THE HIGH COURT

[RECORD NO. 2018 118 C.A.]

BETWEEN

THE MARINE SURVEY OFFICE, DEPARTMENT OF TRANSPORT, TOURISM AND SPORT

APPELLANTS

AND

D'AMICO SOCIETÁ DI NAVIGAZIONE T/A MV CIELO DI MONACO

RESPONDENT

JUDGMENT of Mr. Justice Denis McDonald delivered on the 30th day of November, 2018.

Introduction

1. This is an appeal on a number of points of law from a decision of her Honour Judge Petria McDonnell in the Circuit Court of 25th July, 2017. The appeal is brought by the above named appellants ("MSO") pursuant to Regulation 17(5) of the European Communities (Port State Control) Regulations 2010 (S.I. No. 656 of 2010) ("the 2010 Regulations").

2. Before attempting to address the legal issues which arise on this appeal, it may be helpful in the first instance to describe the chain of events which ultimately led to this appeal.

3. As recorded by the learned Circuit Court judge in her judgment, the Motor Vessel Cielo di Monaco ("the vessel") is a ship registered in Malta under the Maltese Flag. The vessel is owned by an Irish registered company and is managed by an Italian company (the above named respondent) ("DSN"). The vessel was constructed in 2014. She is a bulk carrier of 25,303 gross tonnes.

4. On 27th September, 2015 the vessel entered Greenore Port in Co. Louth for the purposes of discharging part of her cargo. Pilotage is compulsory in Greenore Port. The vessel duly took on a pilot who guided the vessel to a berth at the port. According to the judgment of the learned Circuit Court judge, the berthing position of the vessel was identified in conjunction and in consultation with the pilot and with the aid of a linesman ashore. It should be noted at this point that the vessel is 180m in overall length with a bulbous bow and a draft ranging from 5.19 to 7.98m. Dredging had been carried out at the port to provide a deep water berth but it transpired that no dredging had occurred in the inner area of the berth over which the bulbous bow of the vessel was berthed. Early on the following morning (28th September, 2015) the crew noticed that there was an ingress of water to the vessel. It was established that this was caused by cracks in the steel plating of the vessel resulting from the bow of the vessel having grounded on the lowering tide in circumstances where there was insufficient depth of water under her bow.

5. The Master of the vessel notified a number of relevant organisations and bodies of the damage done to the vessel. These included the Protection and Indemnity ("P&I") Club, the relevant classification society for the vessel, the Maltese Flag State Administration, the local port company and local port surveyors. It should be noted that Greenore is (rather unusually) a privately owned port. The P&I Club surveyor, Mr. Eugene Curry also reported the damage to the Marine Casualty Investigation Board ("the MCIB") by visiting the offices of the MCIB in the Department of Transport in Leeson Lane, Dublin 2. It is conceded that no notice was given to the MSO which is designated as the competent authority in the State for the purposes of the 2010 Regulations and the Port State Control Directive (namely Directive 2009/16/EC) ("the Directive") (both considered in some detail below).

6. The visit by Mr. Curry to the office of the MCIB took place on the morning of 29th September, 2015. On the following day, Captain Black of the MSO boarded the vessel with a notice of detention issued under Regulation 16 of the 2010 Regulations. There was no evidence before the Circuit Court as to how the MSO came to hear of the occurrence described above but it should be noted that the MSO, in common with the MCIB, has its office at the Department of Transport in Leeson Lane. The notice of detention had been pre-prepared but before issuing the notice, Captain Black inspected the damage to the vessel.

7. In the documents issued by him with the notice, three grounds were relied upon by Captain Black for the detention. Two of these grounds related to the failure to report the damage to the hull to the MSO. The remaining ground was the damage sustained to the hull of the vessel. The notice required that this damage should be repaired before departure of the vessel from Greenore. Although, this was not stated in the notice of detention or in the accompanying documents, Captain Black, in the course of his evidence on affidavit before the Circuit Court, said that he considered that there was an immediate and serious threat to the safety of the ship and to the marine environment as a consequence of two splits which he noted had occurred to the hull plating. He took the view that once the hull was breached, the vessel was no longer in compliance with the SOLAS Convention or the International Load Line Convention. He also said, on affidavit, that he considered that detention was the only option available to ensure the safety of life at sea and to protect the marine environment from the risk of pollution. As described in more detail in paras. 10 and 13 below, this evidence was disputed by DSN in the Circuit Court.

8. It appears from the evidence before the Circuit Court that the repairs on the vessel were completed on 7th October, 2015. The Detention Order was subsequently lifted by Captain Black on 9th October, 2015.

9. In the meantime, on 8th October, 2015 a Notice of Appeal was filed by DSN in the Circuit Court seeking to appeal the Detention Order. A right of appeal to the Circuit Court is given to the owner or operator of a ship under Regulation 17 of the 2010 Regulations.

10. In the initial affidavit grounding the appeal, Mr. Domenico Savio Taiano of DSN contended that the detention of the vessel was unnecessary and disproportionate and submitted that the MSO had failed to ensure that the interference with the movement of the vessel was kept to a minimum. Mr. Taiano claimed that the fact that the Detention Order was not lifted until 9th October, 2015 interfered with the vessel's schedule and caused consequential financial loss to the owners of the vessel. He also said that the Detention Order has a very negative effect on the commercial exploitation of the vessel and that the principal interest of DSN was to overturn the Detention Order with a view to minimising the financial harm which has been created by the "*unjustified detention of the Vessel*".

11. Thereafter a number of affidavits were filed on behalf of both the MSO and DSN following which there was a hearing before the learned Circuit Court judge. It is clear that the hearing proceeded on the basis of affidavit evidence only. There was no cross-examination of the deponents. However, the learned Circuit Court judge was uniquely placed to assess the affidavit evidence before her having regard to her very extensive experience as a maritime and shipping lawyer prior to her appointment to the Circuit Court.

There was no dispute at the hearing before me that the learned Circuit Court judge was therefore peculiarly well placed to review material of this kind. It is well known that Judge McDonnell, in the course of her practice, had wide ranging experience as a maritime lawyer in advising a whole range of different interests including ship owners, P&I Clubs, insurers, port authorities, and both claimants and defendants in relation to maritime claims including collisions.

12. It appears that the legal representatives of the parties did not address the Circuit Court as to the ambit or format of an appeal of this nature. Thus, the appeal simply proceeded on the basis of the affidavit evidence before the Circuit Court without any examination by the parties of the appropriate approach to be applied in respect of an appeal under Regulation 17 of the 2010 Regulations.

13. In the course of the proceedings before the Circuit Court, two lengthy affidavits were sworn by Captain Black, there were two affidavits sworn by an expert retained by DSN namely Captain David Hopkins and there was also an affidavit sworn by the Master of the vessel Captain Gaetano Altamare. In his affidavit evidence before the Circuit Court, Captain Hopkins disputed the suggestion made by Captain Black that the vessel had suffered extensive hull damage which required immediate repairs and that the only option was to detain the vessel. In para. 16 of his first affidavit, Captain Hopkins said: -

> *"I cannot understand either the factual evidence or reasoning grounding the [decision to detain]. I am not suggesting that any breach in a ship's plating is an insignificant matter however I think that any mariner with a reasonable depth of experience would be able to differentiate between a rupture to hull plating which is at a minor controllable level and one which is a real (and not fantastical) danger to the integrity of the ship. In this case, the [vessel] was a new built quality ship, a little over a year old, with all the residual structural strength and integrity one could associate with a new built quality ship. In this case the rupture (which consisted of two seam welds.. having split . .) were both to the very bow of the ship forward of the collision bulkhead. This is a steel wall which isolates the bow compartment from the rest of the ship so that if there is a puncture to the bow compartment any ingress of water cannot enter the rest of the ship. As such, in spite of water having access to this . . .compartment . . .the water could not spread to any other part of the ship. It is clear that . . . water was flowing in at a rate of 20 metric tons an hour. This is obviously a significant amount however it is totally within control of the ship's pumps which . . . have a capacity to empty 800 metric tons of water per hour from the . . .tank, a factor which any experienced Master Mariner would take into consideration in assessing the risks associated with a rupture of this sort. If one parses the term "extensive hull damage" it clearly contemplates that on a scale of damage to the hull . . . that this was more serious. I could not agree with such a qualification in circumstances where the damage was to one isolated self – contained compartment . . .and where the level of ingress of water, at all times, was well within the capacity of the pumps and could therefore be controlled. I would prefer the characterisation, of the hull damage as "limited"."*

Captain Hopkins went on to say that he had difficulty in understanding how Captain Black came to the conclusion that there was an immediate and serious threat to the safety of the ship and the marine environment and he drew attention to the way in which no structural calculations were appended to Captain Black's first affidavit in support of his conclusion that there was an immediate and serious threat to the safety of the ship and the marine environment. With regard to the possibility of pollution, Captain Hopkins said that the bunkers (i.e. the marine oil on the ship) were some 140 metres and many bulkheads and waterproof compartments away from the ingress of water or the flooded compartment. He therefore expressed the view that there was no objective scientific basis for the conclusions reached by Captain Black that there was a danger of pollution, that there was an inability to maintain adequate stability during the voyage or that there was an inability to maintain adequate watertight integrity during the voyage. In addition, in his affidavit, Captain Altamare said that Captain Black had refused to review or consider the calculations which Captain Altamare had carried out at the time in relation to the strength and stability of the vessel with regard to the impact of the ingress of water into the forepeak tank. Captain Altamare said that these calculations (which were subsequently confirmed by the recognised organisation RINA) indicated that the vessel could be safely navigated in spite of the ingress of water.

The judgment of the Circuit Court

14. A very careful and comprehensive judgment was delivered by the learned Circuit Court judge on 25th July, 2017. It will be necessary in due course to consider aspects of the judgment in more detail. At this point, it is sufficient to record that, in her judgment, Judge McDonnell, having carefully reviewed the evidence, came to the conclusion that the Detention Order was not justifiable. It is apparent from her judgment that Judge McDonnell concluded, based on the evidence before her, that the vessel was not a clear hazard to safety, health or the environment.

15. In addition to making the finding described in para. 14 above, the judge also considered whether the grounding was accidental such as to potentially attract the application of a particular exemption from detention available under Annex X of the Directive (addressed further below). Judge McDonnell came to the conclusion that the exemption applied. Thus, there were two bases for the decision of the Circuit Court: -

> (a) in the first place, the court held that there was no justification for the making of a Detention Order;
>
> and
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> (b) secondly, and in any event, the exemption available under Annex X of the Directive applied.

16. Thereafter, an application was made by MSO to the learned Circuit Court judge for leave to appeal on a number of specified questions of law. Following a hearing on that issue, the learned Circuit Court judge gave leave to appeal on those specified questions of law each of which were drafted and proposed by MSO. It should be noted at this point that during that hearing of the application for leave to appeal, it was suggested by the legal representatives for DSN that the specified questions were essentially moot in circumstances where no question of law was sought to be specified in respect of the finding described in para. 15(a) above.

17. On the hearing of this appeal, counsel for DSN continued to make the argument that the specified questions of law are in fact moot and therefore do not require to be addressed. This was strongly contested by counsel for the MSO. In due course, it will be necessary to consider that issue, but before doing so, it is necessary to identify the precise questions which have been specified by the learned Circuit Court Judge at the request of MSO.

The Specified Questions of Law

18. The specified questions of law are in the following terms: -

> *"(1) What constitutes a deficiency pursuant to Article 19(2) of [the Directive] and/or Regulation 16(1) of the [2010 Regulations] sufficient to detain a vessel? Further thereto:-*

(a) are the requirements stated in Annex X of [the Directive] applicable solely to Article 19(3) or both Article 19(2) and 19(3)?

(b) if Annex X of [the Directive] applies to Article 19(2) and 19(3), does the detention requirement under Annex X of "ships which are unsafe to proceed to sea" and deficiencies which are "sufficiently serious to merit an inspector returning to satisfy himself that they have been rectified before the ship sails" meet the requirements stated in Article 19(2)?

(2) What is the applicable standard for reviewing the exercise of professional judgment by an inspector to detain a vessel in accordance with Article 19(3) and Annex X of [the Directive]?

(3) What constitutes "accidental damage" under Annex X …? Without prejudice to the generality of the foregoing:-

(a) what constitutes submitting "… details of the circumstances of the accident and the damage suffered and information about the required notification of the Flag State administration" to the Port State Control Authority?

(b) is the aforementioned reporting requirement met by reporting details of the accident and damage suffered to a state body/authority other than the Port State Control Authority?

(c) what constitutes "voyage to a port" and "prior to entering a port" and/or does "accidental damage" cover damage occurring in a port?

(4) Does a vessel undergoing temporary repairs negate or impact upon the requirement to detain under Annex X …?"

19. While questions (1), (3) and (4) purport to deal with legal issues in relation to the interpretation of the Directive and the 2010 Regulations, question (2) addresses the standard for review to be applied by the Circuit Court when considering an appeal under Regulation 17 of the 2010 Regulations. As noted above, this was not a question which was addressed by the legal representatives of the parties before the Circuit Court. An issue therefore arises as to whether it is appropriate for this Court to address it on appeal.

20. In my view, it was the obligation of the legal representatives to address this question in the Circuit Court and to make appropriate submissions to the Circuit Court as to how it should approach an appeal of this kind. Instead, what appears to have happened is that, without analysis of the scope of the appeal, both parties simply filed affidavits and left it to the learned Circuit Court judge to review the evidence and arrive at her decision as to whether the notice of detention had been justified and as to whether the accidental damage exemption applied.

21. In these circumstances, I have considerable reservations as to whether it is at all appropriate for the High Court now to address a question which was never even debated in the Circuit Court. Despite some initial misgivings, I have come to the conclusion that I should address the issue raised in question (2). On reflection, I am convinced that is necessary to do so in order to properly analyse the decision of the Circuit Court and, in particular, to consider the parameters of the present appeal. In fact, it seems to me that this is the first of the specified questions which should properly be considered. However, before doing so, it may be helpful to first consider the scheme of Port State control as a whole. It makes sense to do so at this point as I believe it will assist in assessing the nature and ambit of the appeal envisaged by the Directive.

The Scheme of Port State control established by the Directive

22. As recital 6 to the Directive makes clear, responsibility for monitoring the compliance of ships with international standards for safety, pollution, prevention and on-board conditions lies primarily with the Flag State. In the past, this proved to be an unreliable mechanism to ensure compliance with appropriate standards. As a consequence of the failure of some flag registry states to ensure compliance with safety standards required under international measures, coastal States began to take steps against substandard shipping by performing inspections in port and detaining ships which were (*inter alia*) considered to be substandard. In turn, there was a concern that this would lead to arbitrary action, by coastal States. In order to minimise the scope for such arbitrary action, a number of international agreements were put in place in an attempt to harmonise the steps which might be taken by Port States. The first of these was known as the Hague Port State agreement of 1978. This was subsequently replaced by the Paris Memorandum of Understanding on Port State Control ("Paris MOU") which was signed on 26th January, 1982. The Paris MOU now has 27 participating maritime authorities including Ireland. There are also a number of other international agreements. As part of the arrangements put in place under these agreements, a database is maintained which records detentions and inspections and which allows the risk profiling of ships according to their safety records. A detention-free record for a ship owner is said to be of considerable commercial value. Conversely, the detention of a ship is capable of adversely affecting her value.

23. The Directive was subsequently enacted in 2009. As recital 16 of the Directive makes clear, the purpose of the Directive is to harmonise the laws of the EU Member States to ensure consistent effectiveness in all ports. In addition, Recital 9 shows that the Directive is informed by the experience gained during the previous operation of the Paris MOU.

24. Both Recital 34 and the opening words of Article 1 make it clear that the purpose of the Directive is to reduce substandard shipping in waters under the jurisdiction of EU Member States. Under Article 2, each Member State is required to put in place a competent authority responsible for port state control. Article 3 provides that the Directive is to apply to any ship calling at any port of a Member State. Under Article 4, each Member State is required to take all necessary measures in order to be legally entitled to carry out the inspections provided for in the Directive. This inspection process is at the heart of the Directive. A decision whether to detain a ship will depend on the outcome of an inspection. Annex I sets out the inspection system that should be in place. The main focus of the system is the carrying out of periodic inspections at predetermined intervals. However, the system also envisages that "additional inspections" can be carried out in respect of ships to which "overriding or unexpected factors apply". Paragraph 2 A of Annex I identifies these overriding factors. The factors include "*ships which have been involved in a collision, grounding or stranding on their way to the port*" (emphasis added). As previously noted, the grounding here occurred at the first low tide after the vessel berthed in Greenore.

25. Paragraph 2B of the same Annex deals with "unexpected factors" which will justify an inspection regardless of the period which has passed since the last periodic inspection has taken place. Among the factors which are identified here is the failure to comply with "*the relevant notification requirements referred to in Article 9 of this Directive, in Directive 2000/59/EC, Directive 2002/59/EC and if appropriate in Regulation (EC) No. 725/2004*". In para. 26 below, I deal briefly with the notification obligation under Article 9

(which does not appear to have been engaged on the facts). No submissions were made to the court that any of the other notification obligations arose here and, accordingly, I have not attempted to address them in this judgment and I make no finding as to whether they did or did not apply on the facts.

26. For completeness, it should be noted that Article 9 of the Directive deals with the requirement to notify the competent authority (in this case MSO) of the arrival of a ship which is "*eligible for an expanded inspection …*". In turn, Article 14 deals with "expanded inspections". There are only certain types of ships which are subject to Article 14. There is no suggestion in the present case that the vessel fell within the ambit of that article. In those circumstances, the obligation to notify under Article 9 would not appear to me to be relevant.

27. No submissions have been addressed to me to suggest that any of the other provisions identified in para. 2B of the Annex are relevant here. However, I note that one of the grounds for the carrying out of an additional (i.e. a non-periodic) inspection in para. 2B of the Annex which is where ships have been reported by pilots or port authorities or bodies as "*having apparent anomalies which may prejudice their safe navigation or pose a threat of harm to the environment . . .".* Curiously, there is no evidence in this case that any such report was made to MSO either by the pilot or by any other body. For completeness, it should be noted that this element of para. 2B of Annex I should be read in conjunction with Article 23 of the Directive which imposes an obligation on Member States to take appropriate measures to ensure that pilots engaged in the berthing or un-berthing of ships or engaged on ships bound for a port should immediately inform the competent authority whenever they learn in the course of their normal duties that there are "*apparent anomalies which may prejudice the safe navigation of the ship, or which may pose a threat of harm to the marine environment*". Article 23 also imposes an obligation on port authorities to make a similar notification where they learn that a ship within their port has anomalies of that kind.

28. Article 22 of the Directive makes it mandatory that any inspection of a ship should be carried out only by an inspector who fulfils the qualification criteria specified in Annex XI and who is authorised to carry out Port State Control by the national competent authority. Annex XI sets out the minimum qualification criteria which inspectors must satisfy.

29. Article 17 provides that on completion of the inspection, the inspector is to draw up a report in accordance with Annex IX. It is mandatory that a copy of this report should be provided to the master of the ship in question.

30. Article 19 deals with detention of ships. Article 19.2 provides that in the case of "*deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the Port State where the ship is … inspected shall ensure that the ship is detained …. The detention order … shall not be lifted until the hazard is removed or until such authority establishes that the ship can, subject to any necessary conditions, proceed to sea … without risk to the safety and health of passengers or crew, or risk to other ships, or without there being an unreasonable threat of harm to the marine environment".*

31. Article 19.3 provides that when exercising a professional judgment as to whether or not a ship is to be detained, the inspector shall apply the criteria set out in Annex X. At a later point in this judgment, it will be necessary to consider Annex X in more detail.

32. Where it is decided to detain a ship, Article 19.6 imposes an obligation on the competent authority to immediately inform in writing the Flag State administration of *"all the circumstances in which intervention was considered necessary …".* Curiously, there is no express requirement that similar notification should be made to the ship owner. However, as noted above, Article 17 requires that the Master of the ship should be provided with a copy of the inspection report under Annex IX.

33. Article 19.8 includes a further measure of protection for ship owners. It provides that where control by the Port State is exercised under the Directive "*all possible efforts should be made to avoid a ship being unduly detained or delayed. If a ship is unduly detained or delayed, the owner or operator should be entitled to compensation for any loss or damage suffered. In any instance of alleged undue detention or delay the burden of proof shall lie with the owner or operator of the ship".*

34. Article 20 then deals with the right of appeal. Article 20.1 expressly provides that the owner or operator is to have a right of appeal against detention albeit that any such appeal will not operate to suspend the detention pending determination of the appeal.

35. Article 20.2 provides that the Member States are to establish and maintain appropriate procedures for the purpose of an appeal "*in accordance with their national legislation*". In addition, Article 20.3 provides that the competent authority must inform the Master of the ship of the right of appeal and "*the practical arrangements relating thereto*".

36. Article 20 must be read in conjunction with recital 24 which provides as follows:-

> *"A right of appeal against detention orders by the competent authorities should be made available,* in order to prevent unreasonable decisions *which may cause undue detention and delay. Member States should cooperate in order to ensure that appeals are dealt with in a reasonable time in accordance with their national legislation"* (emphasis added).

Implementation in Ireland

37. The provisions of the Directive have been implemented in Ireland by the 2010 Regulations (although there was some debate at the hearing as to the adequacy of that implementation – a debate which is unnecessary to resolve for the purposes of this appeal). The Regulations cross refer to the Annexes to the Directive. Regulation 4 provides that the MSO is designated as the competent authority for the purposes of both the 2010 Regulations and the Directive. Regulation 5 deals with the appointment of inspectors who fulfil the qualification criteria set out in Annex XI. Regulation 5(3) provides that such inspectors will have such powers as are necessary to (*inter alia*) detain a ship.

38. Regulation 16 is intended to implement Article 19 of the Directive. Regulation 16 (1) provides that where an inspection reveals deficiencies in a ship which are clearly hazardous to safety, health or the environment, the competent authority (i.e. MSO) shall ensure that the ship is detained. Regulation 16 (3) provides that in determining whether or not a ship is to be detained, an inspector is to apply the criteria set out in Annex X of the Directive. Regulation 17 deals with the right of appeal to the Circuit Court. Insofar as relevant, Regulation 17 provides as follows: -

> *"(i) the owner or operator of the ship…shall have a right of appeal against a detention…*
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> *(ii) the competent authority shall notify the Master…of the practical arrangements for lodging an appeal;*
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> *(iii) an appeal…shall be made to a judge of the Circuit Court in whose circuit the port in which the ship is, or has been*

detained is located and shall be made within seven working days of the commencement of the detention…;

(iv) on hearing an appeal under para. (i), the court may confirm or vary the detention…or allow the appeal."

The form of appeal

39. The provisions of Regulation 17 provide no significant guidance as to the form of the appeal which is envisaged by the Regulations. The most that can be said is that there is nothing in the language of Regulation 17 to suggest that the appeal is by way of a full rehearing. This is in contrast, for example, to s. 37 of the Courts of Justice Act 1936, which provides that an appeal from the Circuit Court to the High Court shall be by way of rehearing. On the other hand, it is equally clear from the language of Regulation 17 that it does not stipulate than an appeal in respect of a detention is confined to questions of law. It is therefore necessary to consider where, on the spectrum, an appeal under Regulation 17 lies.

40. The scope of statutory appeals in a wide range of circumstances has been considered in a succession of cases including *Orange Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159, *M. & Gleeson v. Competition Authority* [1999] 1 ILRM 401 and *Carrickdale Hotel Ltd. v. Controller of Patents* [2004] 3 I.R. 410. The approach taken in most of these cases was to apply a test that the court would only interfere on a statutory appeal where the appellant has established as a matter of probability that, taking the process of the first instance body as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying that test, regard will be had to the degree of expertise and specialist knowledge possessed by the first instance adjudicator.

41. However, more recently, McKechnie J. in the Supreme Court in *FitzGibbon v. Law Society of Ireland* [2015] 1 I.R. 516, at p. 542 has suggested that one cannot necessarily take the same approach in all cases. McKechnie J. stressed that in every case the relevant statutory provision must be considered. He indicated at p. 543 that it was also necessary to consider: -

> *"…matters such as the nature of the body in question, the knowledge and expertise within it – by reference to its purpose – the subject matter of its remit, the type of decision… involved, and the impact and consequences thereof for the addressee…; the proceedings and the type of process involved in, and giving rise to, the decision under appeal must also be considered. These are but some of the factors which will inform the provision's ultimate meaning. In the instant case it is of considerable significance to note that the appellant had a full right of participation in, and in fact heavily engaged with, the statutory process, which gave rise to the adverse decision now standing against her."*

42. In the same case, Clarke J. (as he then was) carried out a very comprehensive analysis of the forms of statutory appeal which are potentially available. Clarke J. indicated that appeals can generally be classified into one of the following: -

> (a) The first category is a "*de novo* appeal". In the case of such an appeal, the decision taken by the first instance body is irrelevant and the appeal body is required to come to its own conclusions on the evidence and materials available to it. This is the format that applies under s. 37 of the Courts of Justice Act, 1936. In my view, there is nothing in the terms of Regulation 17 or in the underlying Directive which would suggest that this is the approach that should be taken here. On the contrary, it appears very clear from recital 24 of the Directive that the purpose of the appeal is to remedy unreasonable decisions. In order to reach a conclusion that a decision is unreasonable, it seems to me that one would, of necessity, have to have regard to the decision taken by the inspector to detain the vessel in the first instance. Accordingly, the appeal under Regulation 17 is not a *de novo* appeal.
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> (b) The second category of appeals is an appeal on the record. Clarke J. explained that, in this form of appeal, the appellate body considers the body of evidence and materials which were before the first instance adjudicator but comes to its own independent conclusion as to the proper answer to the issue before it. For reasons which I explain in more detail below, it seems to me that the appeal envisaged under Regulation 17 is not limited to an appeal on the record.
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> *(c) The third category identified by Clarke J. is an appeal against error. In the case of an appeal against error, the appellate body does have regard to the determination of the first instance body and must, in order for the appeal to be allowed, be satisfied that the first instance body was in some way in error. Ordinarily, no evidence other than the record is considered in such cases. Nonetheless, at p. 557, Clarke J. drew attention to the fact that one could have a hybrid appeal involving aspects of both an appeal against error and an appeal in which some evidence is placed before the appellate body. He said: "There is no reason in principle, although it would be preferable if rules made express reference to this, why there might not be a hybrid appeal where, in substance, the appeal is against error or on the record but where the appellate body is expressly or by necessary implication allowed to conduct an oral hearing limited to hearing evidence which the appellate body would need to hear itself in order to be able to come to an independent judgment on questions of contested fact. At the level of principle, either the appellate body must be bound by any sustainable finding of fact at first instance or the appellate body must have the facility to hear evidence itself…."*
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> In my view, for reasons which I set out in more detail below, the appeal to the Circuit Court under Regulation 17 falls into a hybrid category.
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> (d) The fourth category of appeal considered by Clarke J. was an appeal on a point of law. There are many statutory provisions which expressly limit an appeal to a point of law. In my view, there is nothing in Regulation 17(4) to suggest that the appeal to the Circuit Court is limited in any way to a point of law. On the contrary, the wide language of Regulation 17(4) is to be contrasted with the language in Regulation 17(5) (dealing with appeals from the Circuit Court to the High Court). Regulation 17(5) makes it very clear that an appeal to the High Court from the decision of the Circuit Court is not only subject to the requirement to obtain leave from the Circuit Court but is confined to specified questions of law.

43. At this point, I should record that, at the hearing before me, the MSO canvassed for a different standard to that applicable in any of the four categories discussed in para. 42 above. The MSO sought to rely by analogy on the approach taken by Barr J. in *ACT Shipping v. Minister for the Marine* [1995] 3 I.R. 406, where in reliance on *O'Keeffe* principles, Barr J. concluded that a court should only interfere with the decision of the respondent in that case to refuse refuge to a vessel in distress where the court was satisfied that the decision flies in the face of reason and common sense. The MSO suggested that a similar approach should be taken in the context of the appeal to the Circuit Court under Regulation 17 (4). In my view, there is no scope for the application of such an approach which, in essence, is the rationality test classically applied in many judicial review challenges. If the intention underlying Regulation 17 was to apply such a test, it would have been a simple matter to expressly provide that the only form of remedy in respect of a notice of detention is by way of judicial review. That is the approach taken expressly in other statutory schemes such

as, for example, s.13 of the Irish Takeover Panel Act 1997. However, that is not the approach that was taken in Regulation 17. This is understandable in circumstances where, as noted above, Recital 24 to the Directive expressly envisaged that an appeal will enable an unreasonable decision to detain a ship to be overturned. It is well accepted that, when the EU legislature uses words such as "*unreasonable*", it does not have in mind the somewhat attenuated concept of unreasonableness embodied in the *O'Keeffe* principles.

44. Nor do I believe that the legislature could be said to have in mind an appeal solely on the record or solely on the basis of an appeal against error where the Circuit Court would be confined to considering the relevant record relating to the detention of the vessel. There are several reasons why, in my view, it is implausible to think that the Circuit Court on the hearing of an appeal against the detention of a ship is confined to a consideration of the record: -

(a) In the first place, the record relating to the issue of the notice of detention is sparse. This is not a criticism of Captain Black. It is simply a reflection of the system which the Directive appears to envisage. The terms of the notice of detention together with the accompanying report and other documents are remarkably terse, even telegrammatic. It would be extremely difficult (if not impossible) for any court to consider whether the decision to detain was or was not unreasonable (within the meaning of Recital 24) if the court was confined to a consideration of the record.

(b) In expressing the view set out at sub-para. (a) I am not suggesting that the facts of this individual case could, of themselves, have an impact on the manner in which Regulation 17 is to be interpreted. Nor am I suggesting that Captain Black was incorrect in the manner in which he completed his report in this case. On the contrary, the underlying report and accompanying documents issued with the notice of detention appear to me (when read together) to follow the form envisaged by Annex IX to the Directive. Notwithstanding the provisions of Article 19.6 of the Directive (quoted in para. 31 above) Annex IX does not appear to envisage a discursive or detailed report. It does not even require that the relevant inspector should identify in the report the aspects of Annex X which he or she considered to be relevant in carrying out the inspection notwithstanding that Annex X is the template against which any decision to detain a vessel must be assessed and reached. I fail to see how any court would be in a position to review the decision to detain a ship solely by reference to a record of this kind. It would render it virtually impossible for any appellant to succeed and would make an appeal an empty academic exercise which would seem to me to be totally at odds with the well-established EU principle of effectiveness (addressed further below).

(c) In order to illustrate why this is so, it is instructive to consider the terms of the notice of detention and accompanying documents in the present case. The notice of detention is the official document which was issued by Captain Black on 30th September, 2015 notifying the vessel of the arrest pursuant to a Regulation 16. The notice provides no detail as to the grounds for the detention. It simply says that the vessel is being detained under Regulation 16 "*for failure to meet the requirements of the relevant International Conventions*". The notice goes on to state that the specific grounds for detention are detailed in "*attached Form B/1*". Curiously, when one looks at the relevant Form B/1 it is described not as a report under the Directive or the 2016 Regulations but a "*report of inspection in accordance with the [Paris MOU] …".* This form then sets out the deficiencies in very terse terms. There are three in all, namely:-

(i) The vessel failed to report damage to hull to the Port State authorities;

(ii) There were cracks to the hull of the ship leading to ingress of water to the forepeak tank;

(iii) The failure to report the damage to the hull was "*objective evidence of a serious failure or lack of effectiveness of implementation of the ISM Code".*

It appears that the vessel was also provided with a further report which was described as a "*report of inspection in accordance with EU legislation*". That report provides most of the details required under Annex IV save that it says nothing about deficiencies warranting a detention order. Nonetheless, if one reads both the Form B/1 and this report together they would appear on their face to contain all of the details set out in Annex IX. However, as noted above, those details are telegrammatic in their form and content. They do not provide anything like the level of detail that would enable a court to determine whether the decision to issue a detention notice was unreasonable in the sense set out in Recital 24 to the Directive. For completeness, I should also record that a further document was issued to the Master which was described as a "Notice of detention for the Master". This was separate to the notice of detention specifically issued under Regulation 16. As with Form B/1, this was also headed "Paris MoU". It is a standard form which allows the issuer (in this case Captain Black) to place an "X" next to one of the standard form reasons for detention. One of the standard reasons set out in the form is that: "*one or more of the criteria for detention set out in Annex X".* Remarkably, the notice does not record this as a reason for the detention. Instead, the notice records that the reason for the detention was that the Master and crew were unable to comply with operational requirements and there were "*other deficiencies which, individually or together are clearly hazardous to safety, health or environment*" (i.e. deficiencies other than those identified in Annex X). That was the only reference in any of the documents that were issued to a potential hazard to safety health or the environment in any of the documents that were issued. However, as noted above, this document suggested on its face that there were no deficiencies assessed by reference to Annex X notwithstanding that, in the course of his affidavit evidence in the Circuit Court, Captain Black made clear that he had applied the Annex X criteria (as he was obliged to do). Ironically, therefore, if the appeal to the Circuit Court had been confined to the actual record of the detention, the record would have suggested, on its face, that Annex X was not in fact relied upon at all. That would have called into question whether the detention notice was validly issued as a matter of law. MSO has therefore benefitted by the admission of the affidavit evidence in this case.

(d) As I have already indicated, Annex IX does not appear to contemplate that anything more by way of detail would be provided in the report leading to a notice of detention than was actually provided in this case. In my view, it is inconceivable that the EU legislature would have considered that it was sufficient for any appeal to proceed on the basis of what is, by any standard, a very high level document. In particular, in light of the principle of effectiveness, it is impossible to think that the EU legislature could have thought that any appellant would be in a position to discharge the onus of proof which rests on such appellant under Article 19.8 of the Directive in an appeal where the appellate body (in this case the Circuit Court) was limited to considering the bare bones contents of a report under Annex IX. The EU legislature was obviously mindful of the damage that can be done to the owner of a ship by an unjustified detention order and this is evident for example in Article 19.8 which provides that, in such circumstances, the operator or owner of the ship is to be entitled to compensation for any loss or damage suffered. The fact that there is a right of appeal also reflects the concern of the EU legislature to ensure that ship owners would have a remedy where a detention order is

unreasonably imposed. It cannot be the case that the EU legislature envisaged that such an appeal would be rendered toothless and ineffectual by confining the appellate body's consideration of the appeal to the notice of detention itself and the relevant report required under Article IX. In this context, it is a well-established principle of EU law that national law must ensure the full effectiveness of EU law and that domestic procedural law should not make it impossible or excessively difficult to enforce rights derived from EU law. (See for example, Joined Cases C-6/90 and C-9/90 *Francovich v. Italian Republic* at para. 32). Accordingly, Irish procedural law could not render ineffective the right of appeal which the EU legislature clearly intended should be available to the owners and operators of a ship.

(e) I am conscious that Article 20.2 envisages that the appeal is to be available in accordance with the national legislation of the Member States and it may be helpful to also consider this issue through the prism of Irish domestic law. It seems to me that, even when viewed from a purely Irish law perspective, it would be equally problematic were the appeal to be confined to a consideration of the record described above. This is especially so in circumstances where it is clear that there was no significant interactive process prior to the issue of the notice of detention. There was a brief visit by Captain Black to the vessel. There was never any hearing. It is clear from the evidence that there was no opportunity to make any meaningful submissions. As noted above, Captain Black boarded the vessel with a pre-prepared detention notice. It is quite obvious that the Form B/1 was prepared and typed in advance. I do not suggest that this is impermissible. While Article 19.8 envisages that all possible efforts should be made to avoid a ship being unduly detained, there is nothing in the terms of the Directive or of the 2010 Regulations which requires any hearing (as such) to take place. However, the very fact that the Directive and the Regulations do not require a hearing to take place before such a serious step as the issue of a notice of detention seems to me to strongly support the proposition that any appeal should provide for some mechanism which would allow the appellant to place material and evidence before the court to demonstrate that the approach taken by the inspector was vitiated by serious error, a mistaken view of the facts or that it was otherwise unjustified. Clearly, the record would be an important part of any appeal but it could not form the exclusive basis on which the appeal would be heard and determined. The observations of McKechnie J. in the *FitzGibbon* case quoted in para. 40 above appear to be particularly apposite in this context.

(f) Similar considerations appear to me to have underpinned the suggestion made by Clarke J. in the same case that there are circumstances where, by necessary implication, the appellate body must be allowed to conduct an oral hearing limited to hearing evidence which that body would need to hear in order to be able to come to an independent judgment on questions of contested fact. In circumstances where the ship owner has had no opportunity to contest the facts prior to the notice of detention, this seems to me to strongly support the conclusion that it is necessary in an appeal under Regulation 17 of the 2010 Regulations that the Circuit Court should be in a position to hear such evidence as is necessary in order to reach a conclusion itself on any questions of contested fact.

(g) At this point, it may be convenient to deal with an issue which was strongly pressed by MSO at the hearing – namely that the Circuit Court, in any appeal, should accord curial deference to the decision of an inspector to detain a ship. I agree that, on the hearing of any appeal, the Circuit Court should accord appropriate weight to the expert conclusions of the inspector given the requirement that any inspector should meet the minimum qualification criteria required under the Directive. That said, there are obvious limits to the extent to which weight can be attached to the report of an inspector given the rather terse terms in which the report will inevitably be expressed and given also the very important fact that there has been no inter partes hearing before the inspector issues the notice. A further factor to bear in mind is that the report will not be a reasoned opinion or decision. It will simply state conclusions arrived at following an inspection but will not provide any detail as to how the inspector reached those conclusions. This seems to me to be an inherent part of the process under the Directive. As previously noted, there is no requirement, for example, that the Annex IX report should even address any of the criteria for a detention of a ship which are set out in considerable detail in Annex X. Thus, that record will provide very little by way of evidence of the exercise of any expert adjudication by the relevant inspector who decides to issue a notice of detention. For that reason, it seems to me that the inspector should also provide to the court not just the relevant documents generated for the purposes of creating the relevant report but also details (with any supporting materials) as to the basis on which the inspector came to exercise a right to inspect the vessel in question and as to the basis by which the inspector arrived at a decision that the vessel represented a clear hazard to safety, health or the environment. (This is an issue which I address in more detail below). One further point to bear in mind is that, in cases where the underlying facts are contested, the Circuit Court will inevitably have to form its own view as to the facts and, in deciding where the truth lies, I see no scope to accord any level of curial deference to the evidence of the inspector in relation to factual matters. I know of no principle that allows a court to prefer the factual evidence of one person over another solely because the former holds some public office requiring expertise. However, the burden of proof lies on the appellant. Article 19.8 makes that very clear.

(h) Moreover, it is important to bear in mind that even in the case of an expert administrative tribunal, the court, in an appeal against error, has jurisdiction to correct the decision of such an expert Tribunal where its conclusions are based upon an identifiable error of law or an unsustainable finding of fact. The relevant principle is encapsulated in the observation of Hamilton C.J. in *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34 p.p. 37-38 (which in turn is cited by Clarke J. at p. 556 of *FitzGibbon*); -

"*I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals.* Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact *by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review*." (emphasis added).

(i) In my view, there is a very significant difference between an expert tribunal of the kind mentioned by Hamilton C.J. in the *Henry Denny* case and an inspector who issues a notice of detention under the 2010 Regulations. It is clear that what Hamilton C.J. had in mind was a Tribunal which heard evidence and arguments. An inspector exercising powers under the 2010 Regulations does not engage in a process of that kind; instead, the process is, by its nature a much more summary process (albeit one which is subject to the injunction contained in Article 19.8 of the Directive that all possible efforts should be made to avoid a ship being unduly detained or delayed). Crucially, the process does not involve any hearing. In those circumstances, it seems to me that while some weight should be given by the Circuit Court to the expertise of the inspector, the weight to be accorded to his or her expertise is manifestly not of the same order as suggested in the *Henry Denny* case.

(j) Returning to the factors that, in my view point to the necessity for a hybrid appeal, it seems to me from a consideration of the scheme of the Directive and of the factors outlined in sub-paras. (a) to (g) above that the EU legislature has struck a balance between a number of different competing interests. In light of the clear public interest in ensuring that substandard or dangerously defective vessels should not put out to sea, a notice of detention may have to be issued speedily. There is no requirement for a detailed or reasoned report. However, as a counter-balance, the EU legislature has inserted a requirement that there be a right of appeal. Having regard to the principle of effectiveness, any such appeal must, of necessity, provide an effective remedy against an unreasonably imposed or unlawful notice of detention. An appeal which proceeded on the basis of the bare bones Annex IX report would manifestly not do so. In turn, in accordance with the precautionary principle, that right of appeal is not allowed to interfere with the operation of the detention pending the determination of the appeal. On the other hand, if the appeal is successful, the notice of detention will be set aside and damages will be recoverable for any loss sustained by a ship owner or operator as a consequence of the unjustified detention of a ship.

(k) In summary, in circumstances where the notice of detention will have to be issued speedily in very many cases, and where the notice is not the subject of any fully reasoned decision issued to the owners and operators of the ship, it seems to me that, of necessity, the appeal must be more than an appeal on the record. This appears to me to be one of those cases where a hybrid appeal of the kind described by Clarke J. in the *FitzGibbon* case must be available by necessary inference. If an appellant is not at liberty to place material and evidence before the court to show why the notice of detention was unjustified, the right of appeal would be rendered entirely academic. As noted above, it would be virtually impossible for any appellant to succeed if all the appellant could do would be to refer to the very limited record that exists in cases where a notice of detention is issued.

45. Having regard to the factors outlined in para. 44, I am of opinion that an appeal under Regulation 17 of the 2010 Regulations must, of necessity, be a hybrid appeal involving both the aspects of an appeal against error in the manner explained by Clarke J. in *FitzGibbon* and also an appeal on evidence to the extent necessary to allow the Circuit Court to come to an independent judgment on questions of contested fact. Thus, where an appellant wishes to adduce evidence as to the true facts or expert evidence relevant to the facts, it seems to me that such evidence is admissible. In turn, the inspector who issued the notice of detention must also be in a position to provide evidence. However, it is important to bear in mind that in cases of this kind, the inspector would not be entitled to rely on additional reasons for the detention over and above those which were provided at the time of detention. This is a well-established principle both of EU law and of Irish law. Insofar as EU law is concerned, this principle is clear, for example, from the decision of the General Court (in a procurement context) in case T-89/07 *VIP Car Solutions v. European Parliament* at paragraph 76. Insofar as Irish law is concerned, the relevant principle is to be found in the decision of Kelly J. (as he then was) in *Deerland Construction Ltd. v. the Aquaculture Licences Appeals Board* [2009] 1 I.R. 673 where, at p. 694, Kelly J. approved the "*better view*" expressed by Simons in "*Planning and Development Law*, 2nd Ed., 2007 at p. 708-709":-

> *"Some confusion has arisen in the case law as to whether a failure to state the reasons may be remedied by the giving of proper reasons subsequently … The better view, however, is that a failure to state reasons at the time of the decision invalidates the decision under Irish law .... The statutory obligation is to give reasons contemporaneous with the decision, both in the decision itself and in the notification of it, and one cannot therefore be satisfied by the giving of reasons subsequently. One of the objectives of the duty to give reasons is to facilitate a challenge to the decision, whether by way of statutory appeal or by way of an application for judicial review. The bringing of such a challenge is subject to very tight statutory time limits, and the failure to give reasons at the time of the decision would frustrate the preparation of a focused challenge within time".*
>
> The principle expressed by Simons is particular apposite in the context of the 2010 Regulations where the time for appealing a detention notice is limited to seven working days.

The Nature of the Present Appeal

46. Before proceeding further, it is important to consider the parameters of the present appeal. As noted above, the appeal is limited to specified questions of law. The approach to be taken in an appeal of this kind was considered by the Supreme Court in the context of an appeal under s. 5(15) of the Hepatitis C Compensation Tribunal Acts 1997-2002 in *L. O'S. v. Minister for Health and Children* [2015] IESC 61. In that case, Clarke J. (as he then was) explained that, in an appeal of this nature (which is to be distinguished from the quite different regime that operates, for example under s. 50(4)(f)(ii) of the Planning and Development Act 2000), the court is confined to a consideration of the particular questions which are specified for the purposes of the appeal. At para. 3.15 of his judgment, Clarke J. said: -

> *"Counsel … argued that the words "on a specified question of law" would be entirely redundant unless they were intended to confine the appeal to that question of law. In my view, that point is well made. While it is true that what is permitted is an appeal "from the decision", it is equally true that that appeal can only be "on" the specified point of law. No wider appeal is permitted. The only reasonable meaning of the word "on" is that the appeal must be based "on" that point of law and must, therefore, be confined to it."*

47. At para. 4.2 of his judgment, Clarke J. entered what he described as a "*minor caveat*" to that proposition. He said: -

> *"Sometimes points cannot be hermetically sealed. It may be necessary for a court, in answering one question, to touch at least tangentially on other analogous questions. The proper import of subs. (19) seems, however, to be clear. It is only if the appellant succeeds on the specified point of law that this Court has jurisdiction to allow the appeal and to interfere with the order appealed against. However, in considering whether the appellant should succeed on the specified question of law, it may be that the court can legitimately stray into other areas where a consideration of those areas is essential to the court's determination on the specified question of law. To the extent that such a detour may be necessary, the court can embark upon it. But it must remain clear that the result of the appeal can only derive from the view which this Court takes on the specified question of law."*

48. As set out above, counsel for DSN. has argued that the specified questions of law in this case are moot in circumstances where no question has been raised in relation to the very specific finding made by the learned Circuit Court judge on p. 11 of her judgment (after reviewing the evidence and materials discussed on the preceding page of her judgment which included the evidence of Captain Hodnett summarised in para. 13 above) in the following terms: -

> *"The Directive and the implementing regulations provide for detention in a situation where there is a clear hazard to*

safety, health or environment. Taking into account both the underlying purpose and the terms of the Directive and the Regulations I am unable to see how a Detention Order was or could be justifiable in the circumstances." (emphasis added)

49. Counsel for DSN argued that, in circumstances where this finding has not been directly challenged in any of the questions specified, the finding would continue to stand irrespective of the answers given by the court to the questions that have been specified. Thus, it was argued that the decision of the Circuit Court to set aside the notice of detention would remain in place irrespective of the outcome of this appeal. In response, counsel for the MSO sought to rely on the "*minor caveat*" described by Clarke J. in his judgment in *L. O'S.* He suggested that the specified questions impinged on the finding quoted in para. 48 above albeit that they did not directly address it. However, I am not persuaded by that submission on the part of counsel for the MSO. The MSO did not apply to specify a question of law in relation to the specific finding quoted above. There was no reason why a targeted question of law could not have been specified in relation to that finding. It is very important to bear in mind that, although any appeal to the High Court is confined to questions of law which have been specified by the Circuit Court, the ambit of a question of law is in fact significantly wider than the type of questions which the MSO has raised in its notice of appeal. In particular, it is well-established that a question of law includes a question as to whether the evidence supported a particular conclusion of the first instance adjudicator. This is clear, for example, from the *Henry Denny* decision, the subsequent decision of the Supreme Court in *Castleisland Cattle Breeding Society v. Minister for Social and Family Affairs* [2004] 4 I.R. 150 and the earlier decision of Kenny J. (cited in both of these authorities) namely *Mara (Inspector of Taxes) v. Hummingbird* [1982] 2 ILRM 421.

50. As Clarke J. noted in *FitzGibbon* at p. 559, there are two categories of points of law that can be raised in an appeal (such as this) which is limited by the relevant statutory provision to points of law alone: -

> (a) There may be an error of law in the determination of the first instance body. For the purposes of an appeal, a point of law can be framed to deal with such an error. This will cover cases not only where such body misapplies the law but also (as the decision of Kenny J. in the *Hummingbird* case makes clear) where an issue arises as to the interpretation of documents by the first instance body;
>
> (b) Secondly, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. Thus, for the purposes of an appeal, a point of law can be framed to address such an error.

51. Insofar as the second category is concerned, it may seem incongruous that a finding of fact could give rise to a point of law. Nonetheless, it is well-settled that a question of law includes a question as to whether the evidence supported a finding reached by a first instance body. This is confirmed by Geoghegan J. in the Supreme Court in the *Castleisland* case at p. 158. It is also well settled (as explained by Kenny J. in the *Hummingbird* case) that the second category described in para. 50 above also extends to inferences which have been drawn from the primary facts where it is contended that no reasonable decision maker could have drawn such an inference.

52. Having regard to the principles discussed in paras 49-51 above, it would have been open to the MSO to apply to the Circuit Court judge for example to seek leave to appeal on points of law along the following lines (in each case appropriately tailored to the specific findings in the judgment to which the MSO took objection): -

> (a) insofar as the decision that the notice of detention was not justifiable was based on findings of fact, that there was no evidence to support those findings (specifying the findings in question);
>
> (b) that, insofar as a finding involved a mixed question of law and fact, the learned Circuit Court judge misdirected herself in law in reaching that particular conclusion;
>
> (c) that the finding of the learned Circuit Court judge was based upon a mistaken view of the law (specifying the mistake contended for).
>
> (e) it would also have been possible to seek leave to specify a question of law as to whether, on the evidence, the learned Circuit Court judge was entitled to conclude that there was no clear hazard to safety, health or the environment;
>
> (f) Alternatively, a question could have specified as to whether the learned Circuit Court judge was entitled to reach such a conclusion without first undertaking an analysis of the relevant factors set out in Annex X of the Directive (if that is what the MSO contended had been done by the Circuit Court judge). In this context, I should make clear that I do not suggest that the learned Circuit Court judge did not conduct such an analysis. It is clear from the top of p. 11 of her judgment, that she had regard, in reaching her findings, to the terms (as well as the purpose) of the Directive and the 2010 Regulations.

53. All of the issues identified in para. 52 above (when appropriately tailored to the underlying findings in the Circuit Court judgment) were capable of being specified as points of law. However, no application was made for leave to appeal on any such or similar basis. Instead, the questions that are now the subject of the appeal are all rather abstract questions relating to the interpretation of the Directive. None of the questions specifically address whether there was a basis for the Circuit Court to reach a conclusion that the detention of the vessel was unjustifiable. The questions here are not tied down to any identified aspect of the judgment under appeal but are self-standing questions. The way in which they are framed is redolent of the way in which a point of law of public importance is sometimes framed (in cases where the ability to appeal is limited to such points). It may have been thought that this appeal would have to proceed in the same way. However, if this is what motivated the form of the questions, it was, in my view, a mistaken motivation. There was no requirement in Regulation 17 to isolate points of law of public importance or abstract questions divorced from any specific finding of the learned Circuit Court judge. What was required, if this court was to adjudicate on a question of law, were specific points which targeted particular aspects of the *ratio* of the Circuit Court judgment. In substance, what was required was a similar approach to that taken in the context of many other statutory appeals on questions of law (such as appeals under the social welfare code considered in the *Castleisland* case and in the *Henry Denny* case or appeals under the tax code addressed by Kenny J. in the *Hummingbird* case. While such legislation may not refer expressly to "*specified points of law*" the appeals under such legislation are limited to points of law and therefore that case law is of assistance in identifying the range of questions that can be posed).

54. Alternatively, it may be the case that the approach taken by the MSO in framing these questions was motivated by a desire to obtain guidance on the interpretation of the Directive which may well be of assistance to the MSO in the future. While I can understand fully why a body such as the MSO would wish to have guidance on these questions, the purpose of an appeal of this nature is not to obtain guidance but to consider whether the decision of the first instance body (in this case the Circuit Court) was

correct in point of law. In my view, what is required is that the questions should directly relate to the findings of the Circuit Court. While counsel for the MSO has argued that the observation of Clarke J. in para. 4.2 of *L.O'S.* would allow the court to interfere with the order appealed against depending on the view expressed by the court on the specified questions, I do not believe that para. 4.2 could be said to go that far. As noted previously, it is expressed by Clarke J. to be a "*minor caveat*" to the general proposition that a court on an appeal of this nature is confined to a consideration of the specified questions of law. While Clarke J. conceives that, in some cases, it may be necessary for a court to stray into areas beyond the specified questions of law, this is only where a consideration of those areas is essential to the court's determination on the specified questions of law. In para. 5.2 of his judgment, Clarke J. clarified that the court may only examine wider issues as an aid to answering the specified questions of law. The court cannot do so on a stand-alone basis which Clarke J. made clear would run the possibility of the appeal being successful on a basis which is independent of the specified questions of law. In circumstances where the MSO has chosen not to seek to have any question of law specified in relation to the finding of the learned Circuit Court judge outlined in para. 48 above, I find it difficult to see how it could be permissible for the MSO to argue that this finding should be overturned by reference to the answer to one or more of the specified questions of law. To do so would appear to me to give rise to the very mischief which is identified by Clarke J. in para. 5.2 of his judgment. Therefore, even if I came to a conclusion in relation to any of the specified questions which was different to that of the learned Circuit Court judge, I do not believe that I could properly set aside her decision in those circumstances. Consequently, it seems to me to follow that the questions raised in the notice of appeal are moot in the sense explained by McKechnie J. in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 I.R. 274 at p. 298 where he said: -

> *"A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties ...".*

55. In the same case, McKechnie J. explained why a court will not deal with questions which are moot. He said at p. 290: -

> *"The rule by which a court will decline to hear and determine an issue on the grounds of mootness is firmly based on the deep rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical. This policy stems from and is directly related to the system of law within which our courts discharge their essential function of administering justice. Apart from any special jurisdiction conferred by statute, by the Constitution, or resulting from our membership of the European Union, the system in question is fully adversarial. Consequently, there must exist some issue … embedded within a factual or evidential framework, the determination of which is … necessary so as to resolve the conflict or dispute which necessitated the proceedings in the first instance. It has therefore always been recognised that, without such a concrete foundation, the courts typically will decline to intervene."*

56. Quite apart from the concerns expressed in paras. 52-54 above, there are significant additional problems with the questions in that they pre-suppose a state of affairs that does not fully reflect the evidence available to the Circuit Court (on which the learned Circuit Court judge clearly relied). Many of the questions assume that the underlying facts are as the inspector deemed them to be and assume that the vessel presented a clear hazard. The questions ignore the fact that there was contrary evidence before the Circuit Court and, in circumstances where the facts were contested, the learned Circuit Court judge was entitled to form her own view as to the underlying facts. Fundamentally, the basis of the questions is inconsistent with the finding made by the learned Circuit Court judge (as recorded in para. 48 above) even though that finding has not been appealed. There are also other problems with them which I examine in more detail below. In saying this, I am conscious that this is the first appeal that has been taken pursuant to Regulation 17 and the MSO therefore had no precedent to guide it. It is understandable that there were difficulties in drafting the appeal in those circumstances.

Question 1

57. For example, the first part of Question 1 asks a very general question as to what constitutes a deficiency (within the ambit of Article 19 (2) of the Directive and Regulation 16 (1) of the 2010 Regulations) sufficient to detain a vessel. In my view, that is not a question that can be answered by the court on a hearing of this kind. What constitutes a deficiency will depend on the facts and circumstances of any individual case. No question is asked in the first sentence of Question 1 by reference to the particular facts of this case and therefore the question is, in my view, far too vague and general to be addressed by the court. For the court to address that question, the court would, in truth, be providing general advice, which is manifestly not appropriate.

58. The next part of Question 1 asks whether the requirements stated in Annex X of the Directive are applicable solely to Article 19.3 or whether they are applicable to both Article 19.2 and Article 19.3. In the course of the hearing before me, the parties were ad idem that the requirements stated in Annex X are applicable to both provisions. However, this is a question for the court and therefore the fact that the parties are agreed as to the legal position is not definitive. In light of the view which I have formed in para. 54 above, I am reluctant to express any view on this question at all.

59. Nonetheless, in deference to the arguments made in the course of the hearing I will set out my (*obiter*) view in relation to Question 1(a). In my opinion, it is essential to consider this question in light of the structure and provisions of the Directive. Article 19.2 must be read in context. It states that, in the case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the Port State where the ship is being inspected shall ensure that the ship is detained. Although no reference is made to Annex X in Article 19.2, it is clear that Article 19.2 is concerned with the outcome of an inspection which reveals deficiencies in a ship which are considered to be clearly hazardous to safety health or the environment. It must be recalled that the regime established by the Directive is predicated on a system of inspections. It is clear from a consideration of the Directive as a whole that, absent an inspection which reveals a hazardous deficiency, there can be no detention.

60. In turn, Article 19.3, deals with the nature of the inspection which must be carried out before a detention can take place. On a careful reading of their provisions, it seems to me to be very clear that Article 19.2 and Article 19.3 are in fact interlinked. Article 19.2 identifies the standard which is to be met if a ship is to be detained. That standard is to be assessed in the course of an inspection. That is clear from Article 19.2 and the architecture of the directive. Article 19.3 then identifies that, in exercising a professional judgment as to whether or not a ship is to be detained, the inspector is required to apply the criteria set out in Annex X. In other words, Article 19.3 prescribes that Annex X is to be used as the tool to assist the inspector in exercising his or her professional judgment to enable a conclusion to be reached under Article 19.2, as to whether or not there is a deficiency which is clearly hazardous to safety, health or the environment.

61. Annex X provides mandatory guidance to an inspector as to the criteria to be applied by him or her in determining whether a deficiency is sufficiently serious to warrant the detention of a ship. The introduction to Annex X makes clear that before determining whether deficiencies found during an inspection warrant detention of a ship, the inspector must apply the criteria set out in both Points 1 and 2 of the Annex. Point 1 sets out the "*main criteria*" and Point 2 sets out how the main criteria are to be applied. The criteria set out at Point 1 comprise deficiencies which are:

"sufficiently serious to merit an inspector returning to satisfy himself that they have been rectified before the ship sails."

Point 1 identifies that the need for the inspector to return to the ship is a measure of the seriousness of the deficiency.

62. It is clear, however, that Point 1 is not to be considered on its own. As noted above, the introductory words of Annex X require that the criteria set out in Point 2 must also be applied. Point 2 expressly provides that, when deciding whether the deficiencies are sufficiently serious to merit detention, the inspector must assess a number of matters which include for example the three criteria which Captain Black confirms (in his first affidavit) he took into account, namely: -

(a) the prevention of pollution of the environment throughout the forthcoming voyage;

(b) the maintenance of adequate stability during the forthcoming voyage;

(c) the maintenance of adequate watertight integrity throughout the forthcoming voyage.

63. Point 2 concludes in the following terms: -

"If the answer to any of these assessments is negative, taking into account all deficiencies found, the ship must be strongly considered for detention. A combination of deficiencies of a less serious nature may also warrant the detention of the ship."

64. As the learned Circuit Court judge explained, the concluding language of Point 2 does not suggest that detention is the only solution where one or more of these factors apply. While it clearly envisages that the ship must be strongly considered for detention, it nonetheless leaves some scope for the application of professional judgment and for a decision to be made not to detain the vessel. Where those risks are negligible, there may be countervailing factors which, in particular circumstances, may justify a different decision being taken. Alternatively, there may be circumstances where the risk can be safely managed to the satisfaction of the inspector. Thus, as the learned Circuit Court judge said, even where there may be a risk of pollution, or questions over stability or adequate watertight integrity, it does not follow of necessity that there must be a detention. That said, it is impossible to conceive that an inspector would be able to form the view that a ship should not be detained where the available evidence shows that there is a clear risk of pollution or a clear risk to health or safety which cannot be safely managed otherwise than by detention of the ship. There is nothing in the Directive to suggest that the inspector has an overriding discretion to ignore or overlook the existence of a clear hazard which cannot be safely managed. Conversely, where the available evidence (assessed with the benefit of the Annex X guidance) fails to establish a clear risk of that nature, a ship should not be detained.

65. In my view, the way in which it is put in para. 42 of the written submissions filed on behalf of the MSO goes too far. There it is suggested that if an inspector deems that the criteria set out in Annex X apply there must *ipso facto* be a deficiency that is clearly hazardous. In my view, while the inspector must of course apply the criteria, he or she must exercise a professional judgment as to whether any deficiency identified following the application of those criteria is clearly hazardous in the sense described in Article 19.2 so as to justify the detention of the ship. There must be an appropriate exercise of professional judgment informed by the criteria set out in Annex X. The concluding words of Point 2 of Annex X (quoted in para. 63 above) make clear that the criteria are not to be applied in a purely mechanical way. Similarly, the language of Point 3 also supports this conclusion. Point 3 sets out a non-exhaustive list of deficiencies which *may* warrant the detention of a ship.

66. The case made in para. 42 of the written submissions also presupposes that the facts are as Captain Black perceived them to be. This ignores the evidence summarised in para. 13 above including the evidence of Captain Altamare in relation to the stability calculations undertaken by him which showed that it was safe for the vessel to sail. It is clear from the affidavit evidence of Captain Black that he did not have regard to those calculations in assessing the facts. In this context, it is crucial to bear in mind that the application of the criteria in Annex X is ultimately dependant on the underlying facts. One cannot, for example, form a view as to whether a ship can maintain stability during a voyage (one of the considerations expressly mentioned in Point 2 of Annex X) without a consideration of the impact a particular deficiency might have on that stability. In some cases, the deficiency may be so serious that the impact is obvious. In other cases, a consideration of the available evidence (such as reliable stability calculations) may show that the ship could safely set sail notwithstanding the deficiency. Similarly, one cannot form a view that there is a pollution hazard (one of the Point 2 criteria which Captain Black expressly said that he had applied) without examining the facts. Here, the learned Circuit Court judge found, as a matter of fact, that no such risk of pollution existed. At p10 of her judgment she said: "*… the evidence which the court accepts, is that the cracking in the hull was located at an area which was some 140 metres from where the bunkers/fuel was stored and separated by a number of waterproof compartments and as a result no such risk existed*" (emphasis added).

67. Having regard to the discussion in paras. 58-66 above. I am of the view that the question posed at para. 1(a) of the notice of appeal can be answered in this way: any decision to detain a ship under Article 19.2 must be based on the professional judgment of an inspector who has (a) carried out an inspection of the vessel authorised by the Directive and the 2010 Regulations and (b) applied the criteria set out in Annex X in arriving at a professional judgment as to whether the deficiencies observed in the ship are clearly hazardous to safety, health or the environment.

Question 1(b)

68. The question which is asked is whether the "*detention requirement under Annex X*" of ships which are unsafe to proceed to sea and deficiencies which are sufficiently serious to merit an inspector returning to satisfy himself that deficiencies have been rectified meet the requirements stated in Article 19.2. The question appears to proceed on the assumption that there were, as a matter of fact, deficiencies in the vessel which made it unsafe to proceed to sea and that were sufficiently serious to merit a return visit by Captain Black. However, that assumption is plainly inconsistent with the conclusion reached by the Circuit Court. The question has therefore been posed on a mistaken premise and, for that reason, I do not believe that it would be appropriate to attempt to answer it. There are a number of additional points that should also be noted in the context of this question.

69. In the first place, it is wrong, in my view, to refer to Annex X as a "*detention requirement*". The relevant detention requirement is in fact set out in Article 19.2. The criteria set out in Annex X are essentially tools to assist the inspector in reaching a conclusion as to whether the case warrants detention of the ship involved. As I have already indicated above, the Directive contemplates that detention will not be warranted unless the deficiency is clearly hazardous to safety health or the environment.

70. Secondly, I do not believe that the criterion set out in Point 1 of Annex X (which deals with deficiencies which are sufficiently serious to merit an inspector returning to satisfy himself or herself that the deficiencies have been rectified before the ship sails) is intended to be read on its own. It seems to me that what is or is not sufficiently serious is not intended to be a matter purely for the subjective judgment of an individual inspector. That is why the EU legislature was very careful to provide in Annex X that the

inspector must apply not only Point 1 but Point 2. It seems to me that Point 2 is directed towards assisting the inspector to assess what deficiencies should be considered to be "sufficiently serious" within the meaning of Point 1. In my view, Annex X is clearly designed to ensure that a holistic view is taken by the inspector in exercising a professional judgment which is informed by and based upon the application of the criteria set out in Annex X. However, as the closing words of Point 2 (quoted in para. 63 above) make clear, even the existence of some of the deficiencies expressly identified in Point 2 do not give rise to an automatic decision to detain. As noted in para. 64 above, Annex X preserves the ability of the inspector, depending on the individual circumstances of a particular case, to form the view that detention is nonetheless not warranted, notwithstanding that some of the criteria set out in the Annex X may apply.

71. I do not propose to say anything further in relation to Question 1(b). In my view, the decision not to seek to appeal the finding by the learned Circuit Court judge as set out on p. 11 of her judgment, (quoted in para. 49 above) renders this question entirely moot. On a hybrid appeal of this nature, the Circuit Court was in my view, entitled to form an independent judgment on questions of contested fact and therefore to reach a different conclusion to the inspector. As noted earlier in this judgment, Judge McDonnell has vast experience of maritime and shipping disputes and is an expert in maritime law, and she had significant evidence before her from an independent expert retained on behalf of DSN. She was in a position to review all of the material before her and to reach her own conclusion on the facts. Obviously, the conclusions which she reached on the evidence fed into the ultimate decision as to whether the detention order could be said to be justified. The question posed at para. 1(b) of the Notice of Appeal fails to take account of the evidence summarised in para. 13 above which expressly contested Captain Black's view that it was unsafe for the vessel to procced to sea and suggested that there was no objective scientific basis for the conclusions reached by Captain Black. Where the facts were contested in this way, the learned Circuit Court judge was entitled to reach her own finding. She was not bound by the view which Captain Black had taken of the facts when he made his decision to detain the vessel. If the MSO was unhappy with the view which Judge McDonnell formed on the facts, they could have sought leave to appeal on a specified question as to whether the conclusion of the Circuit Court was supported by the evidence. As discussed in paras. 50-52 above, that would constitute a point of law. In the circumstances, I do not believe that it would be appropriate to provide an answer to Question 1(b). As question 2 has already been addressed, the next question that falls to be considered is Question 3.

Question 3

72. The first part of Question 3 asks an impermissibly general question which suffers from the same deficiency as the first part of Question 1 in that it asks what constitutes "*accidental damage*" under Annex X of the directive. In my view, that question is plainly inappropriate since it would involve the court in providing an advisory opinion. Moreover, it is so general as not to admit of a comprehensive answer.

73. The individual questions which are posed in Question 3 (a) to (c) all relate to the concept of "*accidental damage*". The potential relevance of this issue (were it live) is that, in the case of accidental damage, Annex X provides that there will be no order for detention where four conditions are met. The relevant part of Annex X dealing with accidental damage is in the following terms:

> *"Where the ground for detention is the result of accidental damage suffered on the ship's voyage to a port, no detention order shall be issued, provided that:*
>
> > *(a) Due account has been given to the requirements contained in Regulation I-VI (c) of SOLAS 74 regarding notification to the flag State administration, the nominated surveyor or the recognised organisation responsible for issuing the relevant certificate;*
> >
> > *(b) Prior to entering a port, the master or ship owner has submitted to the port State control authority details on the circumstances of the accident and the damage suffered and information about the required notification of the flag State administration;*
> >
> > *(c) Appropriate remedial action, to the satisfaction of the Authority, is being taken by the ship; and*
> >
> > *(d) The authority has ensured, having been notified of the completion of the remedial action, that deficiencies which were clearly hazardous to safety, health or the environment have been rectified."*

74. The accidental damage exemption was relied upon by the learned Circuit Court judge as a second ground for upholding the appeal. This is clear from pp.11-12 of her judgment. In the course of the hearing before me it was argued that there was no scope for the application of this exemption in circumstances where the damage suffered by the vessel here occurred not in the course of a voyage *to* Greenore port but *at* the port *after* the vessel had berthed.

75. An issue of interpretation of the Directive might be said to arise as to whether it was possible in this case to comply with para. (b) because the damage here was suffered *after* the vessel berthed. I do not believe that it would be appropriate for me to address that issue (which is essentially the issue addressed in Question 3(c) of the Notice of Appeal). This is for the reason that it is a question which would, if it were live, require a preliminary reference to the Court of Justice. I have heard conflicting arguments on the issue and, in my view, the answer to the question is far from clear. It would therefore, classically, be a case where a reference would be necessary were it not for the fact that the issue in relation to the applicability of the Annex X exemption is moot. The Annex X exemption was a second and alternative basis on which the Circuit Court upheld the appeal. It would not be appropriate to make a reference in relation to a moot question.

76. In so far as Question 3(a) is concerned, it is also moot for the same reason. Furthermore, it appears to me to have been formulated on a mistaken premise. As is clear from its terms, it conflates two separate things – the obligation under para. (a) to notify the Flag State administration with the separate obligation under para. (b) to notify the Port State authority. It is therefore not a question that could be answered even if it was not moot.

77. It also has to be said that there was a significant issue raised in the course of the hearing as to where the relevant obligation to notify the MSO has been implemented in Irish law. It should be recalled in this context that the failure to notify the MSO was not only relied upon by Captain Black as a basis to dis-apply the Annex X exemption, it was also relied upon as the basis for two of the three grounds for detaining the vessel in the first instance.

78. As explained in an earlier part of this judgment, a non-periodic inspection giving rise to a decision to detain can be justified by reference to "unexpected factors" as set out in para. 2B of Annex I. As noted in paras. 25-26 above, one of those factors arises where ships have failed to comply with relevant notification requirements. The problem is that I was not informed that any of the notification requirements set out in para. 2B was, in fact, applicable here. Indeed, one of the notable features of the hearing before me is that, notwithstanding a challenge by DSN to identify the legal basis on which notification to the MSO was required, no such

basis was in fact identified by the MSO in the course of the hearing. I note that Captain Black, in his first affidavit in the Circuit Court proceedings, refers to the obligation contained Chapter 1 Regulation 11 para. (c) of the Safety of Life at Sea Convention ("SOLAS") under which the master or owner of a ship which suffers damage is required to report that damage to the Flag State administration save that where the ship is moored in a foreign port, there is also an obligation to report to the Port State authority. That provision of SOLAS is specifically mentioned in para. (a) of the extract from Annex X quoted in para. 73 above but, crucially, only in relation to notification to the Flag State administration. Para. (a) makes no reference to the Port State authority at all. The national provisions implementing the SOLAS notification requirements were not identified in the course of the hearing.

79. No one in the course of the hearing before me drew attention to any provision of Irish law imposing an obligation on a ship owner or master to report such damage to the MSO. I do not say that such a notification obligation does not exist – I merely draw attention to the fact that no one identified the Regulation or statutory provision and Captain Black did not do so in his affidavits before the Circuit Court.

80. It is true that, in his first affidavit, Captain Black exhibited Marine Notice No. 03 of 2013 which deals with reporting of casualties or accidents affecting the safety of a ship. However, the reporting requirements set out in that Marine Notice (which itself has no legal force) relate to the reporting to the Coast Guard under the European Communities (Vessel Traffic Monitoring and Information System) Regulations 2010 and to the MCIB under the Merchant Shipping (Investigation of Marine Casualties) Act, 2000 as amended by the European Communities (Merchant Shipping) (Investigation of Accidents) Regulations 2011. There is a reference to the obligation to report to the MSO under the Merchant Shipping and Sea Pollution Act but no one in the course of the hearing either before the Circuit Court or in this court has identified where in any of those Acts there is in fact an obligation to notify the MSO of the damage suffered by the vessel here.

81. In light of the considerations outlined in paras. 78-80 above, it would be unsatisfactory to embark on a consideration of Question 3(a) even if it was not moot and even if it had been correctly formulated. While the obligation to notify is a condition of the Annex X exemption (and might therefore be said to be self-executing), the Court has been left in the dark as to how the underlying obligation to notify the MSO (relied upon in the Form B/1 in support of the notice of detention) has been implemented in Ireland.

82. I also believe that it would be inappropriate to deal with Question 3(b). That question is also moot. In light of the finding by the learned Circuit Court judge in relation to the first part of the case, DSN do not need to rely upon the Annex X exemption.

Question 4

83. Question 4 also gives rise to similar issues as some of the earlier questions in so far as it (a) requires an answer which would involve the court in providing advice divorced from the facts of the case and (b) refers to the "*requirement to detain*" under Annex X. I have already made clear that I do not agree that Annex X should be characterised in that way. The question also presupposes that the facts here were such as to require that the vessel should be detained. As previously explained, the learned Circuit Court judge had evidence before her on which it was open to her to come to the conclusion that she did. In these circumstances, I believe that Question 4 is misconceived.

84. Moreover, the extent to which (if at all) the carrying out of repairs will have an impact on a decision to detain will always depend on the underlying facts. There may well be cases where the fact that repairs are underway will have little or no impact on the decision; conversely there may well be cases where it is a relevant factor to be weighed in the balance. In the present case, the learned Circuit Court judge clearly had regard to the fact that repairs were underway at the time the detention notice was issued and further repairs were planned. It was just one factor to which she had regard and could not be said to be the principal factor.

85. I do not believe that there is any basis on which to form the view that it would be impermissible to have regard to the fact that repairs are underway or have been commissioned. The Directive itself makes reference to the carrying out of remedial action albeit in the context of the Annex X exemption. However, if the carrying out of repairs is considered to be a relevant criterion in the context of the application of the exemption, it is inconceivable that it is not also a matter to which some regard can be had in the making of a decision as to whether a ship should be detained. This conclusion is reinforced by a consideration of Article 19.8 which contains an injunction that all possible efforts should be made to avoid a ship being detained. In light of Article 19.8, it would be bizarre if an inspector could not have regard to the carrying out of repairs at least in cases where the inspector can be assured that the repairs will be completed before the ship sets sail.

86. Moreover, it must be borne in mind that the nub of the decision of the Circuit Court was that there was no clear hazard to safety health or the environment. There was evidence to support that finding. The decision did not rest solely on the fact that repairs were to be carried out.

87. For all of these reasons, I do not propose to answer Question 4 save to the extent that I set out my (*obiter*) observations in relation to it at paras. 84-85 above.

Conclusion

88. In light of the views which I have set out above, I do not believe that there is any basis to interfere with the decision of the learned Circuit Court judge. I will therefore refuse the appeal by MSO and affirm the order of the Circuit Court allowing the appeal of DSN against the validity of the Notice of Detention dated 30 September, 2015.

89. I should add that, in the case of future appeals against similar notices, it would be wise that the inspector, on receipt of the appeal, should swear an affidavit setting out the circumstances leading to the inspection and detention of the ship and the particular aspects of Annex X that led him or her to the decision to detain. That is the approach that was adopted in this case in so far as the detention of the vessel was concerned although the affidavit did not address the basis for the inspection itself.

90. I appreciate that the ship owner bears the burden of proving that the detention is unreasonable but, in light of the very terse terms of the notice of detention and accompanying documents, I believe that it is essential that the court is apprised by the inspector of the circumstances leading to the inspection and detention. I believe that such material should be placed before the court at the outset, so that the court can understand the factors that led the inspector to reach a decision to the detain.