor condition it had some value and, based on the evidence of Captain Hopkins and Mr. Daly, placed a value of €25,000 on the Atlantic Mariner as of March/June 2008.

56. In respect of the claim for loss of use, at para. 21 the trial judge accepted the existence of a market for leasing fishing vessels of this type but as regards this particular vessel, held that *"were the vessel to be leased, improvements would have to be carried out"* and that *"the plaintiff was not in a position to carry out such improvements"*. He then referred to a number of factors which, presumably, would have made the vessel more difficult to lease (its poor fishing record and past engine trouble) but does not expressly make a finding to this effect.

More significantly at para. 22 he makes an express finding that the plaintiff, in conversation with Mr. Finn *"spoke words to the effect that the vessel would not be going fishing again and would be scrapped"*. He then relied on this, along with the plaintiff's health condition and financial difficulties, to find that *"the plaintiff was not seriously in the business of leasing the vessel"*. He concluded at para. 23 that the vessel *"was not going to be leased or used by the plaintiff himself for fishing"*.

57. Whilst many of the findings made by the trial judge are not seriously challenged and some of those which are, are clearly supported by relevant evidence, others were more contentious. The main point pursued by the plaintiff at the appeal hearing was that there was no engagement by the trial judge with the fact that at the time the vessel was lost it was fully licenced and had the benefit of tonnage and kilowattage. By extension, there was no engagement with the impact this had on its value. In my view, this complaint has merit.

58. Significant evidence was advanced as to the requirement for a commercial fishing vessel to be licenced and to be in possession of tonnage. The evidence also established that the market for the purchase or lease of a fishing vessel without the necessary licences and tonnage was significantly more limited than that for a vessel in possession of the necessary licences and tonnage. The low values discussed by Captain Hopkins and, it seems by Mr. Daly, relate to former fishing vessels without tonnage which were converted (or capable of being converted) for leisure or other uses. According to Captain Hopkins a fully working fishing vessel of the type and size of the Atlantic Mariner would be worth between €400,000 and €500,000 whereas a boat in a similar good condition but without tonnage would be worth between €15,000 and €20,000. In fact, in his report Captain Hopkins gave a somewhat higher estimate of between €15,000 and €50,000 and it is these latter figures which are quoted in the judgment.

59. The trial judge did not expressly differentiate between the potential value of the Atlantic Mariner as a fully licenced fishing vessel with tonnage and as a vessel *simpliciter* without the capacity to engage in commercial fishing. If it is to be inferred from his reliance on figures relating to former fishing vessels, presumably unlicensed and without tonnage, that his valuation is on the latter basis, then this would not seem to be a fair reflection of the vessel lost by the plaintiff in March June 2008. In my view, the presence of the licences, tonnage and kilowattage attached to the Atlantic Mariner cannot be stripped out of the value to be placed on the vessel as of 2008.

60. A second and related finding is also problematic. The trial judge's finding that the value of the vessel was dependent on its condition was amply supported by the evidence on both sides including that of Mr. O'Donovan and Mr. Nolan on behalf of the plaintiff. The condition of the Atlantic Mariner was a strenuously contested issue and the trial judge preferred the evidence of the respondent's witnesses in holding that it was *"not in good condition"*. This finding was relevant to both the valuation of the vessel itself and to the consequential claim for damages for loss of its use.

61. There was relevant evidence which supported the trial judge's finding that the plaintiff was not in a financial position to carry out the works necessary to put the vessel into a condition that would enable her to be leased for sea-fishing. However, no finding was made by him as to the actual level of works required to put the vessel into this "*good condition*". By extension, no finding was made which would justify an inference to the effect that the level of work required deprived the vessel of all meaningful value as distinct from presenting a financial hurdle which this particular plaintiff could not immediately meet in order to lease her.

62. In short, the trial judge seems to have equated *"not good condition"* with the vessel being worthless or almost worthless when it is very far from clear from the evidence that

this was so. The height of the evidence as to the vessel's poor condition related to it being *"rough looking"* (a point with which the plaintiff agreed but attempted to explain); to the concrete screed on the deck being cracked, broken and lifting with possible corrosion underneath (Captain Hopkins does not mention seeing rust whilst the boat was at the pier but only on his later inspection after she had been underwater for some time) and to some electronics and controls being missing from the wheelhouse and possibly from the fishing deck, although the engine, generator and sonar equipment remained *in situ* even after she foundered. The witnesses who gave this evidence had not conducted a full inspection of the vessel and were, therefore, largely commenting on her external appearance.

63. As against this, the plaintiff pointed out that the vessel had been provided with a new engine and sonar equipment in 2005 and had been fished for some 65 days in 2007 before being berthed at the pier in Baltimore. Further, Mr. Kearney gave evidence which was not contradicted that when he conducted a dive inspection in 2011, some three years after the vessel had foundered, she was basically sound and, in that context, in good condition. The trial judge does not engage with this aspect of the evidence. He does not attempt to quantify the extent to which issues of the type described in the respondent's evidence detracted from what would otherwise be the market value of the vessel without those defects. Instead, he appears to have treated these defects as rendering the vessel as all but unsaleable, a proposition which the evidence as a whole does not seem to support.

64. For these two reasons I am of the view that the conclusion reached by the trial judge as to the value of the Atlantic Mariner is not supported by the evidence before him. At a minimum the trial judge has not engaged fully with key aspects of the evidence on behalf of the plaintiff (including for example Mr. Kearney's evidence) before making findings contrary to that evidence. On this basis I would allow the plaintiff's appeal on the first issue.

65. I should add that many of the grounds of appeal advanced by the plaintiff as to the trial judge's treatment of the evidence as to the value of the Atlantic Mariner are not well founded. It was not erroneous of the trial judge to exclude previous valuations of the vessel which were not proved by the plaintiff in evidence. Nor was it erroneous to exclude the plaintiff's evidence of expenditure on the vessel when that evidence was extremely vague and unsupported by any independent witness or documentary evidence. There was no requirement for the trial judge to ascribe less weight to the evidence of witnesses for the respondent who were involved with the defendants in the proceedings bearing Record No. 2010/1600P especially as no finding of liability was made against those defendants in the original trial. Further, the precise expertise of each witness was properly made known to the trial judge and no basis was established upon which he should have disregarded or ascribed less weight to the respondent's witnesses because they were not themselves fishermen.

66. The second issue, damages for loss of use, is somewhat more complex. Insofar as the plaintiff advanced a ground of appeal based on exchanges at trial to the effect that the trial judge was of the view the plaintiff could not claim for both the value of the vessel on the date it foundered and for the loss of use of the vessel after that date, I have already noted that this is not actually the basis on which the claim for loss of use was decided. I accept that a claim can be legitimately made for both the loss of a commercial asset and the loss of use of that asset, particularly where compensation for the lost asset is not paid until many years after its loss. The person making the claim will have been deprived of both the capital value of the asset and the opportunity to make a profit from it during that period.

67. However, the fact the plaintiff was awarded damages for loss of the vessel itself was not the reason the trial judge made no award in respect of the loss of its use. Instead, there were two broad reasons for his decision on this issue. The first was that in order to lease the vessel the plaintiff would have had to carry out certain improvements and he was not in a

financial position to do these works. The second was that the plaintiff did not in fact intend to lease the vessel largely due to his health status and financial difficulties. In reaching this conclusion the trial judge relied on a statement made by the plaintiff to Mr. Finn in March 2008 to the effect that the vessel was going to be scrapped, apparently regardless of whether his application for decommissioning was accepted.

68. In fact, an examination of the transcript shows that this is not an accurate reflection of Mr. Finn's evidence. In his direct examination Mr. Finn was asked if in the course of a conversation between the two men at the time the vessel was arrested the plaintiff had said anything about his intentions regarding the vessel. He replied: *"He explained that he had applied for decommissioning and that hopefully the vessel would never again go fishing, basically that she'd be scrapped."* The plaintiff did not initially cross-examine Mr. Finn on this statement, but the trial judge raised it during that cross-examination. The trial judge put it to the plaintiff that Mr. Finn had given evidence that *"You said to him that you had applied for decommissioning, and I think words to the effect of "Well, if you didn't get the decommissioning, the boat would be scrapped""* and he invited the plaintiff to challenge Mr. Finn on this point. It will be apparent from the text of Mr. Finn's evidence-in-chief quoted above that he had not said the boat would be scrapped if the plaintiff did not get decommissioning. Rather he said the plaintiff had expressed a hope the vessel would be scrapped linked to his decommissioning application. There was nothing in Mr. Finn's evidence-in-chief to suggest that the plaintiff had expressly said the boat would be scrapped regardless of the outcome of that application.

69. The plaintiff immediately denied having said this, as indeed he had when something similar had been put to him by counsel for the respondent in cross-examination. In fact, the version of the conversation put to the plaintiff in cross-examination did not clearly suggest that he intended to scrap the vessel regardless of the outcome of the decommissioning

application. Instead, it was put to him that he had said he was finished with fishing and would not care if he never saw the vessel again. The plaintiff disputed this and confirmed that what he had told Mr. Finn was that in the event the vessel was decommissioned, it would be scrapped.

70. Returning to Mr. Finn's cross examination, there followed an exchange between the plaintiff and the trial judge in which the plaintiff continued to dispute the version of Mr. Finn's evidence that the trial judge put to him on a number of occasions. The trial judge then questioned Mr. Finn who repeated that the plaintiff had told him he would not be going fishing with the vessel anymore and that the vessel would be scrapped. When the plaintiff attempted to qualify this and to clarify that the vessel would only be scrapped if it were decommissioned, the judge intervened on the basis this was not what Mr. Finn had said. The matter concluded by the trial judge stating that he would have to resolve this conflict. In his judgment he purported to do this by preferring Mr. Finn's evidence over that of the plaintiff.

71. In the case of a conflict of evidence a trial judge, who has heard and observed the witnesses giving evidence, is not just entitled to but in many instances must choose the evidence of one witness over another in order to resolve the case. However, in such circumstances there is a particular onus on the trial judge to accurately record what each witness has said so that the nature and extent of the conflict is clearly delineated. In this case the trial judge ascribed to Mr. Finn evidence which he did not actually give and then preferred that evidence to the plaintiff's account of the same conversation. In reality there was little or no conflict between the plaintiff's position and what Mr. Finn actually said. The plaintiff had applied for decommissioning and, if that application were to have been successful, as the plaintiff no doubt hoped it would be, the Atlantic Mariner would have been scrapped. As the trial judge appears to have relied on an intention on the part of the plaintiff

to scrap the vessel no matter what to conclude that the vessel was not going to be leased by him in the future, it follows that the plaintiff's appeal on this issue must also succeed.

72. I should note that I do not accept the grounds of appeal advanced by the plaintiff against the other findings made by the trial judge under this heading. The financial evidence available to the High Court amply supported the finding that the plaintiff was not in a position to carry out the improvements necessary to put the vessel into the condition required in order to lease her (even accepting, as I have above, that the level of improvements required did not mean that the vessel was worthless). The plaintiff did not settle his significant debt with his bank until after the bank had sold the tonnage associated with the vessel in July 2013. The plaintiff's own witness, Mr. O'Donovan, agreed that in practice the vessel could not be leased without its tonnage. This means that the plaintiff's ability to pay for works to be done to the boat thereafter is irrelevant as the leasing market attested to by Mr. O'Donovan depended on a boat being fully licensed and in possession of tonnage.

73. In light of these conclusions the plaintiff's appeal must succeed. This gives rise to an issue as to what this court should now do as regards the plaintiff's claim. Generally, where an appeal succeeds on the basis of errors in the trial judge's assessment of the evidence, the appropriate course of action is for the Court of Appeal to direct a re-trial, as this Court did in 2018. However, the position here is somewhat unusual.

74. The events giving rise to the proceedings occurred in 2008, nearly sixteen years ago. There have already been two plenary trials and two appeal hearings. Even though liability is no longer in dispute, the cost of a further plenary hearing and the time it would necessarily take for that hearing (and any subsequent appeal) would seem disproportionate in light of the potential value of the claim. As against this there were serious shortfalls in the plaintiff's evidence but in light of the position adopted by the plaintiff (for example in respect of documentation) it is perhaps unlikely that this would improve on a further re-trial.

Nonetheless, the shortfall in the evidence adduced presents significant difficulties to this Court, as it indeed it did for the trial judge.

75. Fortunately, this Court does not have to make a decision as to whether to direct a re-trial. The plaintiff's counsel expressly invited this Court to value the claim rather than returning the matter to the High Court. Counsel for the defendant, whilst expressing some concerns as to the very generalised nature of the evidence, agreed that this was the best course of action. Consequently, I will proceed to assess the plaintiff's claim on the basis of the evidence that was before the High Court.

Value of the Atlantic Mariner in March/June 2008

76. The staring point in an assessment of the value of the Atlantic Mariner as of March/June 2008 is to acknowledge that at that time she was a fully licenced sea-fishing boat in possession of tonnage and kilowattage which, in principle, permitted her to engage in commercial fishing. It seems that the value of a vessel with these licences is greater than the value of the vessel without tonnage plus the value of tonnage since, in practise without tonnage the vessel cannot be used for its intended purpose regardless of its size, age or general condition.

77. The plaintiff did not adduce formal evidence of the value of the boat. The court cannot treat as evidence the plaintiff's account of the value placed on it by third parties after surveys in 2004 or in 2011 as the individuals in question were not called to give evidence and their reports were not agreed. Equally, the fact that the boat was insured for between €600,000 and €700,000 in 2006 (the plaintiff's evidence varied as to the precise figure) does not establish that this was its actual value although it may give some indication of a general range. The plaintiff's own assessment of the value of the boat either when he placed it for

sale in 2006 or at trial is, as the trial judge held, of little assistance in the absence of evidence supporting that assessment.

78. The plaintiff's evidence of the cost of the vessel and amounts subsequently expended by him on work to her is also of little assistance as, for the reasons already explained, this evidence has to be treated with considerable caution. In any event, for the most part the plaintiff simply ascribed round figure estimates to the cost of works done at particular times. The exception to this is evidence of the cost of replacing her engine in 2005. I also accept that additional sums were spent on equipment at the same time and while those sums were not proven nor quantified, the fact of it purchase is consistent with the boat being basically sea-worthy in 2007 and 2008. Whilst some of the works identified might qualify as improvements which would enhance the value of the vessel (such as the building of a shelter deck and the installation of sonar equipment and a transducer), the plaintiff did not provide specific figures for the cost of those items. He did not distinguish between works which might qualify as improvements and works which clearly would not such as routine maintenance or, for example, the replacement of a broken engine.

79. Both the plaintiff's and the defendant's witnesses were agreed that the value of the vessel, whether for sale or for leasing purposes, depended on its condition. The evidence also established that the vessel was not in *"good condition"* insofar that it was not in a condition that would make her readily leasable. However, the respondent's evidence of the defects to the vessel (which I have already set out) did not in my view establish that the vessel was so defective that she was deprived of all but a negligible value. Rather, the evidence of Mr. Kearney established that she was fundamentally intact and therefore sea-worthy, albeit that she needed work done to her deck, the replacement of at least some electronic equipment and general tidying up and maintenance. This is consistent with the fact that the boat had been fished for 65 days in 2007 before being brought to pier in

Baltimore and had ceased fishing because of problems with the captain and crew rather than with the boat itself. Therefore, I think that in the circumstances the correct approach is to attempt to value the vessel as of March/June 2008 and then to deduct the likely costs of doing the works which would have been necessary to put her to sea again.

80. As the value of the vessel is intertwined with the value of its tonnage, it is also necessary to take account of the fact that the value of the tonnage was actually realised in 2013 and was used to reduce the plaintiff's indebtedness to his bank. No evidence was given as to whether the value of the tonnage varied between 2008 and 2013. Therefore, the Court can only assume that the value recovered for it in 2013 represents the full value of the tonnage attached to the vessel in 2008. That figure must also be deducted from the value of the boat as the plaintiff has already received the benefit of it.

81. In his evidence the plaintiff suggested that the fishing licences (polyvalent and pelagic) also had a value independently of the vessel to which they were attached. The mechanism of such licences having a discreet value is less clear-cut, especially when regard is had to the fact that a vessel with a polyvalent licence automatically received a pelagic licence if it was less than a certain length. In any event no evidence was adduced by the plaintiff as to the value of such licences in 2008 and vastly contradictory evidence was given as between the plaintiff and his own witness as to the value of a tier 2 pelagic licence in 2021/2022. It also seems to be the case that the plaintiff had given his pelagic licence to his brother in exchange for a guarantee of his outstanding loans from the bank (up to a value of €280,000). In all of the circumstances the plaintiff has not discharged the onus on him to establish the connection between the polyvalent and pelagic licences and the value of the vessel much less the value of those licences in 2008.

82. This brings us to the core issue as to the value of the vessel at the material time. As indicated, the plaintiff did not adduce evidence from a valuer or anyone who had surveyed

the vessel. He himself produced a comparator, a boat of apparently similar size and age which was on the market at the time of trial for an asking price of €1.1m. The plaintiff was unable to say what the value of that boat would have been in 2008 (some 14 years earlier). Mr. Nolan gave evidence that two boats with tier 2 mackerel licences (i.e. a generally similar size to the plaintiff's boat) in that Co-Op's fleet had been sold in the preceding three months for in excess of €3m. in both cases and that another boat, the Syracuse, without a mackerel licence, was then for sale for €1.3m. (this may be the same boat the plaintiff referred to).

83. The respondent called two witnesses who gave valuation evidence. In reverse order, Mr. Daly, an auctioneer, said that age, design, general history and condition were all factors which he would take into account when valuing a vessel of this nature. He expressed the view that there would not have been a big demand for this vessel and described a negligible value to it in circumstances where he said there were a lot of vessels for sale. By way of comparators, he introduced five roughly similar vessels which he had placed for auction in 2005 and only one of which had sold (for €12,500). However, it seems that all (perhaps bar one) of these vessels were being sold without their tonnage and so were not comparable to the Atlantic Mariner in that respect. Further, 2005 prices might not accurately reflect 2008 prices given that the reduction of the size of the fleet due to decommissioning is likely to have had some upward influence on the value of the remaining licenced vessels with tonnage.

84. In my view the evidence of the respondent's other witness as to valuation, Captain Hopkins, is key. Captain Hopkins indicated that a vessel could be valued separate from its tonnage, or it could be valued with its licences and tonnage. He then gave two different estimated values. He said that a fully working vessel with valid licences and good tonnage would, at the material time, have been worth *"somewhere in the region of €400,000 or €500,000"*. In his view, a boat in good condition without tonnage was worth between

€15,000 and €20,000 (although as I have noted this is somewhat less than the value he ascribed in his written report). In cross examination, he suggested that even with an improved market due to decommissioning, the plaintiff's boat would not have been attractive to purchasers because it was known to be *"troublesome"*. It *"hadn't fished a whole lot in the previous few years and therefore didn't have a good record"*.

85. When all of this evidence is taken into account the only evidence ascribing a 2008 value to a *"proper working boat with valid licences and good tonnage"* of the type and size of the Atlantic Mariner, is that of Captain Hopkins. Although this figure, of between €400,000 and €500,000, is noticeably less than the value ascribed by the plaintiff, the higher end of it is not entirely removed from the plaintiff's, perhaps optimistic, estimations. Therefore, I think it is reasonable for the Court to treat this figure as the basic value of the plaintiff's boat at the material time. Of course, to make an award of damages it is necessary to fix the point within that range which is reflective of where the plaintiff's vessel is likely to have fallen. I do not think the Atlantic Mariner would have fallen at the highest end of this range for two reasons. Firstly, in a relatively small market I accept the thrust of Captain Hopkin's evidence that the known difficulties with the boat and its poor fishing record would have impacted on the price potential purchasers were likely to pay. Secondly, I accept Mr. Daly's evidence that the fact that the vessel was of an American design and build and, thus, different in some respects to a locally designed and built boat would have had some slight deflationary effect on the price a purchaser would be minded to pay for it or perhaps on the pool of potential purchasers. Taking both of those factors into account I think the basic value of the vessel as of March/June 2008 was at the middle of this range, i.e., €450,000.

86. From that figure the amount recovered by the plaintiff's bank when it sold the tonnage in 2013 must be deducted. The price recovered for the tonnage was €241,550. When that amount is deducted the basic value is €208,450. However, that is not the end of matters as

Captain Hopkins's valuation is dependent on the vessel not merely having a valid licence and good tonnage but also been a proper working boat in good condition. Therefore, the cost of the works which would have been required to put the boat back into a seaworthy condition must also be deducted. This element is very difficult to evaluate as the parties were not in agreement on the condition of the boat nor on the works which would be required to put it back to sea (the respondent having presumably taken the view that as the vessel had no value it would not be worth doing those works to it).

87. In evidence, the plaintiff suggested that all was required was to replace the small generator which had been reconditioned and to put a skim of concrete on the deck which would cost maybe €200 or €300. I do not think this estimate is in any way realistic. During the appeal hearing the plaintiff's counsel suggested that the appropriate cost of the works which would be required was €20,000. This is obviously a far more realistic estimate, but I do not think it necessarily reflects the full value of the works that would be required. This estimate is likely to reflect, albeit at a somewhat more realistic level, the plaintiff's account of the works required. The plaintiff's view of these matters is something which, for reasons already explained, has to be treated with caution. Further, on the balance of probabilities I think that a significant amount of electronic equipment had been removed from the wheelhouse of the boat and would have to be replaced.

88. At minimum the necessary works included clearing the old deck surface, treating any rust, reskimming with concrete, replacement of electronic equipment, installation of a small generator, general tidying up and repainting and, apart from labour or contractor charges, there would be harbour charges and a period when the vessel could not be fished. I am also cognisant of the age of the vessel (1980) and evidence that the plaintiff gave as to the high cost of refitting the vessel in 1989 (US$200,000), 1998 (€200,000) and 2005. Therefore, I am going to ascribe a value of €40,000 to the works which would have to be carried out in

order to make the Atlantic Mariner a fully working fishing vessel. When that figure, €40,000, is deducted the value of the Atlantic Mariner as of March/June 2008 is €168,450.

Loss of use

89. That leaves the assessment of the damages to which the plaintiff is entitled for the loss of use of the Atlantic Mariner, if indeed he is entitled to any such damages. At the outset I think some parameters can be put on the scope of this claim. Firstly, the vessel was under arrest at the time it was lost. Therefore, it was not open to the plaintiff to use it and he cannot claim damages for the loss of its use until the arrest warrant was discharged following settlement of the debt to which it related. That occurred on 29 October 2008. Further, once the plaintiff's bank sold the tonnage attaching to the boat in July 2013 in practice the vessel could no longer be used for commercial fishing whether by the plaintiff or by any person to whom he wished to lease the boat as a fishing vessel. Therefore, the total period under consideration in respect of which the plaintiff might have suffered damages by reason of been unable to use his boat runs from 29 October 2008 to 19 July 2013, i.e., a period of just under five years.

90. Of course, it does not necessarily follow that the plaintiff actually sustained a loss during this period. The claim was rejected by the trial judge for two reasons. I have already held that it was a misconstruction of Mr. Finn's evidence to hold that the plaintiff intended to scrap the vessel in 2008 regardless of whether his application for decommissioning was accepted. However, the other basis upon which the trial judge held that the plaintiff could not claim damages for loss of use seems to me to remain valid and is supported by the evidence at the re-trial.

91. I accept the evidence of the two witnesses called by the plaintiff in this regard. I accept Mr. O'Donovan's evidence that there is a market, particularly a Spanish market, for the

leasing of fishing vessels and that after decommissioning the monthly value of such leases could have reached €9,000 or €10,000 per month. However, Mr. O'Donovan also confirmed that to be leased, the vessel would have to have a licence, tonnage and kilowattage and that it would have to be of a reasonable standard for a potential lessee to be interested in taking a lease. I also accept the evidence of Mr. Nolan as to the potential income that a leased fishing vessel could earn on an annual basis when fishing somewhere in the region of 160 – 200 days per year, i.e. a net profit of €232,000 per year. Again, it has to be supposed that in order to earn those sort of figures the vessel has to be in good working condition.

92. The issue is not really how much the Atlantic Mariner could have earned if she was in good working condition in 2008 and subsequent years but whether the plaintiff would have been in a position to put her into that condition. I am satisfied on the basis of the evidence and on the balance of probabilities that he would not have been. At the time the boat was lost the plaintiff was experiencing both significant health difficulties and significant financial problems. I accept that the plaintiff did not himself personally fish this vessel and that consequently his health difficulties did not preclude him taking an active role he might otherwise have taken.

93. However, serious health issues can make it difficult for a self-employed business person to attend to all their business interests and the plaintiff himself admits that he was having serious difficulties at the time. His financial position was also intractable. Whilst the plaintiff asserts that he was asset-rich but cash-poor, the reality of the situation is that he was unable to pay the insurance premiums on an asset which he valued at between €600,000 - €700,000. He owed nearly €880,000 to his bank; his boat and its tonnage were mortgaged to the bank and BIM also had a mortgage registered on it for an additional debt of €63,000. He had given his pelagic licence to his brother. The plaintiff has not advanced any realistic basis upon which he could have raised the €40,000 which I have estimated would have been

required in order to put the Atlantic Mariner into a leasable condition - indeed he was unable to raise half that amount to pay his insurance.

94. Another factor of potential relevance is that both sides agreed that tonnage and kilowattage can be sold or leased independently of the vessel to which they are nominally attached. The foundering of the Atlantic Mariner did not deprive the plaintiff of the benefit of the tonnage attached to her. The plaintiff was under a duty to mitigate his losses and in principle it was open to him to lease that tonnage and to avail of its value even while he was suffering the loss of use of his vessel. He did not do so. The reason offered for this appears to be two-fold. The plaintiff said in evidence that he was hoping his claim would be resolved and that he would be in a position to buy another boat and to use the tonnage in connection with that boat. This may be so but does not explain why he did not lease the tonnage whilst the claim remained outstanding.

95. Separately, the documentation from the plaintiff's bank suggests that in 2009 the plaintiff sought the permission of the bank to lease the tonnage but this was refused. However, this request was not entirely straightforward as the plaintiff's proposal appears to have been that he would retain the income from the proposed lease rather than pay it to the bank to set off against his debts. The terms of the security held by the bank over the plaintiff's tonnage were not discussed in evidence and therefore the Court does not know whether these terms precluded the plaintiff from leasing his tonnage whilst awaiting the resolution of his claim against the respondent. In any event, it seems the fact that the plaintiff did not gain any commercial advantage from the value of his tonnage between 2008 and 2013 is not exclusively – and perhaps not even primarily - attributable to the respondent's negligence but is due in large part to the plaintiff's own actions and decisions. Any award in respect of loss of use would have to be reduced to reflect this.

96. In addition, the plaintiff has not established in evidence a case as to the income generating capacity of the Atlantic Mariner prior to its sinking. He adduced absolutely no evidence of either the income generated from previous leases (of which there were only two) nor of the income generated while it was being fished by captains and crew employed directly by the plaintiff. No accounts have been provided to the Court nor Revenue returns nor any other basis upon which the Court could realistically estimate what the plaintiff's loss of income - assuming he had carried out the repairs - might have been.

97. Finally, whilst I accept Mr. Nolan's figures as a hypothetical calculation of what a leased fishing vessel can earn, even if the Court were to treat the Atlantic Mariner as capable of being leased, serious regard would have to be paid to the fact that in the years preceding its loss the plaintiff had not managed to operate the Atlantic Mariner in a commercially profitable manner. In short, the plaintiff has not discharged the onus of proof on him to establish that he suffered a financial loss arising from the loss of the use of the Atlantic Mariner between October 2008 and July 2013. Consequently, I award no damages under this heading.

Costs

98. I am conscious that there is a cross-appeal on the issue of costs also before the Court. No argument was heard on this aspect of the appeal in circumstances where it was appreciated by both sides that the Court's decision on the assessment of damages might well have a bearing on the issue of costs both in this court and those under appeal from the court below. In those circumstances I propose to allow the parties a period of 2 weeks to consider the issue of costs and to indicate whether they require a further hearing on this matter.

99. As this judgment is being delivered electronically, my colleagues, Haughton and O'Moore JJ, having read this judgment, have indicated that they agree with it and with the orders proposed.