Neutral Citation: [2016] IEHC 584

THE HIGH COURT

[2007 No. 4129P]

BETWEEN:

BARRY ENGLISH

PLAINTIFF

-AND-

NIALL O'DRISCOLL, GEAROID O'DRISCOLL AND DAN MURPHY, A FIRM PRACTISING UNDER THE STYLE AND TITLE OF NIALL AND GEAROID O'DRISCOLL & COMPANY ACCOUNTANTS AND REGISTERED AUDITORS, ODM ASSET MANAGEMENT LIMITED AND LIBERTY ASSET MANAGEMENT LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 25th day of October 2016.

Introduction

1. This is a professional negligence action by the plaintiff ("Mr. English") against the defendants, a firm of accountants. The case concerns a tax based investment scheme relating to fishing boats. By investing IR£2,250,000 in the scheme in June of 2001, Mr. English was entitled to set off, against his income, certain capital allowances on the purchase of the boats and thereby reduce his personal income tax bill.

2. Mr. English is an engineer and is the founder and managing director of a successful engineering company. The first three named defendants are partners in an accountancy firm in Bandon, Co. Cork, Niall & Gearoid O'Driscoll & Company. The first and second named defendants are sued in their capacity as partners in that firm but the main complaint is against the third named defendant ("Mr. Murphy"), the third partner in the firm. A notice of discontinuance against the fourth and fifth defendants was filed on the 28th May, 2008.

3. A key issue for the consideration of the Court in this case is whether the investment scheme amounted to an attempt by Mr. English, with the assistance of Mr. Murphy, to incorrectly claim capital allowances from the Revenue Commissioners ("the Revenue"). This issue was not raised by the parties, but was raised by the Court during the course of the hearing. From the parties' perspective however, the key issue is whether Mr. Murphy was guilty of professional negligence in obtaining a vendor's valuation of the boats being purchased by his client, Mr. English. This is because the valuer of boats, Casebourne & Southern Limited ("Casebourne & Southern"), was asked by the vendor of the boats to value the boats which Mr. English was buying as part of the investment scheme. It is alleged by Mr. English that this valuation was fraudulent as the valuation ascribed to the boats was approximately IR£1,227,421 greater than their market value. Mr. English claims that if Mr. Murphy had obtained a valuation from an independent valuer (i.e. someone who had not been sourced by the person selling the boats), the boats would not have been overvalued and he would have been saved from overpaying by some IR£1,227,421 for the boats.

4. For the reasons set out in this judgment, this Court finds that Mr. English and Mr. Murphy were engaged in an investment which was designed to unlawfully obtain capital allowances from the Revenue. It is for this reason that this Court will not make any order against Mr. Murphy for alleged negligence in connection with the financial advice and services he provided to Mr. English in relation to that investment scheme.

The Background to the Investment Scheme

5. The rationale for the investment scheme was provided by the extension of the incentives for the renewal of Ireland's white fish fishing fleet by the Finance Act, 2001. This scheme provided that the purchaser of a fishing boat was entitled to set off 100% of the purchase price of the boat against his income and in this way reduce his tax bill. This was achieved over a 5 year period, as each year 20% of the purchase price of the boat was set off as capital allowances against an individual's personal income tax bill. It was necessary for the boat to be fished during the period in which the capital allowances were claimed and so it was imperative not only that the boat be purchased by the investor (in this case Mr. English), but also that the boat be used for fishing. The fisherman in this proposed scheme was Mr. Brendan McGrath ("Mr. McGrath"). The apparent purpose of the tax breaks was to encourage fishermen to renew their fleet by granting attractive capital allowances on the purchase price of vessels. In this case, Mr. English provided the capital for the purchase of two boats and the tonnage which attaches to a fishing boat. The tonnage is necessary in order for the boat to land fish.

The parties and their advisers

6. Mr. English was introduced to Mr. Murphy by Mr. Ian Lawrie ("Mr. Lawrie") of Liberty Asset Management Limited. Mr. Murphy, as an accountant and financial adviser, was involved in negotiating the structure of the investment scheme on behalf of Mr. English, with Mr. Mossie Power ("Mr. Power"), the accountant to Mr. McGrath and Mr. Randal Doherty ("Mr. Doherty"), the solicitor to Mr. McGrath. The solicitor to Mr. English was Mr. Sean Whelan ("Mr. Whelan") of Whelan Solicitors, who had been recommended to Mr. English by Mr. Murphy on the basis that Mr. Whelan had experience of the fishing industry. Two firms of tax advisers were involved in advising on the scheme, Barr Pomery and Robson Rhodes. Mr. English's investment was financed by AIB. The legal advisers to AIB were Barry C. Galvin & Son Solicitors. In addition to these advisers, Mr. English was further assisted by his own personal solicitor, John McDonald of F.H. O'Reilly & Co ("Mr. McDonald"), who reviewed the documentation for the scheme, but who was not paid for this work. Mr. English's personal accountant, Mr. Stephen O'Halloran ("Mr. O'Halloran") of the Hopkins O'Halloran Group also provided advice to Mr. English. This was because Mr. O'Halloran attended to Mr. English's tax returns and he ensured that the scheme made sense in the context of Mr. English having sufficient income to claim the capital allowances. Both Mr. McDonald, solicitor and Mr. O'Halloran, accountant acted as personal advisors to Mr. English (since the solicitor and accountant advising on the scheme itself were Mr. Whelan and Mr. Murphy, respectively) and accordingly they fulfilled background roles in advising Mr. English in relation to the transaction. Finally, the company used by Mr. McGrath for the purposes of providing the fishing services was called EiraPiscado Limited.

Mr. English - a successful business man who pays attention to detail

7. Mr. English is a successful businessman as evidenced by the fact that when contemplating investing in this scheme, some 16 years ago, he was confident that he would have income of approximately IR£380,000 for each of the following five years (since this level of income was necessary in order to use up the capital allowances of IR£380,000 per annum). He is a fastidious individual, as is evidenced by the five page attendance of his meeting with Mr. Murphy and Mr. Whelan at Cork Airport on the 23rd May, 2001 (the "Attendance"), to discuss, *inter alia*, the completion of the investment and the legal documentation. This Attendance records that

Mr. English raised matters such as Mr. McGrath fishing outside the jurisdiction and the difficulties of enforcement against him under the agreements in those circumstances, he sought a break down of Mr. McGrath's fishing plan and he raised the issue of life insurance for Mr. McGrath.

8. This attention to detail is particularly evident in relation to costs. Mr. English gave evidence that he negotiated with AIB directly in relation to the reduction of the arrangement fee from 1% to 0.5%. It is apparent Mr. English is also very numerate, since in his own evidence he stated that he was able to make his own assessment of the audited accounts of Mr. McGrath, without the need of assistance from his own personal accountant, Mr. O'Halloran.

9. It was clear from the evidence of both Mr. Lawrie and Mr. English that Mr. English had invested in an earlier investment scheme prior to 2001 which had been promoted by Mr Lawrie. As a result he intimated to Mr. Lawrie that he was interested in investing in tax based schemes which would facilitate a reduction of his personal tax bill. The scheme at issue was one such scheme and to Mr. English its primary attraction was that it was a tax based scheme.

10. For all these reasons, it was clear to this Court that the tax breaks and therefore the tax allowability of the vessels and the tonnage, and as well as the tax allowability of professional fees and costs would have been to the forefront of Mr. English's mind in approaching this investment, which is an important backdrop to a consideration of the issues that arise in this case.

Financing of the investment
11. Mr. English drew down a bank loan on 6th June, 2001, from AIB Bank in the sum of IR£2,250,000, which he invested in the scheme to acquire the two fishing boats, the Avro Hunter and the Dun Eochalla, as well as 301 tonnes of tonnage which was attached to the Dun Eochalla. The valuations of the two boats obtained from the valuers Casebourne & Southern stated that the Avro Hunter had a value of IR£1,500,000 and the Dun Eochalla had a value of IR£400,000, giving a total of IR£1,900,000, which was duly paid by Mr. English. Additionally, Mr. English paid IR£350,000 for the tonnage, so that the total amount paid by Mr. English was the full sum of IR£2,250,000, which he obtained from AIB to fund the investment.

Allegations of sham purchasers, sham valuations and sham structures
12. The investment scheme, for which the legal documentation was completed on the 1st June, 2001, had at its core what Mr. English describes in his statement of claim in these proceedings as '*a sham and a fraud*'. This is because the documentation for the investment scheme gave the impression that the two boats and the 301 tons of tonnage were being bought by Mr. English from a third party purchaser (a Norwegian company called Myra Mat A/S) for use by Mr. McGrath. However, the reality was that these three assets were already owned by Mr. McGrath, in the case of the Dun Eochalla and the 301 tons of tonnage since 1986 and, in the case of the Avro Hunter it was subject to a purchase agreement in favour of Mr. McGrath. This purchase agreement was dated 11th May, 2001, and pursuant to its terms, Mr. McGrath agreed to purchase the Avro Hunter for IR£648,957 from a Dutch partnership (even though, as noted, it was valued at IR£1,500,000 and thus was being bought by Mr. English within a month at this price). Uncontroverted evidence was given by Mr. English that Myra Mat A/S owned a sweet shop in Norway and had no connection with the fishing industry. No evidence was given on behalf of Mr. Murphy to controvert the allegation by Mr. English that the transaction was a sham and a fraud. Indeed, Mr. Murphy gave no direct evidence at all, whether in relation to the alleged sham transaction or indeed the alleged overvaluations of the boats for the purposes of the claim for capital allowances. The person who signed the Memorandum of Agreement for the sale by Myra Mat A/S of the two boats and the tonnage, as a director of that company, was Mr. Doherty, who was Mr. McGrath's solicitor. Mr. Doherty was not called as a witness to give evidence as regards his role in this transaction and Mr. McGrath was not called to give evidence in relation to this sham transaction, insofar as it purported to give the impression that Myra Mat A/S was the owner of the two boats and the tonnage.

13. The apparent purpose of the tax allowances was to encourage fishermen to renew their fleet. However, one of the many curious aspects of this case is that one of the two boats acquired by Mr. English, for use by Mr. McGrath, the Dun Eochalla, was in fact already owned by Mr. McGrath for the previous 15 years. In reality therefore, the investment scheme did not lead to a renewal of his fishing fleet. Based on the evidence produced to this Court, it seems clear that both boats were sold, allegedly by Mrya Mat A/S, but actually by Mr. McGrath, to Mr. English on the 1st June, 2001. It is possible that the sham transaction interposed was to give the impression to the Revenue that the Dun Eochalla and the Avro Hunter and the tonnage had been bought from a third party. However, this is not something that this Court needs to decide.

The prices paid for the boats v. their market value
14. The purchase price paid by Mr. English for the Dun Eochalla was IR£400,000 (even though its value in Mr. McGrath's accounts for the year 2000 stated that it had a value of £154,981, but more significantly, it seems its market value in 2001 was lower still, since when it was eventually sold on by Mr. English, it was sold for around €30,000 (IR£23,622). The purchase price paid by Mr. English for the Avro Hunter was IR£1,500,000 (even though it had just been purchased by Mr. McGrath for IR£648,957). As noted hereunder, the nub of Mr. English's complaint is that the prices he paid for the boats was supported by valuations which he contends were fraudulent since they did not reflect market value.

The use of a 'support vessel' for the main boat
15. Another curious aspect to this case is the fact that two boats were purchased as part of the investment scheme, yet one boat had tonnage attached to it and the other one did not. The tonnage of the older boat, the Dun Eochalla (which was built in 1955) was transferred to the more modern boat, the Avro Hunter (built in 1984) as part of the investment scheme, since a boat cannot land fish unless it has tonnage. As the Dun Eochalla had no tonnage after this transfer, it could not land fish and was essentially confined to shore. Despite this fact, Mr. English gave uncontroverted evidence that he was told by Mr. Murphy that the Dun Eochalla would collect fish from the Avro Hunter at sea and thereby eliminate the need for the Avro Hunter to waste valuable fishing time coming into shore. This evidence of Mr. English is also consistent with the Long Investment Proposal (which is referred to hereunder, and which document was issued by Mr. Murphy), which states that the Dun Eochalla will operate as a '*support vessel*' to the Avro Hunter. Expert fishing evidence, provided by Mr. Denis O'Flahery at the trial, indicated that such an arrangement would be highly unusual and that in any case it was not possible for the Dun Eochalla to undertake this work since it did not have tonnage.

16. While the reasons for this strange characterisation of the Dun Eochalla are irrelevant to the Court's determinations, a possible reason is that it would have been harder for the promoters of this investment scheme to justify a capital expenditure of £1,900,000 to the Revenue for just one boat (since the Avro Hunter had just been bought on the open market for IR£648,957), whereas this level of expenditure in relation to two boats might be easier to justify and the use of this apparent fiction of a 'support vessel' or a 'tender vessel' was something which might be accepted as plausible by those who were not in the fishing industry, including the Revenue.

Professional valuations of the two boats
17. Even though the Avro Hunter was subject to a purchase agreement dated 11th May, 2001, for IR£648,957 between a Dutch family partnership and Mr. McGrath, it was sold on the 1st June, 2001, to Mr. English (allegedly by Myra Mat A/S but in reality by Mr.

McGrath) for £1,500,000. After Mr. English paid the £1,500,000 to Mr. McGrath's solicitor (who appears to have signed the sales documentation in favour of Mr. English as a director of Myra Mat A/S), part of these funds were then used to enable Mr. McGrath complete the purchase of the boat from the Dutch partnership in early June 2001. The core of Mr. English's case is the fact that even though the boat was agreed to be sold at arms' length in May 2001 to Mr. McGrath for £648,957, a professional valuation was obtained also in May of 2001 from Casebourne & Southern for the purposes of Mr. English purchasing that very same boat as part of the investment scheme but their report put a value of £1,500,000 on the boat.

18. As regards the Dun Eochalla, the valuation of this vessel is also a cause of considerable complaint for Mr. English. This boat was valued in May 2001 by Casebourne & Southern, as part of Mr. English's investment in the scheme, at £400,000, even though its true value appears to be IR£23,622, since this was the price obtained when subsequently sold by Mr. English. Mr. English therefore alleges that the market value of the two vessels at the time of the investment in June 2001 was circa £672,579 (i.e. IR£648,957 plus IR£23,622) while the valuation placed upon them, and the amount paid for them by Mr. English, was £1,900,000, a difference of £1,227,421 in relation to the two boats.

Valuation of the tonnage
19. It is crucial to an understanding of what was going on in this investment scheme, to note that Mr. English understood from Mr. Murphy that the tonnage had a value of IR£800,000, even though he was only paying £350,000 for it. In his evidence he stated that he asked a chartered accountant friend of his to conduct research on the market value of tonnage. In this way Mr. English satisfied himself that the tonnage was in fact worth IR£800,000. In his evidence, Mr. English indicated that he regarded the fact that he was getting tonnage worth £800,000 for a purchase price of only IR£350,000 as part of the overall reason for him to invest in the transaction. In his evidence, he stated that he regarded the £450,000 bonus as Mr. McGrath's '*skin in the game*' and his counsel categorised it as Mr. English's '*safety net*' for his decision to invest in the scheme. This Court will come back to the significance of this overvaluation of the tonnage later in the judgment.

Net tax benefit to Mr. English of investment scheme
20. It is also important to an understanding of this case to note that the purchase price paid for the tonnage was not tax deductible. Of the total purchase price of £2,250,000 invested by Mr. English in the scheme for the two boats and the tonnage, only £1,900,000 paid for the two boats was tax deductible. The tax relief attaching to the £1,900,000 was 100% deductible over 5 years at a rate of £380,000 per annum. With a tax rate of the order of 42% in the years 2001-2006, this meant that the net benefit to Mr. English was approximately £159,600 per annum. Over a period of five years, this amounted to a total net tax benefit to Mr. English of around £798,000. Thus, this was the 'cash' value of the investment from Mr. English's perspective or to put it another way, Mr. English's investment of £2,250,000 led to a return which was the equivalent of the Revenue writing him a cheque for £798,000 approximately.

The Operation of the Scheme as set out in the Documentation
21. There were two investment proposals produced outlining the basis of the investment scheme. The first document was entitled "Draft Investment Proposal" which appears to have been drafted by Mr. Power, the accountant to Mr. McGrath. This was a one page summary of the scheme and sent to Mr. Murphy under cover of Mr. Power's letter dated 6th February, 2001 (the "Short Investment Proposal"). The second document is also entitled "Draft Investment Proposal" and it is a six page summary of the scheme and was sent by Mr. Murphy to Mr. Sean Whelan (Mr. English's solicitor) on the 21st March, 2001 (the "Long Investment Proposal"). It seems likely that Long Investment Proposal was prepared by Mr. Murphy using the Short Investment Proposal which he had received from Mr. Power and some personal information about Mr. English which Mr. Murphy had obtained from Mr. English. Also relevant to an understanding of the scheme is a two page document entitled "Proposal re Fishing Boat Avro Eagle", which was sent by email by Mr. Murphy to Mr. English on the 12th March, 2001, outlining the pros and cons of the investment scheme (the "Pros & Cons Document"). The reference to the 'Avro Eagle', rather than the 'Avro Hunter' in the title of the document is not significant and may have been the name that was intended to be used for the boat, before deciding to use 'Avro Hunter'.

22. Based on these three documents which set out the details of the investment scheme, and also the documentation executed on the closing of the investment on the 1st June, 2001 (including, a Management & Operational Agreement, a Put and Call Option Agreement, a Share Option Agreement, Declarations of Trust and a Deposit Account Agreement), the investment scheme was to operate by Mr. English buying the two fishing vessels and the tonnage for £2,250,000 (apparently from Myra Mat A/S, but in fact from Mr. McGrath) and thereby becoming the beneficial owner of these three assets. Mr. McGrath was to be given legal ownership of these assets during the five year period, while Mr. English obtained his capital allowances. At the end of the five year period, Mr. English was entitled to oblige Mr. McGrath (through his company, EiraPescado Limited) to buy back the beneficial interest in the three assets, pursuant to a Put and Call Option Agreement, using a company called BE Fish Limited and by the use of a Share Option Agreement. The price in the draft Put and Call Option Agreement which was produced in evidence was £2,250,000. In broad terms therefore, Mr. English was to buy the two boats and the tonnage for £2,250,000 (apparently from Myra Mat A/S, but in fact from Mr. McGrath) and sell them back at the end of the end of the five years to Mr. McGrath for the same price, after he had obtained the capital allowances attaching to the purchase of the two boats. The net benefit to Mr. English over the five years would have been a tax benefit of about IR£798,000. It was thus an attractive tax-based scheme for Mr. English, if it had gone according to plan. However, it did require Mr. McGrath to have the funds to buy back the two vessels and the tonnage at the price agreed at the end of the five years, which was not the case as Mr. McGrath ran into financial difficulties.

The Reasons for this Litigation
23. Under the scheme, the interest on the loan which was taken out by Mr. English to pay for the two boats and the tonnage was to be paid off by the income from the fishing trade being carried on by Mr. McGrath. Within the first year or so of the commencement of the scheme Mr. McGrath experienced financial difficulties. As a result he was not in a position to meet the repayments which were required to pay back the interest on Mr. English's loan. This also meant that Mr. McGrath would not be in a position to buy back the assets at the end of the five year period. In September 2003 Mr. English had to take control of the assets, well before the expiry of the five years, and arrange for a different fisherman to work the fishing vessel. It also led to Mr. English having to sell the assets himself, rather being able to compel Mr. McGrath to buy them back under the Put and Call Option Agreement. He obtained a total of €1,175,436 for the Avro Hunter and the tonnage as part of a Government decommissioning scheme and it seems he obtained €30,000 (IR£23,622) salvage for the Dun Eochalla. In total therefore, Mr. English obtained €1,205,436 approximately for the two boats and the tonnage, even though they had been valued at £1,900,000 (the two boats) and £800,000 (the tonnage), a total of £2,700,000/€3,429,000, a difference of €2,223,564.

Mr. English's core complaint against Mr. Murphy
24. When Mr. English bought the boats in June of 2001 they had a combined market value of £672,579, but he paid £1,900,000 for them based on valuations to that effect. Mr. English complains that Mr. Murphy obtained valuations of two boats which were over-valued by £1,227,421. He alleges that this overvaluation arises from the fact that Mr. Murphy used valuations from Casebourne & Southern, which had been requested by Mr. McGrath, the seller of the boats and were vendor valuations rather than independent valuations. According to Mr. English, if Mr. Murphy had obtained truly independent valuations, the boats would have been valued at

their market value, not the inflated valuations which Mr. English alleges are fraudulent. Mr. English is not alleging in these proceedings that Mr. Murphy was party to any fraud, but rather that he was negligent in obtaining a vendor's valuation, rather than a truly independent valuation.

25. Mr. English is claiming, *inter alia*, damages from Mr. Murphy for negligence in his decision to accept the valuations of the Avro Hunter and the Dun Eochalla when it was stated on the face of both of those written valuations from Casebourne & Southern that they were made '*at the request of Mr. Brendan McGrath*'. It is clear from the evidence that Mr. Murphy, in his role as the accountant/financial adviser to Mr. English in relation to his investment in the scheme, had agreed to obtain valuations for the two vessels. While the valuing firm, Casebourne & Southern appears to be an independent firm of valuers, the valuations were obtained on the instruction of Mr. McGrath who was the seller of both boats (since he was the owner of one of the boats for 15 years and had contracted to buy the second boat). No evidence was produced on behalf of Mr. Murphy that he believed Myra Mat A/S was the true owner of the boats or to controvert the evidence of Mr. English that the role of Myra Mat A/S as the alleged vendor was a fiction. Indeed, the Short Investment Proposal received by Mr. Murphy states that the Dun Eochalla was owned by Mr. McGrath and the Long Investment Proposal, which was sent out by Mr. Murphy to Mr. English's solicitor expressly stated that Mr. McGrath was the owner of the Dun Eochalla. Thus, it seems clear that Mr. Murphy was aware that Mr. McGrath was the owner of at least one of the boats. Accordingly, Mr. English is of the view that it was negligent of Mr. Murphy to obtain a valuation of an asset being bought by his client (Mr. English), where that valuation, and the valuer providing it, had been sourced by the vendor of the asset. In Mr. English's own words, he "*wouldn't accept a vendor's valuation from anybody*" and as such, it was negligent of Mr. Murphy to do so in this instance.

If the scheme had gone according to plan

26. It is relevant for an understanding of this case to consider what would have occurred if the scheme had gone according to plan. Mr. English paid £1,500,000 for the Avro Hunter when its market value was £648,957. He says that he believed that he was buying that boat from a third party (Myra Mat A/S) for use by Mr. McGrath to fish that vessel. In reality, he was buying that boat from Mr. McGrath at a sum of £851,043 over its apparent market value. Similarly, Mr. English says he believed that he was buying the Dun Eochalla for £400,000 from a third party (Myra Mat A/S) for use by Mr. McGrath. In reality, he was buying that boat from Mr. McGrath at a sum of around £375,000 over its apparent market value.

27. In addition however, Mr. English paid £350,000 for tonnage, which was actually worth £800,000. In light of the £1,900,000 paid for the two boats and the £350,000 paid for the tonnage, Mr. English's total investment was £2,250,000, but based on the apparent valuations of the boats at £1,900,000 and the valuation of the tonnage at £800,000, Mr. English believed that these three assets had a combined value of £2,700,000, which was well in excess of the £2,250,000 he was paying for them. In his evidence, Mr. English maintained that he believed that he was paying market value for the two boats, but that he knew that was underpaying for the tonnage by £450,000. He gave evidence to the effect that he believed that in paying £2,250,000 for the two boats and the tonnage, he was getting assets that were worth £2,700,000 and he said this gave him added security to make the investment.

28. There appears to be no dispute between the parties that the tonnage was in fact worth £450,000 over what was paid for it. While Mr. English had verified from a chartered accountant that the tonnage was worth £800,000, he stated in evidence that his comfort in relation to the valuation of the boats was being provided by the fact that independent valuations were provided as part of the transaction from professional valuers, Casebourne & Southern. According to Mr. English's evidence, in the event of Mr. McGrath not honouring his obligations or the venture being a failure, his security was his ownership of the two boats and the tonnage, which he believed were worth in excess of the price he had paid for them.

29. If Mr. McGrath's fishing business had not suffered financially, the scheme is likely to have worked very successfully for all concerned, save of course for the Revenue. This is because at the end of the five years, Mr. English could have obliged Mr. McGrath to purchase back the two vessels and the tonnage for in or around IR£2,250,000 as agreed under the Put and Call Option Agreement. At that stage, Mr. English would have received his net tax benefit of £798,000 from the Revenue and would have gotten his full purchase money back.

30. If the scheme had gone according to plan, the fact that the purchase price/valuation of the boats was significantly over-valued would have been irrelevant because the boats and the tonnage would have been sold back to Mr. McGrath at the same price as Mr. English had paid for them (or a very similar price, since in his evidence Mr. English indicated that while the Put and Call Option Agreement provided for a repayment of £,2,250,000, it seemed that Mr. English's understanding was that he would be getting back slightly less than this amount, some £2,040,000, from Mr. McGrath). It is also important to note that it would have been irrelevant that Mr. English believed that he had bought the vessels and tonnage from Myra Mat A/S, since the important issue from a tax perspective is that he became the owner of the boats (which duly occurred), irrespective of whether he had bought them from Mr. McGrath or Myra Mat A/S.

31. The only loser in this scenario would have been the Revenue. This is because valuations and a purchase price of IR£1,900,000 were ascribed to assets with a market value of IR£672,579, and so were overvalued by IR£1,227,421. As a result capital allowances were incorrectly granted by the Revenue on IR£1,227,421.

32. It goes without saying that if the scheme had gone as planned, Mr. English would not have instituted proceedings, since he would have gotten his full capital allowances as well as receiving back from Mr. McGrath the £2,250,000 based on the fraudulent valuations of the three assets and the Revenue would be none the wiser. In this regard, the scheme as it was supposed to have operated, appears to this Court to have been a way to mislead the Revenue into giving inflated tax breaks without any loss to the participants.

Potential Illegality

33. It was alleged by Mr. English in his statement of claim that at the heart of this investment scheme it was '*a sham and a fraud*'. Mr. English alleged in his evidence that the valuations of the boats were fraudulent and that the use of Myra Mat A/S was fraudulent. Mr. Murphy gave no direct evidence to controvert these allegations. He gave no evidence in the case, and no evidence was produced on his behalf which controverted these allegations. It seems to this Court, that having heard all the evidence and before hearing legal submissions, it was, at the very least, arguable that the following was a description of this investment scheme:

• a figure was picked that a taxpayer could set off against his annual income;

• that sum was then attributed to certain assets which are tax deductible;

• fraudulent valuations of tax deductible assets were obtained to reflect the desired values which bore no relation to the market value of the assets;

• a taxpayer bought those assets at that inflated value;

• a sham transaction was interposed in the sale of the assets to give the impression that the assets were purchased at arms' length from a third party;

• there was an underpayment made on other assets that were not tax deductible (tonnage) so that the taxpayer had the security of knowing that, while overpaying on the tax deductible assets (the boats), overall the taxpayer not be overpaying on aggregate for the three assets. (Although of course, in this case, the reason this matter is in court is because the investor overpaid *so much* on the boats that the underpayment on the tonnage did not compensate for the overpayment on the boats);

• the taxpayer obtains the capital allowances on the inflated values over five years;

• the taxpayer gets to sell the assets back to the person he bought them from, at the same inflated value at the end of the five years and so the fact that the values are inflated has no effect upon the taxpayer;

• it is only the Revenue that suffers from this inflated value, since it has granted capital allowances on assets that have been deliberately overvalued.

Raising of issue of illegality by the Court
34. It is against this background that the Court raised, at the end of the evidence, an issue that was not raised by any of the parties during the hearing, namely the effect of a finding by this Court that the parties were involved in an arrangement to unlawfully obtain capital allowances. It was clear to this Court that valuations, which Mr. English has claimed were fraudulent, were obtained. It was also clear to this Court that the Revenue had granted Mr. English substantial capital allowances arising from his purchase of assets based on those valuations. This Court believes that it was obliged to consider this issue, even where the parties themselves, as in this case, have not pleaded the issue. In reaching this decision, the Court relied on the High Court decision of *McIvenna v. Ferris & Green* [1955] IR 318. At p. 322 O'Daly J. stated:-

> "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him."

In the case before this Court, this Court raised the effect of a finding of illegality on the proceedings with the parties at the end of the evidence of the witnesses and before legal submissions were exchanged. This Court has no hesitation in raising the issue itself, since as noted by Finnegan P. in *Anderson v. Cooke* [2005] 2 IR 607 at p. 615, the Court may itself raise this issue for the following reason:-

> "As the issue historically was policy based I consider it appropriate that the court may itself raise the issue even if the defendant does not: there are cases in which the court has regarded it as contrary to policy to lend assistance to a plaintiff involved in a joint illegal activity even though the defence of *ex turpi causa* is not raised by the defendant by way of defence – I recall an action for an account of a joint venture between two highwaymen."

Indeed, in cases where there is a possibility of the Revenue being defrauded and where there is nobody in Court representing the taxpayer, as will often be the case, it is this Court's view that it is the duty of the Court to be alive to illegal transactions, since the parties themselves are unlikely to call evidence which might damage their case and may even seek to conceal their true intentions. If the Court does not look out for the interests of the taxpayer, by being alive to transactions which are designed to defraud the Revenue, the parties themselves are unlikely to do so.

Analysis of the Illegality Issue
35. This Court has referred to certain evidence which raised the possibility of Mr. Murphy and Mr. English being involved in a scheme which unlawfully claimed capital allowances and led to this Court seeking submissions from the parties on this issue. The remainder of this judgement will deal with evidence relating to this issue and the level of knowledge of Mr. Murphy and Mr. English of the true nature of the investment scheme and in particular some of the curious aspects of this case and the conclusions that can be drawn from same.

Fraudulent Valuations and Fictitious Vendor
36. Mr. English has provided sworn evidence that the valuations in this case were an '*obvious fraud*' and that the involvement of Myra Mat A/S was '*a fraud and a sham*' and he produced evidence in support of this allegation. No evidence has been provided by Mr. Murphy to controvert these two allegations. The fact that Mr. Murphy failed to give evidence entitles this Court to draw inferences from that fact. In the Supreme Court case of *Whelan & Lynch v. AIB* [2014] IESC 48, at para 90, O'Donnell J., stated that:-

> "The drawing of an inference in this context, as indeed in any other, is an exercise in logic: when one party asserts a given set of affairs, which the identified witnesses available to the other party could be expected to rebut if untrue, then, if the second party does not call those witnesses to give evidence, the court *may* draw the inference in support of the case made by the first party, that those witnesses were not called to give such evidence because they would not in fact rebut the case made by the first party."

Based on this passage, and indeed based on the sworn testimony and evidence provided by Mr. English, this Court infers that the claim for capital allowances in this case from the Revenue was, on the balance of probabilities, based on a sham and a fraud. Indeed, it appears beyond doubt that both parties accept that the capital allowances were obtained by Mr. English based on monies paid by him which were based on fraudulent valuations of two boats. Having so concluded, the next step is to consider whether Mr. Murphy and Mr. English were aware of this fact, such that they were willing participants in this sham and a fraud. If so, this will prevent this Court offering any assistance to Mr. English in his attempt to recover from Mr. Murphy for his alleged negligence in the investment scheme, which, at its heart, was a sham and a fraud.

Mr. Murphy's knowledge of the true nature of the scheme
37. This Court is of the view that, on the balance of probabilities, Mr. Murphy knew that there was a fraud at the heart of this claim for capital allowances from the Revenue and reaches this conclusion based on the following factors:-

(i) Mr. Murphy had a role in fixing the values for the boats and tonnage
38. As the recipient of the Short Draft Investment Proposal and the sender of the Long Draft Investment Proposal, it is clear that Mr. Murphy knew that Mr. McGrath was the owner of Dun Eochalla. It is unclear from the documentary evidence produced to this Court

whether he knew that Mr. McGrath was the owner of the tonnage and the Avro Hunter. However, whether Mr. Murphy knew that Mr. McGrath was the owner of one, two or three of the assets being purchased by his client, Mr. English, it is most curious, to say the least, that in his role as financial adviser to Mr. English, he would send a fax dated 19th March, 2001, to Mr. McGrath (who was, it must be remembered, on the other side of the transaction, as the seller of the three assets) in the following terms:-

> "Brendan,
>
> as per telephone call Finance requirement for the Bank
> MFV Avro Hunter £1,400,000
>
> MFV Dun Eochalla £500,000
>
> Tonnage £350,000
>
> £2,250,000"

This fax was sent a full two months before the vessels were '*independently valued*' by a marine surveyor as specified in the Long Draft Investment Proposal, which valuation issued on the 28th May, 2001. It was also issued before the '*draft*' valuation was issued by Casebourne & Southern on the 25th April, 2001.

39. As already noted, by this stage, Mr. Murphy was aware that the Dun Eochalla was owned by Mr. McGrath, since he had received confirmation of this fact from Mr. Power in the Short Draft Investment Proposal on 6th February, 2001. Therefore, if ever there was evidence that this was not an ordinary transaction between an accountant on one side of a transaction (acting for Mr. English) and a business man (Mr. McGrath) on the other side selling an asset, where the value of the asset was supposedly to be independently valued, this fax is it. This is because this fax dated the 19th March, 2001, from Mr. Murphy to Mr. McGrath is evidence of the fact that Mr. Murphy was supplying Mr. McGrath with the values to be affixed to the assets (which as previously noted were well over their actual value in the case of the boats, and well under their actual value in the case of the tonnage.)

40. Based on this fax, and the other evidence referred to in this judgment, this Court concludes that Mr. Murphy was actively involved in fixing incorrect valuations to the tonnage and boats and the '*independent valuations*' which were subsequently obtained were not market valuations of the assets, but rather valuations which matched the amounts which the investor (in this case, Mr. English) had available to invest.

41. In support of this conclusion, it is relevant to note that this fax, although dated 19th March, 2001, was sent on the 20th March, 2001, to Mr. McGrath, which is the very day when the Casebourne & Southern valuations state that the first inspections of the vessels for valuation purposes took place. For this and the others reasons set out herein, this Court concludes that, on the balance of probabilities, Mr. Murphy had decided in concert with Mr. McGrath that the vessels and the tonnage should be incorrectly valued in line with these figures, and the "Independent Marine Surveyor" would simply confirm the valuations so fixed between Mr. Murphy and Mr. McGrath.

42. This conclusion is consistent with the wording of the Second Draft Investment Proposal dated 21st March, 2001, which baldly states, not that an independent marine survey would be obtained which would certify the market value of the boats, but that "*An Independent Marine Survey will value the Vessels at £1,900,000*". The Casebourne & Southern valuations dated the 28th May, 2001, duly valued the two boats and the tonnage at £2,250,000 as set out in Mr. Murphy's fax, although it is to be noted that the final valuation of the Dun Eochalla was £400,000 and the final valuation of the Avro Hunter was £1,500,000 (a total of £1,900,000), rather than £500,000 and £1,400,000 (a total of £1,900,000), as per Mr. Murphy's fax of 19th March, 2001, although nothing turns on this. This Court concludes that the only plausible explanation for why Mr. Murphy was effectively affixing a value to the two boats and the tonnage to be purchased by his client, in this fax of the 19th March, 2001, before they had even been inspected by the independent valuers, is that he was a willing participant in the scheme which was ascribing false values to assets for the purposes of incorrectly obtaining capital allowances.

(ii) Role of Mr. Murphy in the amendment of the valuations

43. Casebourne & Southern issued their first valuation, which was a '*draft*' valuation, of the two boats on the 25th April, 2001. It was sent to Mr. McGrath and it gave a draft value of the Dun Eochalla and Avro Hunter at £300,000 and £1,100,000, respectively, a combined value of £1,400,000. The copy of the draft valuation contains hand written manuscript annotations, where the £300,000 valuation appears to have a suggested replacement of £450,000 and the £1,100,000 valuation appears to have a suggested replacement of £1,400,000 (which would give the two vessels a combined valuation of £1,850,000).

44. At around this time a checklist of actions appears to have been prepared by Mr. Murphy for Mr. English since it is entitled "*Client: Barry English*". That checklist is stated to be "Issue no. 5 – 30th May 2001" while Issue no. 4 is stated to be "21st May 2001" in the heading of the checklist. On this basis, it seems likely that this fifth version of the checklist was prepared sometime between 21st May 2001 and 30th May, 2001, which is after the draft valuation issued. This checklist states "*Marine Survey (in water condition) and Valuation of Vessels to be amended by Peter Southern, Casebourne and Southern Ltd, Co. Kildare*" and opposite this is a statement that this action is to be undertaken by "DM", which appears to be Mr. Murphy and no evidence was given to the effect that it might be someone else. As previously noted, on the 28th May, 2001, Casebourne & Southern issued a final valuation in the sum of £1,900,000 for both vessels.

45. It has already been noted that it is curious to say the least, that Mr. Murphy would have issued a fax to Mr. McGrath dated 19th March, 2001, with the valuation of £1,900,000 on the two vessels, a full month before the draft valuation emanated from Casebourne & Southern which valued the vessels at £1,400,000 (on the 25th April, 2001), which valuation was then amended a month later (on the 28th May, 2001) to give a final valuation of £1,900,000. What makes the matter more bizarre is that in the Checklist, which appears to have been prepared after the draft valuation issued, there is a reference to Mr. Murphy seeking the amendment of the draft valuation for the assets to be purchased by his own client, which valuation is then duly increased. It must be remembered that Mr. Murphy is apparently seeking to increase the valuation/price being paid by his own client for an asset. Since the figures provided by Mr. Murphy to Mr. McGrath by fax on the 19th March, 2001, end up being exactly the figures given by the 'independent marine valuations' to the two vessels, this documentation (whereby a professional valuer would issue a draft valuation of an asset and then re-issue a final valuation which is 35% higher, after the accountant for the buyer has apparently sought its amendment) provides further support for the Court's conclusion that Mr. Murphy was a participant in the scheme which was ascribing false values to assets for the purposes of incorrectly obtaining capital allowances.

46. The Court concludes from all of this that the price to be paid for the vessels in the investment scheme as set out in the Second Draft Investment Proposal, was based not on their true market value, but rather on an arbitrary price of £1,900,000 (which was £1,227,421 approx. greater than their market value) and Mr. Murphy was actively involved in having those vessels valued not at an independent arms' length value, but rather at this value of £1,900,000.

47. It is worth observing that from Mr. Murphy's perspective, he may have felt that even though the sum of £1,900,000 may have been in excess of market value, the process would end up being academic (and of no detriment to his client, Mr. English), since it could be claimed back in capital allowances and in any case under the Put and Call Option Agreement, the fact that the price paid was greater than the market value of the assets was not only academic, but actually was beneficial to Mr. English, since the greater the price paid (which he was to get back anyway under the Put and Call Option Agreement) the greater the tax benefit.

(iii) Mr. Murphy's meeting with tax adviser James Byrne on 23rd March, 2001

48. It is relevant also to refer to a meeting on the 23rd March, 2001, between Mr. Whelan, Mr. O'Sullivan (a solicitor in Mr. Whelan's office), Mr. Murphy and Mr. Byrne, a tax adviser. The attendance of the meeting states, *inter alia*, that:-

> "The valuation of the Boats was £1.9 million for the boats and £300,000 for the tonnage. James Byrne noted that this was capable of challenge by the Revenue".

This Court infers from this attendance that, as early as the 23rd March, 2001, Mr. Murphy was aware that the valuations of the boats at £1.9 million and the valuation of the tonnage at £300,000 (when it was worth £800,000) were likely to be challenged, as there was no basis for these valuations.

49. There are also two handwritten attendance note that appear to be written by Mr. Murphy. The first one is undated and states:-

> "Barry English – investor
>
> Brendan McGrath – operator
>
> 1. Two boats – both second-hand. Valuations 1.9 million +300
>
> 1.9 is high 300L is low
>
> extra tonnage?"

The second handwritten attendance note is dated 23rd March, 2001, and states:-

> "Barry English
>
> MFV Avro Hunter
>
> Tax Issues
>
> 1. Valuation of boats challenged by Rev.
>
> Value £1.9 million boat
>
> 3K tonnage – extra tonnage may be reqd."

50. These references in attendances to the boats being over-valued and the risk of a Revenue challenge provide further support for this Court's conclusion that Mr. Murphy did know about the fraudulent valuations and the consequent incorrect claiming of capital allowances and so was a knowing participant in structuring an unlawful arrangement to enable his client, Mr. English defraud the Revenue.

51. It is to be noted that Mr. English, in the face of this overwhelming evidence of Mr. Murphy's role in, and knowledge of, the overvaluations, persisted with his stance that he was not alleging that Mr. Murphy had any involvement in the fraud. However, as noted hereunder, Mr. English may not have wished to raise Mr. Murphy's degree of knowledge of the '*sham and a fraud*', since it would have raised questions about Mr. English's knowledge of it.

(iv) Mr. Murphy did not raise concerns about seller of boat being Myra Mat A/S

52. It is also relevant to note that at the closing of the investment on the 1st June, 2001, Mr. Murphy raised no issue regarding the fact that the seller of the boats and tonnage was a Norwegian company called Myra Mat A/S, even though Mr. Murphy knew that Mr. McGrath was the owner of the Dun Eochalla, since he had received the Short Investment Proposal which expressly states this fact. One explanation for why Mr. Murphy would not have raised this issue with his client, Mr. English, is that Mr. Murphy was aware of the fact that not only were the valuations a fraud but also that the alleged third party seller of the assets was a sham. It seems inconceivable that Mr. Murphy, who was so integral to the structuring of the scheme could have failed to remark upon the fact that the seller of the boats and thus the recipient of his client's funds was a Norwegian company and yet did not raise, at a minimum, queries regarding same, unless (as this Court thinks is more likely), Mr. Murphy was aware that Myra Mat A/S was not the true seller of the boats, but rather was interposed to give the impression (presumably to the Revenue) that the valuations of the boats and the tonnage were legitimate, on the grounds that they were being apparently purchased from a third party seller dealing at arms' length.

(v)Mr. Murphy gave no direct testimony in his defence

53. It is remarkable that Mr. Murphy provided no direct evidence from himself or his partners to defeat the claim of professional negligence against him. It appears to this Court that one likely reason for this remarkable failure to give any evidence in his defence to the professional negligence action against him is that his only credible defence to the evidence that was produced to the Court of his knowledge of the true nature of the scheme, would be to allege that Mr. English was also aware that the scheme was a sham and a fraud. The difficulty with such a defence is that it is likely to lead to the avoidance of any insurance policy that Mr. Murphy had in place to meet this claim. In contrast, the defence which he has mounted (i.e. that it was not negligent for an accountant to rely on a vendor's valuation), left the possibility of the unlawful nature of the scheme remaining hidden and if he lost on the negligence claim, his insurance policy would cover the claim, rather than him personally.

Mr. English's knowledge of the true nature of the scheme

54. This Court is of the view that, on the balance of probabilities, Mr. English knew, or ought to have known, that there was a fraud at the heart of this claim for capital allowances from the Revenue and reaches this conclusion based on the following factors (some of which are also relevant to the finding that Mr. Murphy knew about the true nature of the scheme):-

(i) Mr English's and Mr. Murphy's knowledge of the incorrect tonnage valuation

55. Mr. English has accepted in evidence that he knew the tonnage was undervalued by £450,000, since it was sold for £350,000, even though it was worth £800,000. The evidence shows that Mr. Murphy also knew that the tonnage was undervalued by this amount, since the Pros & Cons Document which he sent to Mr. English on the 12th March, 2001, states: "*Tonnage on boat worth approx. £800,000 easily marketable*", yet he knew that it was to be valued/priced at £350,000 for the purposes of the investment scheme (as evidenced, *inter alia*, by his fax of 19th March, 2001, to Mr. McGrath attributing the figure of £350,000 to the tonnage). There was thus an explicit under-valuation of the non-tax deductible asset by £450,000.

56. It is also appropriate to refer, at this juncture, to the fact that evidence was provided to this Court that Mr. McGrath was a successful business man at the time of the investment in 2001, as he was described in the Short Draft Investment Proposal as the "*largest and most commercially advanced operator in the Irish White Fish Fleet*." Against this background, it is relevant to note that Mr. McGrath sold an asset (tonnage) to a person who was also an experienced business man (Mr. English) for IR£450,000 less than its market value. As part of the same transaction, in which Mr. McGrath was willingly selling the tonnage (which it is important to note was not tax deductible) at significant undervalue, he was also selling two boats (which were tax deductible) at a significant overvalue. It is this Court's view that this statement need only be made for what should be obvious to become patently obvious. While in other proceedings, the expression '*follow the money*' may be appropriate to help understand the reasons certain actions are taken by participants in a venture, in this case, a more suitable expression might be to '*follow the tax breaks*'. Despite what, to this Court, appeared obvious (namely that there must be a connection between the undervaluation of non-tax deductible assets and the overvaluation of tax deductible assets in the same transaction), this connection received no attention from either party to these proceedings in this litigation.

57. To this Court it was the elephant in the room during the proceedings. When one follows the tax breaks this Court believes that one can find no plausible reason for an experienced business man such as Mr. McGrath selling an asset at such undervalue, other than for tax reasons. In this case, the tax reason was that for every pound that the non-tax deductible tonnage was undervalued and that the tax-deductible boats were correspondingly overvalued, the taxpayer, Mr. English, gained a benefit in his tax return.

58. Since Mr. English and Mr. Murphy knew the tonnage was undervalued, this Court finds that on the balance of probabilities, Mr. English, as an experienced business man, with an interest in tax based investments and as someone who was financially literate, and Mr. Murphy, as an experienced accountant, knew or should have known the true reason the tonnage was undervalued by £450,000. It is this Court's view the true reason was that if this £450,000 was instead attributed to the boats (and they were overvalued by that amount), Mr. English would get a tax break on this £450,000 that he would not have gotten from the Revenue if the tonnage had been correctly valued. For this reason (and the other reasons set out in this judgment), this Court concludes that the investment scheme which is the subject of these proceedings was a scheme which was set up by Mr. Murphy and knowingly participated in by Mr. English, which had as its aim the defrauding of the Revenue.

59. Of course, everything would have worked out for Mr. English and Mr. Murphy, if the two vessels were over-valued *only* to the extent of £450,000 for these 'tax purposes'. However, the sting in the tail was that when Mr. English tried to sell the two vessels he discovered that they had in fact been overvalued, not just by this £450,000 but by £1,227,421. It bears repeating that even this overvaluation of £1,227,421 would have worked out for Mr. English if the scheme had gone according to plan and Mr. McGrath had been in a position to buy back the boats and the tonnage after the five year period at this overvaluation. Due to a change in his financial circumstances, this was not possible.

Mr. English's explanation for the undervaluation of the tonnage

60. As this Court has concluded that not only did Mr. English know about the undervaluation of the tonnage (which he accepts was the case), but also that he knew the tax reasons for the undervaluation (the unlawful obtaining of capital allowances), it is important to refer to the reason Mr. English gave for his being able to buy an asset at a reduction of £450,000. He said that this £450,000 was Mr. McGrath's '*skin in the game*' and his counsel categorised it as Mr. English's '*safety net*' for his decision to invest in the scheme. This, he said was the reason for this undervaluation and Mr. English made no reference in his direct evidence to the coincidence of this undervaluation of £450,000 with the overvaluation of the two boats. Nor indeed, was there any cross-examination of him on this coincidence, but it is understandable that there would be no such highlighting of the potential illegality of the capital allowances by Mr. English or Mr. Murphy.

61. This Court does not find it plausible that an experienced business man, such as Mr. McGrath, would sell his assets at such undervalue. Business men do not become successful by selling an asset which is '*easily marketable*' and worth £800,000 for £350,000. This Court does not accept this explanation by Mr. English as credible. Indeed, even if it were true that this massive discount on the market value of one asset was an incentive for Mr. English to invest in the scheme, there is no plausible reason why it is just the tonnage, the asset which is not tax-deductible, which is subject to the discount and not the boats (the assets that are tax-deductible). It is this Court's view that the fact that it is just the non-tax deductible asset which is subject to this undervaluation highlights the true purpose of this undervaluation, namely it was an integral part of a scheme which was designed by Mr. Murphy with Mr. English's knowledge which over-valued a tax deductible asset and under-valued a non-tax deductible asset.

Mr. O'Halloran knew that the tonnage was undervalued

62. Further support for this Court's conclusion regarding Mr. English's knowledge of the true reason for the overvaluation of the tonnage is provided by the level of knowledge his own personal accountant, Mr O'Halloran of the *Hopkins O'Halloran Group*. Mr. O'Halloran was sent a copy of the Long Draft Investment Proposal by Mr. Murphy on the 27th April, 2001. This document contained the reference to the fact that the two vessels would be valued at £1,900,000, but it made an express reference to the fact that the tonnage had a value of £800,000 on the open market, yet the total price for the three assets was £2,250,000. This document received by Mr. O'Halloran therefore made clear that the tonnage was being sold at £450,000 undervalue.

63. The Court has already concluded that an experienced business man, such as Mr. English, who was interested in tax based investments, and who accepted in his evidence that he is able to interpret audited accountants without professional advice, would plainly see the true purpose of this valuation as being to unlawfully increase the capital tax allowances which arise from the investment. Even, if this were not the Court's conclusion, it is worth noting that Mr. English's personal accountant, Mr. O'Halloran, reviewed the Long Draft Investment Proposal for the purposes of making sure that Mr. English had enough income to set off against the capital allowances. It would be bizarre if an experienced accountant, whose role was to advise on Mr. English's tax position, did not immediately spot the relevance of the under-valuation of the non-tax deductible tonnage and conclude that the likely reason for that under-valuation was to ensure that the tax deductible assets were over-valued to the benefit of the tax-payer, Mr. English. In

this regard, Mr. English also stated in evidence that he would have discussed the scheme with Mr. O'Halloran before investing in it. Accordingly, it is this Court's view that it is likely that they would have discussed the reason for this undervaluation of the tonnage, which this Court has concluded was to incorrectly apportion the under-value on the tonnage to the tax deductible assets.

No independent valuation required by Mr. English of the tonnage

64. It is also relevant that Mr. English did not require an independent valuation of the tonnage, as he had done for the two boats. Instead, he received confirmation from Mr. Murphy that it was worth £800,000 and he had an acquaintance, who was a chartered accountant, confirm that this was so. However, he does not appear to have obtained an independent or formal valuation, upon which he could sue if the valuation of the tonnage proved to be incorrect. Rather, he was happy to rely on the valuation of Mr. Murphy of the tonnage and a confirmation from an acquaintance that this was so. Yet, in these proceedings Mr. English is alleging that Mr. Murphy was negligent to have allowed him to invest in the scheme without getting a formal and truly independent valuation of the boats from professional valuers. This is completely inconsistent with his own approach to the tonnage valuation.

65. It is also relevant to note that Mr. English does not complain in these proceedings that the valuation that was provided by Mr. Murphy of the tonnage at £800,000 was also fraudulent. This is of course because with the fraudulent valuation of the two boats Mr. English was the victim since he suffered as a result of the overvaluation, while with the incorrect valuation of the tonnage (which it is relevant to note Mr. English does not allege was fraudulent) he was the beneficiary, as he got an asset which was worth more than he paid for it and the only party to suffer was the Revenue.

66. It is also significant that Mr. English explained in his evidence that he was relying on the boat valuations as his security for his investment. As he explained it, he could sell the vessels (and the tonnage) if the scheme did not live up to expectations and based on these 'independent valuations' from Casebourne & Southern, he would be able to sell the vessels on the open market for £1.9 million. If this was indeed a correct representation of his approach to the valuations in entering the investment scheme, it is curious to say the least that he got no formal valuation of an asset (tonnage) that was worth £800,000 which was twice the 'value' of one of the boats (the Dun Eochalla). The only comfort he appears to have had in relation to the value of the tonnage was a conversation with an acquaintance. In particular, there was no formal independent valuation obtained upon which he might be able to sue if the valuation was incorrect. Yet, to support his negligence claim against Mr. Murphy, Mr. English made it clear that he was well aware of the importance when buying any asset of getting a formal independent valuation of that asset.

67. This Court believes that the clear inconsistency in approach between the two categories of assets, which it must be remembered were equally important as security for Mr. English in investing, can be explained by the fact that in reality Mr. English did not attach significance to the valuations of the boats (as he claims). This is because it is the Court's view that he knew they were over-valued for the purposes of his capital allowances claim (with a consequent undervalue being put on the tonnage). This would also explain why, although the value of the tonnage was also his 'security', he did not get a formal independent valuation of the tonnage. Indeed the existence of any such formal written valuation of the tonnage might have compromised his claim for capital allowances, since it would have shown the true value of the tonnage.

68. In this Court's view, the true worth of the Casebourne & Southern valuations of the boats to Mr. English was that these false valuations supported his Revenue claim for capital allowances, if the Revenue sought such valuations. The Revenue were never likely to look for valuations of the tonnage, since this was not a tax-deductible asset. It is this Court's view that Mr. English never expected to be relying on the boats as security, just as he did not expect to be relying on the value of the tonnage as security. This is why he never felt the need to get a formal valuation of the tonnage, since he expected to be selling the three assets back at the end of the five year period at the same price as he paid for them. This Court is of the view that his attitude to the valuation of the tonnage illustrates his true attitude to the valuations of the boats. Despite his claims to the contrary, this Court does not believe that he relied upon the Casebourne & Southern valuations as true values which provided him with security. On the balance of probabilities this Court is of the view that he knew the valuations of the boats were incorrect, just as he knew the tonnage price was incorrect. It is only now, after the whole scheme failed unexpectedly that he is seeking to attach such importance to the independent valuations of two of the three assets. It is this Court's view that Mr. English knew that the Casebourne & Southern valuations of the two boats were inflated by £450,000 (to take account of the undervaluation of the tonnage) and (as noted hereunder in the region of £100,000/£200,000 in respect of professional fees) – a total overvaluation of some £650,000. This was not of concern to him, since under the Put and Call Option Agreement, he was expecting to get the purchase price based on these inflated valuations back from Mr. McGrath. When the scheme did not proceed as planned, he was surprised to learn that the boats had not in fact been overvalued by £650,000, but they had been overvalued by £1,227,421 and because Mr. McGrath did not have the financial resources to pay back the inflated values, Mr. English was at a loss of some £1,227,421. However, the problem for Mr. English is that there is no remedy for someone who sought to use incorrect valuations of assets to unlawfully claim capital allowances, when it turns out that the valuations were overvalued much more than he expected.

(ii) No query by Mr. English's personal solicitor regarding the vendor valuation

69. One of Mr. English's core complaints against Mr. Murphy is that the valuations he obtained for the two boats were stated on their face to be given by Casebourne & Southern "*at the request of Mr. Brendan McGrath*". As such, the valuations were 'vendor valuations' and in Mr. English's view, it amounts to negligence for an accountant or other professional, such as a solicitor, to rely on a valuation of an asset procured by the person selling it, since this is not a true independent valuation.

70. However, a fax of 1st June, 2001, to Mr. English from Mr. McDonald, his personal solicitor, shows that Mr. McDonald had reviewed these very valuations which show on their face that they are vendor valuations (since Mr. McDonald commented on them in that fax to Mr. English). Thus, Mr. McDonald would have been aware that the valuations were obtained at the request of Mr. McGrath, yet apparently he did not regard this as significant, even though Mr. English regards it as a clear case of negligence for an adviser to a buyer of assets to rely on a valuation procured by the seller of those assets.

71. This raises the question of why would Mr. McDonald, an experienced solicitor, not have flagged what Mr. English says amounts to clear negligence, i.e. his client relying on a vendor's valuation? The Court believes that the most plausible answer to this alleged oversight by Mr. McDonald in not raising the fact that it was a vendor's valuation to his client is that there was in fact no oversight since it was likely to have been known (by Mr. English and Mr. McDonald) that the valuations were exaggerated for tax reasons for Mr. English's benefit. For this reason, a false vendor's valuation was as of much value as a false purchaser's valuation, since neither could be relied upon as they were not reflective of market value and were only obtained for 'tax purposes'. Accordingly, the fact that it was obtained at the request of the vendor was not a relevant issue to Mr. McDonald and it was not raised by him with Mr. English, because in this Court's view, Mr. English already knew it, or if it was raised by Mr. McDonald with Mr. English, Mr. English would have ignored it.

(iii) Mr. English's knowledge the Dun Eochalla was owned/operated by Mr. McGrath

72. Mr. Murphy's personal accountant, Mr. O'Halloran, was sent a copy of the Long Draft Investment Proposal by Mr. Murphy on the

27th April, 2001. This document states that "*Brendan McGrath currently operates 4 vessels, the MFV Dun Eochalla, MFV Avontuur, MFV Strongbow and MFV Avro Warrior*.' Thus, Mr. O'Halloran would have known that one of the vessels being bought by Mr. English was operated by Mr. McGrath. In this regard, Mr. English stated in evidence that he would have discussed the scheme with Mr. O'Halloran before investing in it. It is therefore likely that Mr. English was also aware of the fact that Mr. McGrath operated the Dun Eocahalla, as it was known to his agent, Mr. O'Halloran. Indeed, when Mr. Murphy was sending this Long Draft Investment Proposal to Mr. O'Halloran, a document he had not sent directly to Mr. English, it would have been reasonable for Mr. Murphy to assume that Mr. O'Halloran would show it or discuss it with Mr. English. Since Mr. English accepted in evidence that he knew that the tonnage was undervalued by £450,000, one source of this information was this Long Draft Investment Proposal, and it is likely that this is how he became aware of this crucial factor in his decision to invest in the scheme i.e. in discussions with Mr. O'Halloran about the scheme, after Mr. O'Halloran had received the Long Investment Proposal.

73. It is also relevant that Mr. English received the accounts of Mr. McGrath for 2000, prior to his investment in the scheme, and these listed the assets of Mr. McGrath as including the Dun Eochalla. They provided in the list of fixed assets that Mr. McGrath owned the Dun Eochalla which was listed as having a cost of IR£372,035 and after depreciation, a value of £154,981. Mr. English, on his own evidence, was financially numerate and he accepted that he would have been able to interpret these accounts without assistance. This Court concludes that he knew that the Dun Eochalla belonged to Mr. McGrath. Support for this conclusion is to be found in the Attendance of the meeting between Mr. Whelan, Mr. Murphy and Mr. English at the Cork Airport Hotel on the 23rd May, 2001, since it is apparent from the Attendance that Mr. English went through the Accounts in order to asses the personal assets of Mr. McGrath. The Attendance states:-

> "Personal assets of Brendan McGrath in his statement of affairs were analysed by Barry English he wanted to know what would his personal guarantees be supported by. There was no previous accounts furnished other than those up to June 2000. He wasn't at all happy with the personal assets displayed in the flares and in the fact that there was no up to date figures and he was also concerned that he had been operating for such long period of time and this seemed to show only a recent profit and wanted to know why was that. We are to check to see if there are other is any support being provided for his personal guarantee."

74. Bearing in mind the attention to detail which Mr. English possesses (as is evidenced by the detailed queries he raised on the investment scheme in this Attendance), this Court concludes that prior to the completion of this investment, Mr. English was aware that the Dun Eochalla was owned by Mr. McGrath, yet he signed a Memorandum of Agreement with Myra Mat A/S in which that company purported to sell the Dun Eochalla to Mr. English. Despite this fact, in his statement of claim in these proceedings, Mr. English states:-

> "[I] was furnished with documentation to suggest that the purchase price of the two boats, the MV Avro Hunter and the MV Dun Eochalla, was IR£1,900,000 and was paid to a Norwegian company called Myra Mat SA. This was untrue and the boats were not in fact in the ownership of the alleged vendor at the time. The said transaction was a sham and a fraud.
>
> In fact the MV Dun Eochalla was owned by Mr McGrath and the MV Avro Hunter was purchased by Mr McGrath for a significant significantly lesser sum."

75. Thus, when Mr. English signed documentation at the closing in June 2001, which transaction he now alleges was a sham and a fraud (on the grounds that Mr. McGrath should have been the vendor of the boats rather than Myra Mat A/S), it is clear to this Court that Mr. English knew, or should have known, at that time, that the Dun Eochalla was owned by Mr. McGrath. Yet these proceedings are premised on the basis that Mr. English believed that Myra Mat A/S was the true owner of the Dun Eochalla and he only discovered many years later that Mr. McGrath was the true owner.

76. It is possible that the reason he did not raise that issue of the involvement of Myra Mat A/S in the sale of a boat (which he knew was owned by Mr. McGrath) was because just as he has accepted in evidence that he knew that that the valuation of the tonnage was incorrectly overvalued (to the detriment of the Revenue), he also knew or did not care to ask whether the correct seller was on the documentation, also to the detriment of the Revenue, (since it gave the impression of an arms' length transaction).

77. In this Court's view, Mr. English had a significant degree of knowledge of the moving parts that made up this investment scheme that was designed to unlawfully claim capital allowances, namely the incorrect valuation attributed to the tonnage and the fact that Mr. McGrath was the owner of the Dun Eochalla, even though the transaction documentation gave the impression that Myra Mat A/S was the owner.

(iv) The incorrect attribution of fees and costs as capital allowances by Mr. English and Mr. Murphy

78. There is a dispute between Mr. English and Mr. Murphy regarding the fees which are due on the scheme. Mr. English believed that the fee was £160,000, while Mr. Murphy was of the view that the fee was £360,000. The discrepancy arose from Mr. Murphy's belief that in addition to the £160,000 to which Mr. English refers, he believed that he was to receive £200,000 out of the proceeds of £2,250,000 which was paid to Mr. McGrath's solicitor for the two vessels and the tonnage by Mr. English. It was claimed on behalf of Mr. Murphy that this £200,000 was to be used by him to discharge all the third party professional fees and other costs attaching to the investment.

Mr. Murphy's understanding of the fee arrangement

79. One of the few pieces of written correspondence from Mr. English to Mr. Murphy in relation to the transaction is a letter of retainer dated 29th May, 2001, from Mr. English to Mr. Murphy's firm. This letter states:-

> "Dear Sir/Madam,
>
> I hereby instruct Mr. Dan Murphy, Partner in the above Firm, to act on my behalf in relation to the financial and taxation considerations pertaining to the purchase of the Trawlers, The MFV Avro Hunter and The MFV Dun Eochalla and particularly in relation to the tax planning arising from such purchases in order to maximise the taxational and cash flow advantages to me and to employ such other third parties as may necessary to fully implement such tax planning. I agree a fee with Niall and Gearóid O'Driscoll & Company for the said project in the amount of £160,000. This fee is to be paid annually by way of five equal instalments commencing on 31st October 2002 to run until 31st October 2006. This fee is conditional on Barry English being granted capital allowances of the Fishing Trade."

It is to be noted first that there is no reference in that letter to any other adviser's costs, it is simply a reference to "*a fee with Niall and Gearóid O'Driscoll & Company for the said project in the amount of £160,000*". Yet Mr. English alleges that this letter was intended to refer to the fee for all the legal, tax and other professional advisers on the scheme. Secondly, it contains a condition

regarding the payment of the £160,000 fee. If this £160,000 were the only fee payable in respect of all the professional advisers and costs, as alleged by Mr. English, this would be a most unusual condition for an experienced business man to suggest in respect of professional fees. It would mean that independent tax and legal advisers with whom Mr. English does not appear to have any prior professional relationship, who were being engaged for this scheme on his behalf, would not receive their fee when the transaction closed, but rather over a five year period and only if the client obtained the capital allowances.

80. The evidence in support of Mr. Murphy's contention that, in addition to this fee of £160,000, he was due a further £200,000, is provided by a letter dated 31st May, 2001, from Mr. Doherty, solicitor to Mr. McGrath, to Mr. Murphy. It is relevant to note that Mr. Doherty, as Mr. McGrath's solicitor was going to be in receipt of the £2,250,000 purchase monies on completion of the investment in and around 1st June, 2001, and it seems clear that it is out of these funds that any payments (to which he refers) would be made. This letter states as follows:-

> "Re: Payment of Fees
>
> Dear Dan,
>
> I write to confirm that immediately upon completion of all necessary transactions involving the purchase Tonnage and the Vessels I shall remit to you the sum of £128,000 being the balance due from a total fee of £200,000.
>
> Yours faithfully".

81. The fact that this solicitor's undertaking was to remit £128,000, rather than £200,000 is explained by the fact that Mr. Murphy had lent Mr. English £72,000 to enable him complete the transaction and so there is a separate undertaking by Mr. Doherty in his letter of 1st June, 2001, to AIB and Mr. Whelan (Mr. English's solicitor) in relation to the £72,000. In this letter Mr. Doherty gives a solicitor's undertaking in the following terms:-

> "We undertake to remit to AIB Bank plc the sum of £72,000 from a total sum of £200,000 which shall be available to us the same being a loan from Niall & Gearoid O'Driscoll & Co., to Barry English".

It appears that upon receipt of the £72,000 from Mr. Doherty, AIB would pay back the funds lent by Mr. Murphy to Mr. English. Therefore, on the basis of these two separate undertakings, it seems clear to this Court that a total of £200,000 was to be paid to Mr. Murphy/AIB in respect of fees out of the purchase monies received by Mr. Doherty from Mr. English.

82. A subsequent letter, dated 28th January, 2002, written by Mr. Murphy to Mr. Power, the accountant to Mr. McGrath, stated:-

> "we must also discuss the matter of our on-going fee in this case for the maintenance of Management Agreements and preparation of Report and Accounts on an annual basis for the business".

This is further evidence that there would appear to be fees to be paid to Mr. Murphy from Mr. Power's client, Mr. McGrath, which could only have come out of the £2,250,000 paid by Mr. English.

83. Based on the foregoing documentation, this Court concludes that Mr. Murphy was aware that Mr. English's funds were the source of £200,000 of the fee of £360,000, the balance of £160,000 being paid by Mr. English to Mr. Murphy over five years if the capital allowances were received by Mr. English, as set out in Mr. English's letter of retainer to Mr. Murphy. Thus, while the Long Draft Investment Proposal issued by Mr. Murphy and all the other documentation at the completion of the investment (such as the Memorandum of Agreement for the sale of the two vessels and the tonnage) referred to a total purchase price of £2,250,000 for the three assets, it is clear that Mr. Murphy was aware that he would be receiving £200,000 of this sum to enable him discharge professional fees.

Mr. English's alleged understanding of the fees

84. Mr. English claims that he knew nothing about fees coming out of his investment and he believed that all the fees in relation to the scheme would be paid out of the £160,000. This Court does not regard Mr. English's version of events as credible (just as it does not find credible the suggestion that an experienced business man such as Mr. McGrath would sell him an '*easily marketable*' asset at £450,000 undervalue). Mr. English's position regarding these fees is not tenable in this Court's view. His stated position is that he believed that no fees were to come out of his funds of £2,250,000 since the two boats and the tonnage accounted for all of this figure. This would mean that under the terms of his retainer letter, all the professional advisers that were working for him on the investment scheme were not getting paid when the transaction was completed, but only over a period of five years and if he got his capital allowances. It is just not believable that the professional advisers, i.e. the solicitor who was acting for him (Mr. Whelan) who charged €15,871 excluding VAT ,the two separate tax advisers who provided tax advice (i.e. Robson Rhodes who charged €7,000 (excluding VAT) and Barr Pomeroy (whose fee note was not provided to the Court, the solicitors to the bank (Barry C Galvin & Son who charged €7,500 (ex VAT) as well as AIB's arrangement fee which was £22,500, would all agree that they would not get paid when the transaction had completed and would only get paid over five years if, and only if, Mr. English got his capital allowances.

85. As a savvy business man, Mr. English could not have believed that this was the case and it is this Court's view that his testimony in this regard is not credible. He either did know, or should have known, that the £2,250,000 that he was investing in the scheme was not attributable to boats and the tonnage, but rather that a portion of this investment would be used to pay off the fees of the various advisers and AIB.

86. It is this Court's view that a possible reason why Mr. English was reluctant to admit that this was the true position was because it would have involved an admission by him that the £2,250,000 purchase price he paid was not for the boats and tonnage solely, but also included fees and costs. This would have involved an admission by him that the valuation of the boats was not a true valuation, but rather a 'valuation for tax purposes' so as to give the impression that £1,900,000 was the price attributable to the two tax deductible boats, when in fact it actually included fees and costs even though these items were not capital expenditure and therefore should not have been subject to capital allowances.

87. When cross-examined about where the money was to come from to pay the fees for AIB in connection with his loan from AIB, the most that Mr. English would say was that it depended on which side of the line it fell:-

> "I don't know which side the line those fees, were they part of the all-in 160,000 fee or not. So if they were part of the 160,000 fee they would be paid by Dan Murphy."

88. Until this comment by Mr. English that the fees could be payable by Mr. Murphy or could be paid by someone else depending on which side of the line they fell, there was absolutely no question of these fees ever being paid by Mr. McGrath since it was Mr. English's position that his investment of £2,250,000 was fully accounted for by the value of the boats and the tonnage and there was therefore no possibility of these, or any other fees being paid for on Mr. McGrath's side of the line. However, what this answer does illustrate is the inconsistency between this statement on the one hand (which this Court concludes was the true position) and was so understood by Mr. English (namely that the fees were paid on Mr. McGrath's side of the line out of the funds provided by Mr. English), and on the other hand his testimony that he was unaware that the fees would be taken out of the purchase money. This Court believes that Mr. English was aware of the fact that fees were to come out of his purchase funds, but he did give this matter too much thought, since if the investment had gone according to plan, it would be irrelevant to him (since he would be getting the £2,250,000 back). However, attributing all the 'costs' to capital expenditure had the advantage for him of incorrectly being able to treat the fees and costs as capital allowances, when they were not capital allowances.

Mr. Lawrie's testimony regarding treatment of fees

89. In support of this conclusion is the evidence of Mr. Lawrie of Liberty Asset Management Limited who introduced Mr. English to Mr. Murphy for the purpose of the investment. Mr. Lawrie's evidence was that Mr. English previously invested in a scheme with him and Mr. English had asked him to keep an eye out for tax-based investments for him. In this Court's view, Mr. Lawrie, as a person who would not be implicated by any evidence which he gave as he was not the adviser on a scheme which was described by Mr. English as a '*fraud and a sham*', but rather the introducer, was the witness who provided the most forthcoming testimony.

90. He made it clear that in tax based investment schemes such as this one, the fees were not written into the investment proposal documents or the legal documentation for tax reasons. He explained that the written documentation was deliberately silent on costs because, while the purchase price of the vessels was a capital allowance and therefore deductible over five years, professional and bank fees were not. In his view (and he had promoted one previous scheme to Mr. English), there would have been an understanding, between the investor in Mr. English's position and the adviser/promoter in Mr. Murphy's position, that fees were taken care of as part of the overall investment. In this way, even though the fees should not have been part of the capital allowances, the Revenue was led to believe that the overall price paid was all deductible as a capital allowance. In refreshingly frank evidence, he stated:-

> "So it couldn't be written up, because if you wrote it up and said you know your investment is £1 million and the fee is £200,000, well then you only get a tax break on the £1 million you don't get it on the 200,000 so it is better off saying your investment is 1.2 million or whatever the amount is."

Since Mr. Murphy knew that he was getting back £200,000 in professional fees out of Mr. English's total consideration of £2,250,000 and he knew that the tonnage was under-valued by £450,000, this Court is of the view that, on the balance of probabilities, Mr. Murphy structured this investment scheme in such a way as to give the impression to the Revenue that the entire of the £1,900,000 attributed to the purchase of the two vessels was properly capital allowable. He did this in the knowledge that part of this consideration was attributable to tonnage and part was attributable to professional fees and Bank fees, neither of which was capital allowable. This was done, in this Court's view, with the intention of depriving the Revenue of tax income for the benefit of his client, Mr. English.

Conclusion regarding Mr. English's knowledge regarding fees

91. In light of Mr. English's meticulous nature, the Attendance of his meeting with Mr. Whelan and Mr. Murphy at Cork Airport Hotel on the 23rd May, 2001, is surprising in one respect. It contains a very significant amount of detail regarding the transaction and the Bank costs regarding the arrangement fee but there is no reference whatsoever to professional fees of the various accountants, solicitors and tax advisers in it or indeed in any of the documentation.

92. In light of his attention to detail on all matters and particularly fees, this Court finds it hard to believe that Mr. English would not have discussed these fees at this meeting. This Court has already noted that it does not think that it is realistic for Mr. English to suggest that the solicitors and tax advisers as well as the Bank involved in this investment would be covered by a contingency fee payable over five years.

93. This Court is of the view, on the balance of probabilities, that there was an unwritten understanding (so that the Revenue would not have written evidence of the professional fees and costs due) between Mr. English and Mr. Murphy that the professional fees would come out of the funds which were invested by him in the scheme. It is this Court's view that, once Mr. English got all his capital allowances from the Revenue and then sold the vessels and tonnage back to Mr. McGrath at the same price as he had he bought them, that he was not concerned if some fees came out of the monies he put into the investment. In such a situation, whether the fee taken out of his £2,250,000 investment was £50,000 or £200,000 (to pay Whelans Solicitors, Barry C. Galvin & Son, Robson Rhodes, Barr Pomery and AIB) was academic, since he would get his money back from Mr. McGrath at the end of the five years. For this reason, this Court concludes that it is likely that Mr. English, who is normally quite a fastidious person, was not overly concerned about the level of the fees that actually came out of his funds. He may have been surprised to discover that the total fee ended up being £200,000, but as noted, if the scheme had gone according to plan this was irrelevant as he would be getting the £2,250,000 back (including this £200,000 in fees) at the end of the five years.

94. For this reason, this Court concludes that it is likely that Mr. English chose not to concern himself too much with these *minutiae*. He felt he had covered the risk by the fact that he was getting his money back at the end of the five years and not only that, he had built in a condition on the professional fee of £160,000 to Mr. Murphy which meant it was only payable if he got his capital allowances from the Revenue. Accordingly, this Court concludes that Mr. English was aware that the valuation of the boats was incorrect as it included not just part of the purchase price for the tonnage (as previously noted) but also the professional fees and costs.

Knowledge of Mr. English's personal solicitor of fees

95. In further support of this conclusion, is the knowledge of Mr. English's personal solicitor, Mr. McDonald, of the fees to be paid out of the purchase funds provided by Mr. English. As previously noted, as well as having instructed Mr. Whelan as his solicitor for the investment, Mr. English also had his own personal solicitor review all the documentation for the investment. Mr. McDonald was not paid for his legal services and his role was akin to that of being Mr. English's agent, rather than his solicitor on the transaction (since this was Mr. Whelan). On of the documents sent to Mr. McDonald was a letter dated 1st June, 2001, from Mr. Doherty (Mr. McGrath's solicitor), which contained various undertakings by Mr. Doherty, including the undertaking to pay AIB "*the sum of £72,000 from a total sum of £200,000*". Mr. McDonald commented on the undertakings in that letter in a fax to Mr. English on the 1st June, 2001, which was sent to him at the closing meeting for the investment scheme. It was intended that Mr. English would convey to Mr. Whelan the extensive comments of Mr. McDonald in that fax on the Memorandum of Agreement, the Put & Call Option Agreement etc. as well as the undertakings by Mr. Doherty. It is clear from this fax of 1st June, 2001, from Mr. McDonald that he had reviewed the undertakings of Mr. Doherty, since he states:-

> "undertaking (draft) of Randall Doherty (a) Should this confirm undertaking to acquire to 310 tons tonnage applied to Avro Hunter 'free from encumbrances'"?

In the same letter, Mr. McDonald flags that all documents should refer to 'Onderneming' (the former name of Avro Hunter), and not to Avro Hunter. In his reply to Mr. McDonald on the 8th June, 2001, Mr. Whelan tells him that:-

> "Randal Doherty's undertaking was amended to reflect the current name of the MV Avro Hunter namely Onderneming".

This letter of 8th June, 2001, referring to the undertakings of Mr. Doherty was copied to Mr. English. When it was put to Mr. English that his personal solicitor knew about the undertakings regarding, *inter alia*, the fees of £200,000, he stated:-

> "I wasn't aware, but I could not see my solicitor being aware of them getting 200,000 and not asking me was that what they agreed[….]
>
> I can't, I don't believe – I can't expect that something like this would have been seen by my solicitor, by John McDonald and not picked up."

96. This Court concludes from this evidence that it is likely that Mr. McDonald was aware of the payment of £200,000 from Mr. Doherty to Mr. Murphy in respect of fees (in addition to the £160,000 conditional fee). It is likely that Mr. English was also aware of this fact (because in Mr. English's own words, Mr. McDonald would have picked up on it and would have asked Mr. English about it).

The real nature of the conditional fee
97. Finally, under this heading, it is worth noting the real nature of the conditional fee. In this Court's view, the £160,000 was in essence a 'success fee' that was payable to Mr. Murphy alone by Mr. English over a five year period if all the capital allowances were received from the Revenue. This Court believes that the most likely reason for this conditionality being imposed by Mr. English on this fee, and being accepted by Mr. Murphy, was because from the date of that conditional fee letter from Mr. English to Mr. Murphy (29th May, 2001), they both knew that the scheme involved an exaggerated claim for capital allowances and there was a very real chance that it would not be successful if the Revenue discovered the incorrect attribution of the tonnage consideration, and the incorrect attribution of professional fees, as capital allowable expenses.

(v) Deliberately concealing matters from tax advisers by Mr. Murphy and Mr. English
98. In the letter dated 4th June, 2001, from Barry C. Galvin & Son (AIB's solicitor) to Mr. Whelan (Mr. English's solicitor), it was stated that:-

> "The best way probably to get the power of attorney problem resolved this morning is to get Barry English to go into his solicitor in Dublin and email it to him. His Solicitor can fax me a copy and undertake to forward me the original by post. I think I will need this level of assurance given the problems that have arisen with Barry English so far".

In his evidence Mr. English accepted that his propensity to want to examine and discuss in detail the scheme was the likely reason for this comment. Against this background, it is relevant to again refer to the Attendance of 23rd May, 2001, between Mr. English, Mr. Whelan and Mr. Murphy. As is apparent from the Attendance, there was an issue at the time of this meeting about whether Mr. English might get a 'tax warranty' from Mr. McGrath. The Attendance notes:-

> "A tax warranty is to be included in Marie Barr's [the tax advisor who had advised on the tax workings of the scheme] opinion. It may be advisable that this is not sought as this will only bring to the attention of Marie Barr the fact a tax warranty is being provided by Brendan McGrath."

This appears to be a reference to a guarantee from Mr. McGrath that the scheme would give Mr. English the tax breaks he anticipated and a right on the part of Mr. English to sue Mr. McGrath if this was not the case. However, it appears that the problem with such a warranty is that it might have deprived the scheme of its commercial risk and lead to it being categorised as a tax evasion scheme. For this reason, later on in the Attendance, it is stated:-

> "Tax indemnity is to be obtained from Brendan McGrath and is not included in the tax warranty Marie Barr's opinion."

99. A letter dated 25th May, 2001, from Mr. Whelan, solicitor, to Mr. English, which summarises the meeting which was the subject of that Attendance puts it in the following terms:-

> "I note that we are to seek a tax warranty from Brendan McGrath and I confirm we have drafted same and forward same to Brendan McGrath's solicitor for approval."

This Court infers from the foregoing that Mr. Murphy and Mr. English discussed at their meeting the fact that the presence of a tax warranty would prevent Mr. English from obtaining the capital allowances. Yet they both knowingly proceeded with seeking this tax warranty on the basis that they would deceive the tax adviser, Marie Barr, who would not be told about the tax warranty. If Ms. Barr was aware of the tax warranty, she would not be able to give a 'clean' tax opinion to the effect that Mr. English would get the capital allowances. In addition of course, it seems that Mr. English and Mr. Murphy were deceiving the Revenue into believing that no such tax warranty was to be given to Mr. English.

100. To this Court, this establishes, on the balance of probabilities, that Mr. English and Mr. Murphy had no qualms about seeking to deceive the Revenue into granting the capital allowances, even though if the Revenue had been aware that there was to be a warranty from Mr. McGrath, they might not have been granted. This mindset on the part of Mr. Murphy and Mr. English is consistent with their knowingly wrongly attributing the tonnage consideration to the vessels and the professional fees as capital expenditure. This evidence regarding the tax warranty is therefore further support for this Court's conclusion that Mr. English, despite his evidence to contrary, was, on the balance of probabilities, aware that the real purpose for the undervaluation of the tonnage and the lack of reference to professional fees in the documentation, was to unlawfully claim capital allowances.

(vi) Mr English's decision not to sue certain parties or call certain witnesses

Mr. English did not sue Casebourne & Southern
101. It is curious, to say the least, that Mr. English, who has produced sworn evidence that the valuations of the two boats were 'a fraud' would not sue the professional valuation firm which issued those valuations. This forces this Court to consider why this would be the case. Mr. English stated that that he did not sue Casebourne & Southern on the grounds that he did not have a contractual

relationship with them. Mr. English said that as Mr. Murphy had the contractual relationship with that firm and he was the person who had organised the valuation, therefore, he, Mr. English, had no privity of contract with Casebourne & Southern. This does not appear to this Court to be a plausible reason not to sue Casebourne & Southern. It seems beyond argument that a firm issuing a fraudulent valuation is likely to be liable to the person who was going to purchase assets based on that valuation. It seems to this Court that any litigant in Mr. English's position would sue the valuer that had issued the fraudulent valuation, unless there were good reasons not to sue that firm.

102. As an astute business man Mr. English is likely to have taken a very calculated decision as to the parties he sued. One possible reason that Mr. English would not have sued Casebourne & Southern is that an allegation of fraud against Casebourne & Southern would have involved an even broader inquiry into the level of knowledge that Mr. English had in relation to the scheme than the current litigation and also the fact that in any case, Casebourne & Southern's insurance policy is unlikely to cover fraud. On the other hand, if this Court were to find Mr. Murphy negligent, as claimed by Mr. English, there would be an insurance policy to cover Mr. English's losses.

103. Just as the timing of these proceedings appears to be very calculated (as noted below) so too does the identity of the defendants. This Court is of the view that if Mr. English genuinely had no knowledge of the true nature of this capital allowance scheme which he says was a sham and a fraud, and had no fear of what evidence would be produced by certain witnesses, he is likely to have sued not only Casebourne & Southern, but also several other parties and called all of the participants in the sham and the fraud as witnesses.

No allegation by Mr. English against Mr. McGrath of fraud

104. Another curious fact in this case is that in relation to a transaction which Mr. English says is a sham and a fraud, Mr. English appeared to go to great lengths to avoid making an allegation against Mr. McGrath. In his evidence, the reason he gave for not suing Mr. McGrath was that he was not a mark for damages. However, in his cross-examination, Mr. English states, when pressed as to whether Mr. McGrath might have been involved in the fraud:-

> "I am not going to point fingers at anybody in this box".

It is clear from the foregoing that when it was put to Mr. English that the person whom the alleged fraud appears to have benefited, as the seller of the overvalued boats, might be involved in it, he was not prepared to allege fraud against him and the reason he gave for that position was because he was not going to point fingers at anybody in the witness box. This reluctance to allege fraud against Mr. McGrath is despite the fact that Mr. English appears to have notified the fraud squad of the transaction in 2010. The reason he gives for not alleging fraud is not very credible, considering that he has no difficulty in pointing fingers (albeit for negligence and other derelictions of duty) against Mr. Murphy in the very same witness box.

105. A possible explanation for Mr. English's refusal to allege fraud against Mr. McGrath is that he had an ulterior motive for so doing, namely that he did not wish to raise the issue of fraud since it immediately raised the issue of his knowledge or role in that fraud as well as potentially compromising Mr. Murphy's insurance policy against which he was hoping to claim.

No allegation by Mr. English of fraud against Mr. Murphy

106. Mr. English was also at pains to emphasise during the hearing that he was not alleging fraud against Mr. Murphy, but rather negligence. It is curious that despite the involvement of Mr. Murphy in these valuations that he says are a fraud, that Mr. English would state the following in such unequivocal terms in his cross-examination:-

> "Q. ... As I understand the pleaded case that you make here and your evidence, it is no part of your case that Mr Murphy committed a fraud, isn't that correct?
>
> A. Yes."

This means that Mr English was not alleging that Mr. Murphy had any part in increasing the valuations from their draft inflated valuations to the final inflated valuations, since if he made that allegation it would be difficult to avoid alleging that Mr. Murphy was a party to a fraudulent valuation. This is despite the evidence (referred to in this judgment) which would support the view that Mr. Murphy had an active role in increasing the valuations. This is consistent with his approach during the trial to seek to claim that Mr. Murphy was unaware of the fraudulent valuation, in the face of evidence to the contrary.

107. In light of the evidence linking Mr. Murphy to the valuations, it is curious that Mr. English would allege that the valuations were fraudulent, but that Mr. Murphy had no role or knowledge of that fraud. In considering why this might be the case, it is relevant for this Court to note that, first if Mr. English were to allege that Mr. Murphy knew that the valuations were fraudulent, it would of course have raised the issue of what Mr. English knew about the true nature of the scheme. By expressly disavowing any claim of fraud against Mr. Murphy, Mr English lessened the likelihood of the issue of his own knowledge of fraud being raised in these proceedings. Secondly, any suggestion in these proceedings of an involvement by Mr. Murphy in promoting a fraudulent investment scheme would have significance for any insurance cover that Mr. Murphy might have to cover this negligence claim by Mr. English against him, since it is unlikely to cover any losses caused by fraud. Thus, if Mr. English had alleged that Mr. Murphy was party to a fraud, there would be no insurance cover available for Mr. English to rely upon, which is particularly relevant in this case, since Mr English has stated that Mr. McGrath is not a mark for damages.

108. It is possible that another reason for Mr. English not pursuing a claim that Mr. Murphy was aware of the 'sham and a fraud' at the heart of this investment was because it lessened the chance of the Revenue seeking to have his capital allowances repaid, since this is only likely to arise if the Revenue were to claim that no time limit applies to opening tax returns in previous years, where the taxpayer has engaged in fraud.

Mr. McGrath, Mr. Doherty and Mr. Power were not called as witnesses

109. When the investment scheme closed in June of 2001, evidence was produced to the Court to show that Mr. McGrath knew that the vessels were overvalued by £1,227,421 approximately, since he owned the Dun Eochalla (which was a 1955 fishing trawler and was valued in his accounts at £154,981, a fraction of the £400,000 valuation) and had in May of 2001 entered a contract to buy the Avro Hunter for a fraction of the price agreed with Mr. English. However, Mr. McGrath, as well as not being sued, was not called to give evidence. This was despite the fact that he was the person who was at the centre of this scheme, since he agreed to sell the tonnage at undervalue, he obtained the overvaluations of the two vessels from Casebourne & Southern and his solicitor, Mr. Doherty, signed a sales agreement on behalf of a Norwegian sweet shop which purported to sell boats which it didn't own. Mr English has sworn that the valuations were a 'fraud' and the whole transaction was a 'sham'. Yet, Mr. McGrath was not called to give evidence. Nor was Mr. Doherty, Mr. McGrath's solicitor, who signed the documentation on behalf of Myra Mat A/S that is alleged to be at the core of the

sham transaction. Nor was Mr. Power, Mr. McGrath's accountant, even though he appears to have structured the scheme with Mr. Murphy.

110. One possible explanation for why Mr. McGrath and his advisers were not called to give evidence is that Mr. McGrath's evidence in particular in relation to a transaction which is alleged to be a sham and a fraud is likely to have highlighted the degree of knowledge of Mr. Murphy and Mr. English about the fraudulent valuations and sham transactions, which this Court believes would have indicated a greater degree of knowledge than is evident from the pleadings.

(vii) Mr English's decisions regarding the timing of the proceedings

111. Mr. English instituted these proceedings on the last possible day for the purposes of the Statute of Limitations, on the 30th May, 2007, the last day of the six year time-limit from the date of the investment on the 1st June, 2001. This is relevant because Mr. English had by that stage obtained all the capital allowances from the Revenue based on the sum of £1,900,000 even though he accepts that the valuations of the boats were a fraud. That decision to institute the proceedings on the last possible day is then compounded by the fact that the plaintiff, by his issue of a Notice of Trial dated 3rd July, 2015, did not seek to have this matter heard until October, 2015, at the earliest, some eight and a half years after instituting proceedings. The case came before this Court for hearing on the 2nd March, 2016, almost 15 years since the date of the investment. Yet, to this Court there is nothing special about the evidence or circumstances of this case, which if we take the plaintiff's case at its height is a straight-forward professional negligence action, which would justify the 13 year delay between September 2003, when Mr. English discovered that the scheme was a failure and the hearing of the action.

112. Indeed, it is relevant to note that as early as the 28th May, 2008, the plaintiff had sufficient details in relation to his claim, to be able to determine that he did not have a case against Liberty Asset Management Limited, since he issued a notice of discontinuance against that firm on that date. This was in spite of the fact that that firm had introduced him to the scheme and as is clear from the letter of 24th May, 2001, from Mr. Lawrie of Liberty Asset Management to Mr. Doherty (Mr. McGrath's solicitor), also despite the fact that Mr. Lawrie was to be paid fees (also apparently of the purchase funds provided by Mr. English). Despite this, it is a full seven years after this date in May 2008, namely in July 2015, that Mr. English felt sufficiently informed about all the details of his case against Mr. Murphy to proceed with the trial.

113. One possible explanation for all of this is Mr. English's desire to ensure that his claims for capital allowances in the five years beginning in 2001 are not re-opened by the Revenue. If this case had been heard in the period 2007-2010, the fact that these allowances had been incorrectly claimed is likely to have led to the recovery of all or substantially all of those allowances by the Revenue, without the Revenue having to establish fraud on the part of Mr. English.

114. However, in the absence of the Revenue being able to prove fraud on the part of a taxpayer, there are time limits regarding the re-opening of capital allowances claimed in previous years. Some 15 years since the investment and almost 10 years since the last of the capital allowances were claimed, and even though Mr. English accepts that they were claimed based on '*a sham and a fraud*', it may now be too late for the Revenue to recover these capital allowances, in the absence of fraud on the part of Mr. English.

115. It is this Court's view that a likely reason for the delay in Mr. English first instituting proceedings and secondly in prosecuting his claim, was his desire to ensure that the Revenue were not in a position to recover capital allowances from him, since he knew that his proceedings were going to disclose that he had incorrectly claimed capital allowances. Mr. English had an incentive to claim the full extent of the capital allowances, based on the valuations which he has sworn were an '*obvious fraud*', but by delaying making his claim against Mr. Murphy, it would seem to this Court that he has reduced the chance of those capital allowances being clawed back by the Revenue.

116. If Mr. English was a genuinely innocent participant in this investment scheme (and there was absolutely no risk of his being implicated in an attempt to defraud the Revenue) this Court could see no reason why the proceedings were not instituted and prosecuted much earlier so as to be heard much earlier than 13 years after the scheme collapsed. It is this Court's view that the timing of the institution of the proceedings and the timing of the prosecution of the claim provides further evidence of the level of understanding of Mr. English regarding the true nature of the scheme, not just after it failed, but also at the time of the investment. Mr. English's attention to detail and skill as a business man as well as his financial numeracy leads this Court to conclude that he is someone who was at all times (and not just after the scheme collapsed) very conscious of the entitlement of the Revenue to claw back capital allowances, which were based on a sham and a fraud. Indeed, as previously noted, this is evident in Mr. English's decision to make his payment of the £160,000 fee to Mr. Murphy, conditional on a scheme (which he now acknowledges was a sham and a fraud) being successful and which conditionality, he suggested in evidence, applied to all the professionals advising on the scheme.

Conclusion

117. For the reasons set out in this judgment, this Court concludes that not only did Mr. Murphy know that the structure he was promoting was designed to incorrectly claim capital allowances, but Mr. English also knew, or should have known, that this was the case. Accordingly, they were both knowing participants in a scheme which was designed to incorrectly claim capital allowances.

118. As a matter of public policy, this Court must therefore refuse to offer assistance to either party in relation to these proceedings, since to do so, would be to implicitly approve of the unlawful scheme in which the parties were engaged. This conclusion is based on the well established principle that a person is not permitted to invoke the aid of the Court in relation to an illegal arrangement if he is implicated in the illegality. This Court also relies on the decision of *Starling Securities v. Woods* (Unreported, High Court, 24th May 1977). In that case, McWilliam J. refused to permit the plaintiff to enforce the contract designed to reduce the defendant's stamp duty by way of specific performance. At page 6 of the judgment he states:-

> "The only interpretation that I can put on the very peculiar method adopted to conduct these transactions is that both parties were trying to conceal from the Revenue authorities the true nature of the transactions. Certainly no other possible explanation has been suggested to me... [I]t it appears to me that I am not entitled to countenance such attempted frauds on the Revenue by enforcing performance of the contracts at the instance of either party. The issue of illegality should certainly have been pleaded but, once the evidence of it has been properly introduced in respect of one issue in the case, namely with regard to the sufficiency of the memorandum, I am not entitled to ignore it…"

Similarly, in this case, it is this Court's view that the investment scheme was designed to incorrectly claim capital allowances. Since all Mr. English's claims against Mr. Murphy relate to the services which he provided in connection with this investment scheme which had an unlawful purpose, this Court concludes that it would contravene public policy for it to assist one person who was a willing participant in this unlawful investment scheme to pursue the other party for alleged negligence and so is making no order in this case in favour of either party.