THE COURT OF APPEAL

Edwards J.
Donnelly J.
Noonan J

Neutral Citation Number [2020] IECA 186

Record No: 2019/183

COLUM BROWNE

PLAINTIFF/APPELLANT

V

MINISTER FOR AGRICULTURE, FISHERIES AND FOOD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court delivered by Mr Justice Edwards on the 10th of July, 2020.

Introduction

1. For simplicity the plaintiff/appellant will be referred to in this judgment as the plaintiff, and the defendants/respondents will be referred to as the defendants.

2. This is an appeal against the judgment of the High Court (Ní Raifeartaigh J) of the 13th of February 2019, and her Order consequent upon it made on the 5th of March 2019 and perfected on the 25th of March 2019, dismissing the plaintiff's claim. It arises in the context of proceedings commenced by the plaintiff by Plenary Summons in which he claims various declarations and damages from the defendants for alleged tort, breach of his right to earn a livelihood and to own property pursuant to Article 40. 3. 1. of the Constitution of Ireland and Article 1 of the First Protocol of the European Convention on Human Rights.

3. The High Court's said judgment ruled upon several preliminary issues that had been set down for determination prior to the hearing of the substantive case. The ruling on those issues was adverse to the plaintiff resulting in the dismissal of his claim with costs to the defendants. He now appeals against the entirety of the High Court's judgment and Order.

Background to the proceedings

4. The plaintiff is a sea fisherman and sea fishing boat owner. His boat is called the MFV Áine Íde. It was built in 1978 and purchased by him in 1993.

5. Following the establishment of the common fisheries policy, the then European Economic Community (EEC) sought to define characteristics for (sea) fishing vessels by regulation, and to that end promulgated Council Regulation (EEC) No 2930/86 determining characteristics for fishing vessels. The recitals to that regulation reflect the thinking

behind it, in that they note that "*in the framework of the common fisheries policy reference is made to the characteristics of fishing vessels, such as length, breath, tonnage, date of entry into service and engine power*", and they go on to assert (*inter alia*) that "*it is essential that identical rules for determining the characteristics of fishing vessels should be used in order to unify the conditions for pursuit of the activity (i.e. commercial sea fishing) in the community.*" Accordingly, Regulation (EEC) No 2930/86 aimed to set identical rules for determining the characteristics of fishing vessels for the purposes of the common fisheries policy by providing common definitions of what would constitute a vessel's length, breath, tonnage, engine power and data of entry the service.

6. In so far as it was later registered as a sea fishing boat for the purposes of the Fisheries (Amendment) Act 2003 ("the Act of 2003") the MFV Áine Íde was registered as having a length of 65.5 ft, or 19.96 m, when measured according to Article 2.1 of Council Regulation (EEC) No 2930/86 which defines the length of a vessel as being "*the distance in a straight line between the foremost point of the bow and the aftermost point of the stern*".

7. In so far as its tonnage was concerned, as a boat built during the currency of the Merchant Shipping (Tonnage) Regulations 1967 (SI No 23 of 1967) ("the 1967 tonnage regulations"), the MFV Áine Íde may be presumed to have had its tonnage initially measured in accordance with those regulations. By the time the plaintiff purchased the vessel in 1993 the 1967 tonnage regulations had been replaced by the Merchant Shipping (Tonnage) Regulations 1984 (S.I. 369/1984) ("the 1984 tonnage regulations"), which implemented the International Convention on Tonnage Measurement of Ships, 1969 ("the ICTM 1969"), but only for vessels of 24 metres or more in length. Vessels of less than 24 metres in length, such as the MFV Áine Íde, were exempted from the application of the Convention.

8. However, Article 4 of Council Regulation (EEC) No 2930/86 later required the gross tonnage characteristic of all community fishing boats, regardless of length, to be measured in the manner specified in Annex 1 to the ICTM 1969. What this meant in practical terms for vessels, such as MFV Áine Íde, that were already in service prior to the coming into effect of that regulation was that such vessels needed to be re-measured for tonnage purposes using a methodology that was ICTM 1969 Annex 1 compliant. Article 4 imposed an initial deadline in that regard of 18 July 1994.

9. As that deadline approached it was recognised that member states were having technical difficulties in implementing it, particularly in the case of smaller vessels for whom the ICTM tonnage measurement methodology was considered by some to be inappropriate. The MFV Áine Íde had not been re-measured for tonnage purposes at the point at which the plaintiff purchased it in 1993.

10. Shortly thereafter, Council Regulation (EEC) No 2930/86 was amended by Council Regulation (EC) 3295/94. The circumstances giving rise to the enactment of the amending Council Regulation (EC) 3529/94 and its concern with tonnage, to which I have

already alluded in general terms, are reflected in the recitals to that instrument, which merit quotation (to the extent relevant):

> "Whereas reference is made to the characteristics of fishing vessels in the common fisheries policy, requiring uniform definitions of vessel characteristics; whereas Council Regulation (EEC) No 2930/86 of 22 September 1986 defining the characteristics of fishing vessels (3) was adopted for this purpose;
>
> Whereas Community action in this field should where possible be based on recommendations already adopted by specialist international organizations;
>
> Whereas the need for a standardized international system of tonnage measurement of ships was recognized because of widely differing tonnages for individual ships of the same length; whereas, in view of this, the International Convention on Tonnage Measurement of Ships was signed in London on 23 June 1969 (ICTM 1969) under the aegis of the International Maritime Organization (IMO);
>
> Whereas that Convention defines gross tonnage as a function of the total volume of all enclosed spaces of a ship; whereas the methodology for the measurement of gross tonnage is laid down in Annex I to the Convention;
>
> Whereas the said Convention applies from 18 July 1994 to all non-exempted ships, including fishing vessels of 24 metres or more in length engaging in international voyages; whereas ships of less than 24 metres in length are, inter alia, exempted from the Convention;
>
> Whereas Regulation (EEC) No 2930/86 extended the provisions of Annex I to the said Convention to all Community fishing vessels;
>
> Whereas Member States have experienced certain difficulties in fully implementing the tonnage provisions of Regulation (EEC) No 2930/86, particularly in relation to smaller fishing vessels; whereas, for those smaller vessels, the methodology laid down in Annex I to the said Convention is in certain cases inappropriate;
>
> Whereas there should be flexible provisions for existing vessels, and in particular for those less than 15 metres in length, so that an estimate may be used for their tonnage;
>
> Whereas for vessels less than 15 metres in length a simpler definition of gross tonnage is desirable;
>
> Whereas vessels equal to, or greater than, 15 metres in length should be measured in accordance with the said Convention in view of the greater importance of the superstructure volume of those vessels;
>
> Whereas a postponement of the deadline of 18 July 1994 for remeasuring existing vessels equal to, or greater than, 15 metres and less than 24 metres in length is

necessary because of the technical demands involved in measuring vessels in accordance with the methodology of the 1969 Convention, …"

11. Council Regulation (EC) 3295/94 set a new deadline of the 1 January 2004 for remeasuring fishing vessels equal to, or greater than, 15 m, and less than 24 m, in length. The MFV Áine Íde was in that category. The existence of this new deadline prompted the Marine Survey Office of the Department of Transport to re-measure the MFV Áine Íde in late 2003.

12. The significance of the re-measurement exercise from the plaintiff's perspective was this. Ireland acceded to the ICTM 1969 with effect from the 11th of July 1985. In preparation for Ireland's accession, the Minister for the Marine, in exercise of the powers conferred on him under s. 91 of the Mercantile Marine Act 1955, had made the Merchant Shipping (Tonnage) Regulations 1984 (S.I. 369/1984) ("the 1984 tonnage regulations") which replaced the 1967 tonnage regulations and, *inter alia*, specified a method of ascertainment of tonnage that was ICTM 1969 compliant. The method of measurement set out in the 1984 tonnage regulations included taking account of the length of the vessel, and "length" was defined (in regulation 2) for the purposes of those regulations as meaning:

> "the greater of the following distances:
>
> *(a) the distance between the fore side of the stem and the axes of the rudder stock; or*
>
> *(b) a distance measured from the fore side of the stem, being 96 per cent of the distance between that point and the aft side of the stern,*
>
> the said points and measurements being taken respectively at and along a waterline at 85 per cent of the least moulded depth of the ship. In the case of a ship having a rake of keel the waterline shall be parallel to the designed waterline."

13. Accordingly, when re-measuring the tonnage of the MFV Áine Íde for the purposes of Council Regulation (EC) 3529/94, the MSO applied the regulation 2 definition of "length" (as it was required to do when measuring tonnage) rather than the definition of length in Article 2.1 of Council Regulation (EEC) No 2930/86. The difference in definition gave rise a difference in measured length. The recorded length of the MFV Áine Íde following the re-measurement for gross tonnage calculation purposes was 63.97 feet.

14. It is pertinent to note that in the same year as the re-measurement occurred, our legislative scheme in so far as it relates to sea fisheries was radically overhauled by the Act of 2003. Following the enactment of the Act of 2003, the Registrar General of Fishing Boats became the licensing authority in relation to sea fishing boats (the "Sea Fishing Licensing Authority"), replacing the (relevant) Minister who had until then had exercised a licensing function in that respect under the Fisheries Acts 1959 - 2001. Moreover, under

the new legislative regime, the Minister could now give policy directions on sea-fishing boat licensing to the licensing authority as provided for in s. 3(2)(b) of the Act of 2003.

15. Also relevant, as the High Court judge records in her judgment, is the fact that between 1983, and the coming into effect of the new sea fisheries licencing scheme under the Act of 2003, the Irish fishing fleet was divided for licensing purposes into vessels over 65-ft in length and under 65 ft in length. Following the plaintiff's purchase of the MFV Áine Íde in 1993 he was issued licences by the (relevant) Minister to fish for herring and mackerel in the over-65 ft segment of the fleet.

16. Seemingly, following the remeasurement of the MFV Áine Íde for gross tonnage purposes the MSO notified the Sea Fishing Licensing Authority that the length of the MFV Áine Íde had been re-measured at 63.97 ft, in consequence of which the characteristics of the MFV Áine Íde as recorded in the Register of Fishing Boats were amended to show a length of 63.97 feet in substitution for the previously measured length of 65.5 feet.

17. The plaintiff was notified by the MSO of the new measurement on the 30th of December 2003, and the change of registered length was entered on the Register of Fishing Boats on the 21st of April 2004.

18. The consequences of the change of registered length were significant in the plaintiff's case because it meant that, on the basis of the vessel's registered length, the plaintiff, as owner and master of the MFV Áine Íde, was no longer eligible to obtain licences for it to fish for herring and mackerel in the over-65 ft segment of the fleet. He was initially denied a quota authorisation in 2005 to fish for mackerel in the over 65ft category on the grounds that the registered length of his vessel was under 65 ft, while anomalously being granted a quota authorisation in that year to fish for herring in the over 65ft category. However, in 2006 he was denied quota authorisations to fish for either mackerel or herring in the over 65ft category, on the grounds that the registered length of his vessel was under 65 ft.

19. As the High Court judge then records (at paragraphs 4 - 7 of her judgment):

> "4. From (at the latest) 2006 onwards, the Áine Íde was not granted a quota authorisation in either the mackerel or herring fishery for over-65 ft vessels, but was apparently granted authorisation in the under-65 ft category. It appears that, on foot of a complaint by the plaintiff, the Minister referred the matter to the Marine Survey Office and that on the 3rd October, 2006, the latter informed the Minister that the change in registered length was a national change for the calculation of tonnage and that there had been no physical change in the actual length of the vessel. Thereafter, the vessel was never granted any license or entitlement to fish for herring or mackerel in the over-65ft category.
>
> 5. In 2010, the minister introduced a policy which involved categorizing vessels into 'Tier 1'and 'Tier 2' vessels and allocating quotas in respect of mackerel and herring fisheries on the basis of the vessel's track record for those species in particular

years. This policy was given effect to in the subsequent Policy Directives referred to below.

6. On the 26th January 2011, the Minister issued a Policy Directive under S. 3(2) of the Fisheries (Amendment) Act 2003, as amended, that his department would determine which vessels would qualify for Tier 1 and Tier 2 for the purpose of mackerel fishing; allocations were to be based on track record of the vessel between the years 2007 to 2009. Tier 1 vessels were those which had landed 275 tonnes per year. The Áine Íde did not qualify for Tier 1 or Tier 2.

7. On the 19th September 2012, the Minister issued a Policy Directive under s. 3(2) of the Fisheries (Amendment) Act 2003, as amended, that his Department would determine which vessels would qualify for Tier 1 and Tier 2 for the purpose of herring fishing, which involved a ring-fencing of certain vessels, again based on track record. A subsequent Policy Directive dated 11th October 2002 made minor amendments to the first Policy Directive. The Áine Íde was not placed in the ring-fenced portion of either the North West or Celtic sea herring fisheries."

20. It is appropriate to mention at this point, although somewhat to jump ahead in terms of the chronology, that the plaintiff now maintains that the MSO, and/or the Sea Fishing Licensing Authority, was/were in error in reclassifying his vessel as belonging in the under 65 ft segment of the fleet. His contention is that the effect of Council Regulation (EC) No 3259/94 was to merely amend Council Regulation (EEC) No 2930/86 to require a re-measurement of his vessel for **tonnage purposes** only. It did not repeal or replace Council Regulation (EEC) No 2930/86. Moreover, the plaintiff contends, a close examination of both instruments indicates that Council Regulation (EC) No 3259/94 did not purport to amend the definition of length for general classification purposes which is contained in Article 2.1 of Council Regulation (EEC) No 2930/86. Rather, it amended Article 3 of that instrument (defining the breadth of a vessel), and completely replaced Article 4(1) of that instrument (relating to gross tonnage) with a new Article 4(1) containing five sub-articles, i.e., (a) to (e), respectively with sub-article 4(1)(e) requiring a re-measurement of the gross tonnage of existing vessels equal to, or greater than, 15 m, and less than 24 m, in length in accordance with the methodology set out in the annex to the regulation where the Commission considered those values to be sufficiently accurate, alternatively in accordance with Annex 1 to the ICTM 1969. The critical point from the plaintiff's perspective is that Article 2.1 of Council Regulation (EEC) No 2930/86 remained unaltered and in force for all purposes other than the process of the measurement of gross tonnage. The plaintiff says that under that rubric, the MFV Áine Íde, which was not physically altered in any way at any material time either before or after re-measurement for gross tonnage purposes, is properly to be regarded as being over 65 ft in terms of its general characteristics, such as would have rendered it's operator eligible at all material times to obtain licences to fish for herring and mackerel in the over 65 ft segment of the fleet.

21. The difficulty now faced by the plaintiff is that, although ostensibly he did complain to the relevant Minister in 2006 about the change in the registered length of his vessel, which had resulted in him being denied licences in the over-65 ft category, he did nothing in 2003 when the vessel was re-measured by the MSO, or in 2004 when the change of registered length was entered on the register, to challenge by means of litigation the change of registered length of his vessel. If, as he now contends, the registered length of his vessel was unilaterally altered to his prejudice by the Sea Fishing Licensing Authority acting on information supplied by the MSO, based upon a misinterpretation by either or both of them as to the law, and in particular of the effect of Council Regulation (EEC) No 2930/86 as amended by Council Regulation (EC) No 3259/94, it would have been open to him within the time limits permitted by order 84 of the Rules of the Superior Courts to challenge the recording of that alteration on the Register of Fishing Vessels by seeking leave to apply by way of judicial review for an order of certiorari to quash it (for failure to correctly apply article 2(1) of Council Regulation (EEC) No 2930/86 giving rise to error on the face of the record) and/or possibly an order of mandamus to compel rectification of the inaccuracy, amongst perhaps other possibilities, against the MSO and/or the Sea Fishing Licensing Authority.

22. While time in that regard might arguably have begun to run on the date of re-measurement (30/12/2003); or more likely on the date of alteration of the register (12th of April 2004); or even, taking an optimistic view of it, when he was refused quota authorisations to fish for either, or both, mackerel or herring in consequence of the alteration of the register ("*2006 at the latest*", in the words of the trial judge); he took no steps to initiate any such legal action.

23. What the plaintiff did do was to agitate his case by means of representations to the Minister, leading to the MSO confirming in writing to the licencing authority (the Registrar General) on the 2nd of June 2006. who in turn confirmed it to the Minister on the 3rd of October 2006, that there had been no physical change to the vessel. Notwithstanding these concessions the plaintiff still took no steps in terms of initiating litigation against any party.

24. He then allowed matters to drag on over the next almost six years, during which time (in 2011 and 2012) the Minister issued the Policy Directives referred to by the trial judge establishing Tier 1 and Tier 2 vessels for allocation of quota purposes in respect of commercial sea fishing for herring and mackerel. After the plaintiff had failed to be allocated any quota under Tier 1 or Tier 2 rules for either herring or mackerel in 2011 or 2012, he then finally issued the present proceedings by way of Plenary Summons dated the 28th of September 2012.

25. The proceedings herein are framed somewhat unusually. The defendants are the relevant Minister, Ireland and the Attorney General. The Statement of Claim, which was not filed until the 18th of December 2015, recites the fact of the registered length of the MFV Áine Íde being altered in 2004 in consequence of a re-measurement of the vessel by the MSO in 2003, leading to the plaintiff being refused quota authorisations to fish for mackerel in

2005, and for both mackerel and herring in 2006. It then goes on to impugn the ministerial Policy Directives of 2011 and 2012. In that regard the Statement of Claim asserts that "*the effect of the new systems* (it is to be inferred that this is a reference to the Policy Directives) *combined with the exclusion of the MFV Áine Íde from 2006 to the present day in respect of the over 65 foot mackerel fishery and from 2006 to the present day in respect of the over 65 foot herring fishery has resulted in the exclusion of the MFV Áine Íde from the mackerel and herring fisheries altogether*." The Policy Directives are further impugned on the basis that they were not proportionate and that "*they created an inflexible scheme whereby the MFV Áine Íde was excluded from the mackerel and herring fisheries*". The plaintiff particularises the latter claim as follows:

a. The first named defendant failed to have any or any adequate regard to the fact that there had been no physical change in the length of the MFV Áine Íde from its construction in 1978 to date;

b. The first named defendant failed to have any or any adequate regard to the fact that the MFV Áine Íde had fished in the mackerel and herring fisheries from 1978;

c. The first named defendant's selection of certain years and certain amounts of fish to be landed inclusive was arbitrary;

d. The first named defendant purported in a policy direction (sic) to legislate in an impermissible manner having regard to the provisions of the Constitution, in particular Article 15. 2. 1.

26. The Statement of Claim goes on to assert that the plaintiff has suffered loss and damage and particulars are provided. It further goes on to claim that in consequence of the matters pleaded the plaintiff has suffered a breach of his constitutional rights and his rights under the European Convention on Human Rights and Fundamental Freedoms, and certain particulars are again pleaded in support of those claims. Finally, the prayer to the Statement of Claim seeks:

(a) A declaration that the plaintiff was entitled in the year 2006 to the full renewal of his sea fishing boat licence for mackerel and herring, for abode of more than 65 feet in length in circumstances where there had been no actual change in the length of the boat and notwithstanding that the method of the Marine survey office of measuring length for their purposes had changed;

(b) A declaration that the Minister was not entitled to give an inflexible sea fishing policy directive in or about the year 2010 which had or would have the effect of excluding the plaintiff from the mackerel fishery.

(c) A declaration that the Minister was not entitled to give an inflexible sea fishing policy directive in or about the year 2011 – 2012 which had or would have the effect of excluding the plaintiff from the herring fishery.

(d) Further or other relief.

(e) Further, or alternatively, the plaintiff claims damages, reparations or compensation in tort or for interference with his right to earn a livelihood and to own property pursuant to Article 40. 3. 1 of the Constitution of Ireland and Article 1 of the First Protocol of the European Convention on Human Rights.

(f) Interest pursuant to the Courts Acts;

(g) And the costs of the proceedings

27. For completeness it should be stated that the defendants sought further and better particulars of aspects of the claim in a Notice for Particulars dated the 22nd of January 2016 which was replied to on the 30th of November 2016. A defence was then filed by the defendants raising a series of preliminary objections and then without prejudice to those objections traversing all the substantive claims advanced in the Statement of Claim.

28. Amongst the preliminary objections raised in the defence were pleas that

"The plaintiff's claim herein in substance and truth involves a challenge to the legitimacy of the exercise of powers and/or discretions and insofar as the plaintiff has not sought to challenge:

(i) The decision or decisions taken by the Marine Survey Office of the Department of Transport in or about 2003 pursuant to the provisions of Council Regulation (EEC) 2930/86 as amended by Council Regulation (EC) 3259/94; and/or

(ii) The decision or decisions taken by the Licensing Authority in respect of the issue of licences under the Fisheries (Amendment) Act 2003 and said Act as amended from in or about 2006 to 2012; and/or

(iii) The exercise of discretion of the first named defendant pursuant to section 3(2) of the Fisheries (Amendment) Act 2003 as amended in the issue of policy directions in 201 l or 2012; and/or

(iv) The exercise by the first named defendant of a statutory discretion in the allocation of fishing authorisations for mackerel and herring from 2005-2012 and in particular in relation to the MFV Áine Idè;

on public law grounds and/or by way of Stateside application, he accordingly is precluded from pursuing the relief sought herein in respect of same; Further the plaintiff has failed to make any such challenge or challenges promptly and/or within applicable time limits and the plaintiff's claims in that regard should be dismissed accordingly."

29. Further preliminary objections pleaded included:

- that the plaintiff s alleged cause or causes of action as against the defendants and/or part thereof is and/or are time barred pursuant to the provisions of the Statute of Limitations Act 1957, section 11 as amended;

- that the plaintiff has been guilty of inordinate and inexcusable delay and laches in the institution and prosecution of his claim, such that he is barred and estopped from claiming the claimed or any relief against the defendants;

- that the plaintiff is guilty of prolonged, inordinate and inexcusable delay such that

- the defendants have been or would now be prejudiced and unable to get a fair trial and that the plaintiff s claim should be struck out pursuant to the inherent jurisdiction of this Honourable Court;

- that by reason of the Plaintiffs conduct and his delay in commencing the proceedings the Plaintiff is not entitled to invoke the equitable jurisdiction of the Court to claim the declaratory reliefs prayed for in the Statement of Claim;

- that the defendants do not have responsibility for the Minister for Transport and/or the Licensing Authority for Sea Fishing Boats and any claims against the defendants in respect of the actions or inactions of same should be dismissed.

30. It was clear therefore from the filing of the Defence on the 8th of March 2016 that, in addition to a flagged intention to mount a vigorous substantive defence if required to do, the defendants were putting the plaintiff on notice that they would be also be raising serious objections to the form of the proceedings, including the procedure being adopted, the reliefs being sought, alleged delay in commencing the proceedings and the appropriateness of suing the defendants who had been named.

31. That represented the state of the pleadings as of the 8th of March 2016. Nothing further was done, in terms of official filings, to progress the proceedings for another nineteen months. No Notice for Particulars was raised in respect of the Defence, no Reply was filed to the Defence, no motions of any sort were filed, and no Notice of Trial was served. The evidence does, however, reveal that in July 2017 the plaintiff's solicitors wrote to the defendant's solicitors seeking voluntary discovery, and that this was followed on the 20th of October 2017 with the issuance of a 14 day warning letter advising the defendants that the plaintiff would seek an Order for Discovery should the requested voluntary discovery not be made within the specified timeframe. Although nothing turns on it, the plaintiff did in fact subsequently issue a motion seeking an Order for Discovery in February 2018, but this post- dated the issuance by the defendants of the motion leading to the setting down of various preliminary issues for trial in advance of the hearing of the substantive action and accordingly it was overtaken by events.

The defendants' Motion seeking a trial of preliminary issues.

32. The next thing that occurred in terms of official filings after the filing of the Defence was that on the 14th of November 2017 the defendants issued a motion returnable for the 15th of January 2018 seeking the following reliefs:

    1. An Order striking out or dismissing the plaintiffs claim on any or all of the grounds set out hereunder.

2 In the alternative, an Order pursuant to Order 25 rule 1 and/or Order 34 rule 2 of the Rules of the Superior Courts 1986 as amended directing the trial of the following preliminary issues of law:

(i) Whether the plaintiff s alleged cause or causes of action as against the defendants and/or part thereof is and/or are time barred pursuant to the provisions of the Statute of Limitations 1957, section 11 (as amended).

(ii) Whether the plaintiff herein has been guilty of inordinate and inexcusable delay in the institution and prosecution of the claim herein, and/or in the alternative has been guilty of delay and laches and is therefore barred and estopped from claiming the alleged or any relief or any part of the relief claimed against the defendants.

(iii) Whether the plaintiff is guilty of prolonged, inordinate and inexcusable delay such that the defendants have been or would now be prejudiced and unable to get a fair trial herein and the plaintiff's claim should be struck out pursuant to the inherent jurisdiction of this Honourable Court.

(iv) Whether by reason of the plaintiffs conduct and his delay in commencing the proceedings the plaintiff is not entitled to invoke the equitable jurisdiction of the Court to claim the declaratory reliefs prayed for in the Statement of Claim.

(v) Whether the plaintiff s claim herein in substance and truth involves a challenge to the legitimacy of the exercise of powers and/or discretions and insofar as the plaintiff has not sought to challenge

(a) The decision or decisions taken by the Marine Survey Office of the Department of Transport in or about 2003 pursuant to the provisions of Council Regulation (EEC) 2930/86 as amended by Council Regulation (EC) 3259/94 and/or

(b) The decision or decisions taken by the Licensing Authority in respect of the issue of licences under the Fisheries (Amendment) Act 2003 and said Act as amended from in or about 2006 to 2012 and/or

(c) The exercise of discretion of the first named defendant pursuant to section 3(2) of the Fisheries (Amendment) Act 2003 as amended in the issue of policy directions in 20ll or 2012; and/or

(d) The exercise by the first named defendant of a statutory discretion in the allocation of fishing authorisations for mackerel and herring from 2005-2012 and in particular in relation to the MFV Áine Idè.

on public law grounds he accordingly is precluded from pursuing the relief sought herein in respect of same; and/or whether the plaintiff has failed to make any such challenge or challenges promptly and/or within applicable time limits and the plaintiff’s claims in that regard should be dismissed accordingly.

(vi) Whether claims against the defendants in respect of the alleged actions or inaction of the Minister for Transport and/or the Licensing Authority for Sea

Fishing Boats should be dismissed the defendants not having responsibility for same.

3. Such further and/or other Orders as to this Honourable Court doth seem meet;

4. Costs

33. The motion was grounded on an affidavit of Donal King, an Assistant Principal Officer in the Sea Fisheries Policy and Management Division of the Department of the Minister or Agriculture, Fisheries and Food, the first named defendant, sworn on the 7th of November 2017, which sets out the factual position from the defendant's perspective and the procedural history of the case. The plaintiff did not file any affidavit in reply.

34. The fact of the plaintiff not having filed any affidavit in reply is of some significance in the context of this appeal in circumstances where the plaintiff, as appellant, and in putative compliance with the requirement in the Rules of the Superior Courts to append a chronology to his Notice of Appeal, has sought to use that chronology as a vehicle to seek to place numerous additional facts before this Court on which he now seeks to rely and which were never placed in evidence before the High Court. Neither the Rules, nor the laws of evidence, allow a party to seek to place new or additional evidence before the Court of Appeal in this fashion. The chronology that is required to be appended to a Notice of Appeal must be based on, and confined to, evidence that was before the court below, or official filings in the Central Office of the High Court in connection with the proceedings, or which it must be assumed is available to the plaintiff to adduce on the basis of what is pleaded.. Accordingly, in so far as the chronology appended to the Notice of Appeal refers to factual matters not previously placed in evidence, which do not relate to official filings, and which are not pleaded in the Statement of Claim, I am not prepared to have regard to them in the determination of this appeal. I say this without prejudice to the necessity to acknowledge that the court below, in considering the defendant's motion seeking a dismissal of the proceedings as being in essence misconceived and bound to fail, was obliged to proceed on the assumption that the plaintiff would be able to adduce evidence to establish such factual matters as are pleaded in his Statement of Claim, and that this court in considering the present appeal is also required to proceed on the same assumption. However, there are matters contained in the plaintiff's chronology that extend considerably beyond anything pleaded in the Statement of Claim.

35. The defendant's said motion came on for hearing before O'Regan J in the High Court on the 9th of May 2018, who substantially granted relief No 2 in the defendants' Notice of Motion and directed the trial of three preliminary issues in advance of the hearing of the substantive action. These were:

(i) whether the plaintiffs alleged cause or causes of action against the defendants is and/or are time barred pursuant to section 1l (as amended) of the Statute of Limitations Act 1957;

(ii) whether the plaintiff is guilty of prolonged, inordinate and inexcusable delay such that the defendants would have been or would now be prejudiced and unable to get a fair trial; and,

(iii) whether the plaintiff s claim in substance and truth involves a challenge to the legitimacy of the exercise of powers and/or discretions, and insofar as the plaintiff has not sought to challenge decisions listed in the submissions on public law grounds, he accordingly is precluded from pursuing the relief in respect of same.

36. The trial of the preliminary issues subsequently took place before Ni Raifeartaigh J., on the 18th of October 2018, following which judgment was reserved. Her judgment, which is the subject of this appeal, was ultimately delivered on the 13th of February 2019.

The Judgment of the High Court

37. Having set out the relevant chronology of facts as established in the evidence, and having reviewed the pleadings, the High Court judge succinctly summarised the submissions of the parties on the preliminary issues at paragraphs 10 and 11 of her judgment as follows:

> "10. It was submitted on behalf of the Minister that the plaintiff's claim, in essence, involved a challenge to the exercise of powers or discretions of a type which would normally fall for review by way of judicial review proceedings, and that the plaintiff was therefore precluded from pursuing the relief sought because he was well outside the time limit applicable for judicial review proceedings. In this regard, the Minister relied on the decisions in O'Donnell v. Dun Laoghaire Corporation [1991] ILRM 301, Kildare Meats Limited & Kildare Chilling Company v. Minister for Agriculture and Food [2004] 1 I.R. 92, Shell E&P Ireland Limited v. McGrath & Ors [2013] 1 I.R. 247 and Express Bus Limited v. National Transport Authority [2018] IECA 236. The Minister also sought to argue that any tortious cause of action put forward on behalf of the plaintiff had long since accrued for the purpose of the Statute of Limitations within the meaning of 'accrual' as that term was deployed in the authorities. Particular reliance was placed on the recent decision in Brandley v. Dean [2017] IESC 83, where the Supreme Court held that the date of accrual in case of the type before it (negligence in the building of a house leading to economic damage) was when the damage is "manifest". It was submitted on behalf of the Minister that the date of accrual was the date when the Áine Íde was re-measured i.e. the date of the certificate of survey in December 2003, when it was labelled as being under 65ft in length. In the alternative, it was submitted that the damage was manifest when the first decision was made to deny access to the vessel to an over- 65ft segment of a fishery because of this re-measurement, which was 2006 at the latest.
>
> 11. In the course of submissions on behalf of the plaintiff, it was emphasised that under the complex regime provided for by Irish and EU law, a person does not have an automatic right to fish and that each new season brings a fresh decision of the Minister with regard to the allocation of quotas/fishing opportunities. It was submitted that because of this, time did not start to run until the Minister's Policy

Directives of 2011 and 2012 shut the plaintiff out of the fisheries in question. It was submitted that the remeasurement by the MSO (in 2003) and the Minister's acquisition of the knowledge that this re-measurement had taken place (in 2006) were merely part of the narrative, but that it was not until the introduction of the Policy Directives in 2011 and 2012 respectively that the plaintiff suffered the particular damage complained of in these proceedings and/or that his cause of action arose. It was submitted that he was not out of time with respect to the period of time prescribed by the Statute of Limitations because the damage did not accrue until 2011 and/or 2012, and that, even if the claim was characterised as a judicial review claim in its essence, the authorities (in particular, the Shell case) did not preclude him from bringing such a claim outside judicial review time limit in all circumstances."

38. Relevant authorities, including *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301; *Kildare Meats Limited & Kildare Chilling Company v. Minister for Agriculture and Food* [2004] 1 I.R. 92, *Shell E&P Ireland Limited v. McGrath & Ors* [2013] 1 I.R. 247 and *Express Bus Limited v. National Transport Authority* [2018] IECA 236, are then reviewed in the High Court's judgment. I have considered these judgments in detail and, although further reference will be made to some or all of them later in this judgment, it is unnecessary to repeat the reviewing exercise conducted by the High Court judge which was succinct and accurate.

39. In the decision section of her judgment the High Court judge concluded that:

> "…what the plaintiff seeks to do in these proceedings is, in essence, to challenge certain decisions of public authorities of a kind typically and classically amenable to judicial review. This is so, whether one considers the issue of the Policy Directives in 2011 and 2012, or the earlier decisions concerning the vessel's measurement in 2003 or the refusal of licences /authorisations in the over 65ft category from 2006 onwards".

40. In her assessment, insofar as there were any decisions concerning the re-classification of the plaintiff's vessel, these occurred by decision not of the Minister but of the MSO in 2003; and the refusal of licence decisions were made by the Sea Fishing Licensing Authority.

41. The High Court rejected the plaintiff's contention that because each new season brings a fresh decision of the Minister/authorisations with regard to the allocation of quotas/fishing opportunity time should only be deemed to run from 2011 and 2012, because it was only on those dates that the earlier re-measurement decisions and the introduction of the Policy Directives combined to have the impact on his fishing livelihood of which the plaintiff now complains. The High Court judge considered that the situation was similar to that in the *Express Bus* case insofar as the plaintiff could not hope to succeed in his claim without also simultaneously challenging what, in substance, was the validity of an administrative decision to reclassify his fishing vessel in 2003 (or, even taking the timescale at its most favourable to the plaintiff, when that decision was confirmed to the

Minister in 2006). She concluded that the plaintiff's claim amounted in substance to a collateral challenge to the validity of the earlier decision(s) concerning the remeasurement of his vessel because, to succeed in its damages claim, the plaintiff would also, at a minimum, have to challenge the validity of that decision (or those decisions), even if only indirectly. The plaintiff's attempt to distinguish the *Express Bus* case on the basis that it had concerned a claim for *Francovich* damages was expressly rejected by the High Court judge on the basis that what seemed to her to be essential was whether the cause of action consists fundamentally of a challenge to a decision with a public law character, which in her view was the proper characterisation of the present proceedings.

42. Moreover, the High Court judge was of the view that even if the specific damage now complained of did not occur until 2011/2012 it was manifestly an essential part of his claim to challenge the validity of the earlier decision(s).

43. Ni Raifeartaigh J held that, in circumstances where a claim clearly involves a challenge to a decision or decisions of a public law character, the judicial review time limits apply unless the exceptional situation described by Clarke J in the *Shell* case applies, which was not true in this case. The High Court judge went on to say:

> "If I am wrong about the narrowness of that exception, I would find in any event that the plaintiff did not have such a good reason for the delay in bringing proceeding as to warrant an extension of time; though the particular damage he claims to have been caused by the policy decisions in 2011/0212 could not have been foreseen in 2006/2007, it was manifestly obvious that he would have some limitation of his fishing opportunity by reason of the re-measurement decision, which was borne out by the licences he obtained from 2006 onwards. In those circumstances, I would therefore be reluctant, even if I had a discretion to extend time, to exercise that discretion in favour of the plaintiff."

44. The High Court judge was equally not impressed with the argument that the correct approach was to look to when a cause of action in tort had accrued, and expressed the view that the present case "*does not, in reality, involve a negligence claim at all*". She continued:

> "Either the vessel was measured correctly and lawfully in accordance with the relevant Regulation and/or the Minister's introduction of the Policy Directives were lawful or not. This seems to me to be quintessentially a public law challenge to which the principles of accrual of action in tort/economic loss, discussed in cases such as Hegarty v. O'Loughran [1990] 1 IR 148, Gallagher v. ACC Bank plc [2012] 2 IR 620, and Brandley v. Deane [2017] IESC 83, simply do not apply, and that the appropriate time limit is that applicable to judicial review proceedings."

45. In the light of the conclusions that she had reached on the facts and on the law, Ni Raifeartaigh J. issued the following determinations in respect of the preliminary issues that had been set down before her:

"(i) The issue of whether the plaintiff's alleged cause or causes of action as against the defendants is and/or are time barred pursuant to section 11 (as amended) of the Statute of Limitations 1957 is not applicable by virtue of my finding on issue (iii) below.

(ii) The issue of whether the plaintiff is guilty of prolonged, inordinate and inexcusable delay such that the defendants would have been or would now be prejudiced and unable to get a fair trial was not pursued, therefore it is not necessary for me to make a finding on same.

(iii) Regarding the issue of whether the plaintiff's claim in substance and truth involves a challenge to the legitimacy of the exercise of powers and/or discretions, and, whether, insofar as the plaintiff has not sought to challenge the decisions listed in the submissions on public law grounds, he accordingly is precluded from pursuing the relief in respect of same, I find that the answer to both questions is yes and that the plaintiff is precluded from pursuing the reliefs described. In respect of whether the plaintiff has failed to make such challenge or challenges promptly and/or within the applicable time limits and in that regard should be accordingly dismissed, I find the answer to be yes."

The Grounds of Appeal

46. The plaintiff has appealed on four grounds, as follows:

1. The learned High Court judge erred in law or on a mixed question of law and fact (at paragraph 20 (iii) of her Judgment) in holding that the plaintiff's claim in substance and truth involves a challenge to the legitimacy of the exercise of powers and/or discretions; while failing to hold that it also involved the failure of the defendants to apply a European Council Regulation to the length of the plaintiff's boat when the Regulation did not give the defendants a power or a discretion to apply a different length to the plaintiff's boat and/or the misfeasance of the defendants in applying a different rule.

2. The learned High Court judge erred in law or on a mixed question of law and fact (at paragraph 20 (iii) of her judgment) in holding that in so far as the plaintiff has not sought to challenge the decisions listed in the submissions on public law grounds, he accordingly is precluded from pursuing the relief in respect of same; while failing to distinguish between the relief sought by the plaintiff way of declarations, damages and reparations from the public law relief referred to by the judge.

3. In short, the learned High Court judge erred in law and on a mixed question of law and of fact in failing to recognise that the plaintiff does not seek to set aside or reverse a public law decision or policy decision of the minister (as had been the case in *Kildare Meats Limited & Kildare Chilling Company v. Minister for Agriculture and Food* [2004] 1 1.R. 92) but seeks to remedy the mis-application of that law and policy to him on the principles set out in *O'Donnell v. Dun Laoghaire Corporation*

[1991] lLRM 301, *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158 and *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716.

4. In these premises, the learned High Court judge erred in law or on a mixed question of law and fact in dismissing the whole of the plaintiff's claim.

Submissions of the plaintiff in support of his appeal

47. The plaintiff maintains in his submissions that the High Court judge's crucial finding, i.e that his claim involves a challenge to the legitimacy of the exercise of powers and/or discretions and that, insofar as he has not sought to challenge the decisions listed in the submissions on public law grounds, he is accordingly precluded from pursuing the relief he now seeks, is based upon "too narrow a categorisation of the plaintiff's claim". He points to his Plenary Summons and maintains that it embraces claims for:

> "… equitable and declaratory relief and for damages and reparations arising out of the failure, refusal and neglect of the defendant Minister (his servants or agents) to correct the anomaly in his sea-fisheries policy, or the interpretation of his sea-fisheries policy, which anomaly was identified to him (and the servants and agents to whom he had delegated his authority to deal with matters of sea-fishing policy) on or about the 3rd day of October 2006, and which anomaly or interpretation had the effect of depriving the plaintiff of his sea-fishing boat licence and fishing quota (tonnage and horsepower) to which he was entitled thereunder."

48. The plaintiff has sought to emphasise that a major limb of the claim seeks damages in tort, and specifically negligence, and, he says, this is in no way a collateral attack on the legitimacy of the exercise of powers and/or discretions. The plaintiff says that the essence of his claim is that the Minister, on learning of the unintended effect his unwitting actions were having on the plaintiff's livelihood, nevertheless persisted with those actions and refused, failed and neglected to remedy the situation. The plaintiff contends that the Minister had been told by the MSO and the Sea Fishing Licensing Authority that it was his, and his department's, responsibility to remedy the situation and that the plaintiff was unintendedly and unnecessarily affected over and above other fishermen by the measurement of the length of his vessel according to the definition of length in the 1984 tonnage regulations rather than the definition in Article 2(1) of Council Regulation (EEC) 2930/86. Despite this, the Minister had failed to act. The tort relied upon is therefore negligence by omission.

49. The plaintiff further submits that his proceedings, in addition to centrally maintaining a genuine claim for damages in tort, and specifically negligence, also includes a claim to the independent remedy of damages by way of reparation for breaches of EU law by the State which have directly impacted upon him. He says that his actions were reasonable in seeking to engage with the Minister or his servants or agents with a view to securing remediation of the wrong committed by them. The plaintiff contends that the principles of law in this regard are set out in *R v. Secretary for Social Security, ex parte Sutton Case* C-66/95, judgment of 22 Apr. 1997 where it was held that the right to reparations for State liability for breach of EU law is an independent remedy which may be sought in

addition to other remedies available; and, in *Marshall v. Southampton and South West Hampshire Area Health Authority* [1991] ECR-271/91 where it was held that the issue of availing of other remedies, if applicable at all, only goes to mitigation and that the true test is not whether alternative remedies were sought but whether the plaintiff showed reasonable diligence to avoid the loss or limit its extent.

50. For completeness, and bearing on the asserted claim for reparations for State liability for breach of EU law as a remedy independent of, and available notwithstanding the existence of, other remedies; I must acknowledge that we were helpfully referred by counsel for the plaintiff in the course of her oral submissions to various passages from judgments of the European Court of Justice, and from well-regarded academic works, including (amongst others) passages from *Frontini v Ministerio delle Finanze* 1974] 2 CMLR 372 [para 12]; from *Amministrazione delle Finanze dello Stato v. Simmenthal*, Case 106/77, [1978 ECR 629 [p. 635, and also paras 21-23]; from the Advocate General's Opinion in *Fantask A/S and Others v Ministry of Trade and Industry* , Case c-188/95, 26th of June 1997[para 47]; from *The Queen v MAAF,* ex parte Hadley Lomas [1996] ECR I 2553 [para 28]; from Eeckhout, P on "Liability of Member States in Damages and the Community System of Remedies" in Beatson, J and Tridimas, T (Eds), *New Directions in European Public Law*, (1998), (Oxford: Hart Publishing); and from "The Relationship Between Comtemporary Rules on State Liability and Other Case Law on Remedies and Procedures" [pp 246-248] in Ward, A, *Judicial Review and the Rights of Private Law Parties in EU Law*, 2nd Edn, (2008) (Oxford: OUP). Careful consideration has been given to all these materials.

51. We were also referred to an obiter dictum from the judgment of Fennelly J in *De Ròiste v Minister for Defence* [2001] 1 IR 190, at 216, in which the learned Supreme Court judge suggested that failure to seek certiorari or mandamus expeditiously does "*not bar a remedy and a party may, in an appropriate case, proceed by plenary proceedings*."

52. The plaintiff has further submitted, without prejudice to his contentions that his proceedings were properly brought by way of plenary summons, and that he was within time to do so in respect of all aspects of his claim, that even if we were to hold that judicial review time limits did apply he was in fact inside those time limits for bringing proceedings regarding the Minister's herring policies. He points out that the then Minister issued his herring policy No 1 of 2012 on the 19th of September 2012 and the plaintiff's proceedings were issued on the 28th of September 2012. Accordingly, he says, on any view of the matter the High Court judge was in error in dismissing the entirety of his claim.

53. Finally, the plaintiff requests that if the Court of Appeal does not consider the position to be acte clair, we should make a preliminary reference to the ECJ in the following terms:

> "Is a Member State and its courts entitled to make the failure to seek public law judicial review remedies a bar to seeking Community law reparations, common-law damages or other effective remedies; or is the Member State and its courts obliged

to give a plaintiff rented for his reasonable diligence in engaging with the administration in a non-litigation matter?"

Submissions of the defendants in reply to the plaintiff

54. Counsel for the defendants has submitted in response that the High Court judge properly applied and followed this Court's dicta, in *Express Bus Limited v National Transport Authority* [2018] IECA 236 and found that these proceedings fell within the description given by Hogan J in that case and that :

> "the Plaintiff's claim amounts in substance to a collateral challenge to the validity of the earlier decisions(s) concerning the re-measurement of his vessel because, to succeed in its damages claim, the plaintiff would also, at a minimum, have to challenge the validity of that decision(s) even if only indirectly. This reality is underlined by the fact that the plaintiff has included, among the declaratory reliefs sought in his plenary summons, reliefs relating to the decisions that he says were made in 2006".

55. It was further submitted that the proceedings are "a challenge to a public law measure designed to underlie a claim for damages" to paraphrase Clarke J in *Shell E & P Ireland Ltd v McGrath & Others* [2013] 1 I.R. 247 and that the High Court judge correctly followed *Kildare Meats Ltd v The Minister for Agriculture and Food* [2004] 1 I.R. 92 in holding that t: "*insofar as the plaintiff has not sought to challenge the decisions listed in the submissions on public law grounds, he accordingly is precluded from pursuing the relief in respect of same.*"

56. In further support of this submission our attention was drawn to the following passages from the judgment of Fennelly J in *Kildare Meats* at pages 100 *et seq* where he says:

> "32 A detailed analysis of the key Regulation in this case, Commission Regulation (EEC) No. 2730/79, demonstrates the administrative nature and, therefore, public law character, of the function of paying export refunds. …"
>
> …
>
> 36 This decision, until set aside or abandoned, had the effect, once the security had been forfeited, of depriving the plaintiffs of their right to the export refunds claimed. The decision could not simply be ignored or bypassed by a direct claim for payment of the refunds. The plaintiffs' proceedings were, therefore, misconceived."

57. Counsel for the defendants submits that the decisions here cannot simply be ignored or bypassed by a direct claim to obtain what the decision(s) refused the plaintiff or it's/their equivalent in damages.

58. The defendants maintain that the High Court judge followed established law in holding that the time limit for making an application for judicial review applied by analogy to claims which had as their substance the seeking of the types of relief ordinarily obtained by judicial review and the key decisions, previously referred to, of *O'Donnell v. Dun*

Laoghaire Corporation; *Shell E & P Ireland Ltd v. McGrath and others* and *Express Bus Limited v National transport Authority* were all relied upon in that regard.

59. Counsel for the defendants submits that as regards when time should be deemed to run from the High Court judge had been correct to reject the argument on behalf of the appellant that time had only begun to run from 2011 and 2012 and in viewing the 2011 and 2012 policy directives in essence as continuing damage.

60. With reference to the alleged claim for reparations, counsel for the defendants referred us to the decision of the ECJ in *Bulicke v Deutsche Buro Service GmbH* Case C-246/09 [2010] ECR 1-7003, and in particular to paragraphs 25-29 of the judgment therein, as support for its contention that Irish procedural legal rules that require that different types or categories of cases should be litigated according to different procedures, and in respect of which different time limits may apply, are not contrary to the primary law of the EU, and specifically that they do not breach the principles of EU law which limit the exercise of national procedural autonomy i.e. the principle of equivalence and effectiveness. The defendants maintain that this is so in circumstances where the question of time limits for the initiation of claims seeking judicial review of administrative action, and/or claims for damages for breach of, or in consequence of a breach of, EU law rules, is not ostensibly governed by any specific EU law.

61. By way of background, the *Bulicke* case was concerned with a preliminary reference to the ECJ from the Regional Labour Court in Hamburg, Germany which was hearing a claim for compensation on grounds of discrimination in recruitment on grounds of age. The claim was met with an objection that it was out of time according to paragraph 15(4) of a German domestic law on equal treatment i.e., the Allgemeines Gleichbehandlungsgesetz ("the AGG") which required such claims to be brought within two months of the decision complained of.

62. The Regional Labour Court was concerned with whether, in light of Articles 8 and 9 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, paragraph 15(4) of the AGG was compatible with the principles of equivalence and effectiveness "*since, first, in the absence of a binding collective agreement, no limitation periods apply in employment law in Germany other than general limitation periods, …, and secondly, the time-limit is too brief to enable applicants to assert their rights*".

63. Consequently, the Regional Labour Court referred a question to the ECJ (the precise and somewhat complicated terms of which it is unnecessary to recite) addressed to this issue.

64. The ECJ, in its judgment, stated (*inter alia*):

> "25. In accordance with settled case-law, in the absence of European Union rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from

European Union law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness) (see, in particular, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28 and the case-law cited; and Case C 2/06 *Kempter* [2008] ECR I 411, paragraph 57).

26. The principle of equivalence requires that the national rule in question be applied without distinction, whether the infringement alleged is of European Union law or national law, where the purpose and cause of action are similar (Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41; Case C 78/98 *Preston and Others* [2000] ECR I 3201, paragraph 55; and Case C 63/08 *Pontin* [2009] ECR I 0000, paragraph 45).

27. However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions, such as the case in the main proceedings, brought in the field of employment law (see, to that effect, *Levez*, paragraph 42, and *Pontin*, paragraph 45).

28. In order to establish whether the principle of equivalence has been complied with in the case in the main proceedings, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of employment law, to consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Levez*, paragraphs 43; *Preston and Others*, paragraph 56; and *Pontin*, paragraph 45).

29. Moreover, every case in which the question arises as to whether a national procedural provision is less favourable than those concerning similar domestic actions must be analysed by the national court by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies (*Levez*, paragraph 44; *Preston and Others*, paragraph 61; and *Pontin*, paragraph 46)."

65. Counsel for the defendants in the present proceedings points out that the *Bulicke* case, *inter alia*, was considered by the Supreme Court in *T.D. (a minor) v Minister for Justice, Equality and Law Reform* [2014] 4 IR 277, in which that court had divided 4:1 with Murray J dissenting. The *T.D.* case had involved an attempt to judicially review decisions of the Refugee Applications Commissioner and the Refugee Appeals Tribunal refusing to grant asylum to the applicant, and a further decision of the Minister for Justice, Equality and Law Reform refusing to grant subsidiary protection to the applicant. The State had sought to assert that the claims were out of time having regard to s 5(2) of the Illegal Immigrants (Trafficking) Act 2000 which prescribed a 14-day time limit for the commencement of judicial review proceedings challenging a refusal to grant refugee status or a deportation order. The High Court (Hogan J) granted leave to apply for judicial

review, holding that the time limit imposed by s. 5(2) of the Act of 2000 breached the EU law principles of equivalence and effectiveness. However, the respondent State parties were granted leave to appeal to the Supreme Court and the High Court certified the following point of law as being a point of exceptional public importance for the purpose of that appeal:-

> 'Where an applicant for judicial review seeks relief against a refusal by the Minister for Justice, Equality and Law Reform to grant a declaration of refugee status on the grounds that the Refugee Act 1996, as amended, is incompatible with European Union law, is the application of the limitation period contained in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, and where there is otherwise no good or sufficient reason for extending the period within the meaning of that subsection, incompatible with either or both of the European Union principles of equivalence and effectiveness?'

66. It was held by the Supreme Court in allowing the appeal and in refusing the respondents leave to seek judicial review, 1, that the exercise of sovereign national procedural autonomy in the field of asylum and international protection, including in the setting of time limits for the commencement of actions, was subject to the two limiting principles in European Union law of equivalence and effectiveness. 2. That, in assessing whether a national provision breached the principle of equivalence, the court must consider the substantive area of law concerned, the nature and scope of the relief claimed and the grounds of the claim. Having done so, the court should carry out the comparison exercise, in order to decide whether there was a lack of equivalence and consider the nature and effectiveness of the remedy provided, any limitation period, the expense of the procedure and any other procedural rules. The similarity of causes of action was not determined by the nature of the remedy claimed. 3. That s. 5 of the Act of 2000 did not infringe the European Union law principle of equivalence as the time limit contained in that section applied to all immigration decisions and decisions otherwise controlling the entry of persons onto the national territory, whether those decisions were based on European Union law or national law. 4. That a national court must, of its own motion, set aside any provision of national law that conflicted with either the principle of equivalence or the principle of effectiveness.

67. Although the passages quoted above were specifically cited and relied upon by Murray J., at para [62], in his dissenting judgment in *T.D.*, it is fair to say that the principles stated therein were uncontroversial either as to their terms, or as to what they meant, although the majority and the minority in TD ultimately differed over how they should apply in the circumstances of that particular case. Murray J had felt that s.5(1) of the Act of 2000 infringed the principle of equivalence whereas the majority disagreed with him on that. The basis of the dissent was not, however, any disagreement as to the applicable principles of EU law, but rather disagreement as to the scope of the domestic law provision at issue. As Fennelly J, for the majority, put it:

> "I entirely accept his very full account of the jurisprudence of the Court of Justice on these issues. My difference with the judgment of Murray J. concerns essentially the interpretation of the scope of s. 5 (1) of the Act of 2000 and the range of proceedings to which it applies."

68. The defendants submit that it is clear from the passages quoted that one must look at the purpose and essential characteristics of the case. As Fennelly J (giving judgment for the majority) put it in T.D., "*regard must be had to the essential nature of the subject matter of the claim*". The defendants' case is that equivalence is not offended in this case because the time limits for challenging decisions of a public law character (i.e., those applicable to judicial review) are the same regardless of whether a claim is based upon EU law or national law only. In this instance the plaintiff's claims, however formulated, all depend upon impugning various administrative decisions/exercises of discretion, individually and cumulatively; and in particular the decision to re-classify the vessel, based upon, or linked to, an alleged failure to properly apply Article 2(1) of Council Regulation (EEC) 2930/86) in recording the length, as a general characteristic, of the plaintiff's fishing vessel following the re-measurement exercise for tonnage purposes carried out by the MSO in 2003. However, if it had been sought to impugn those administrative decisions/exercises of discretion based on non-compliance with some provision of entirely domestic law the same time limits would apply.

69. Finally, the defendants argue in the alternative that if this court were to take the view that judicial review time limits did not in fact apply, the plaintiff's case is nonetheless time barred pursuant to s.11 of the Statute of Limitations 1957 as amended. Reliance was placed on *Hegarthy v. O'Loughran* [1990] 1 I.R. 148; *Irish Equine Foundation Ltd v. Robinson* [1999] 2 I.R. 442; *Gallagher v. ACC Bank Plc* [2012] 2 IR 620 and *Brandley v. Deane* [2017] IESC 83 in support of that contention. The defendants maintain that on the evidence the cause of action accrued at the latest in January 2006 in respect of denial of access to the over 65 foot segment of both fisheries on foot of the remeasured length. The alleged damage caused by the Policy Directives issued in 2011 and 2012, on foot of which the plaintiff was not placed in the ring fenced portion of the mackerel and herring fisheries, where access to quota was based on track record, represented further or continuing damage/loss emanating from the earlier decisions, and not the accrual of a fresh cause, or fresh causes of action, in those years.

70. With reference to the dictum relied upon by the plaintiff from the judgment of Fennelly J. in *De Ròiste v Minister for Defence*, it was submitted by counsel for the defendants in oral submissions that it is clear from later cases that this *dictum* does not reflect the law as it has developed.

71. The defendants maintain that the legal position, in terms of EU law, is in fact *acte clair* and that the suggested reference is not necessary.

Discussion and Decision

72. Following a careful consideration of the arguments presented on both sides I have concluded that the High Court judge's analysis of the reality of this case was correct and that her decision should be upheld.

73. It seems to me that no matter how one views the plaintiff's proceedings the essential nature of the subject matter is to do with administrative decisions / exercises of discretion about which the plaintiff is dissatisfied, particularly the decision to reclassify the MFV Áine Íde, and all that flowed from that subsequently in terms of refusal of licences which would have permitted his vessel to fish for mackerel and herring in the over 65ft category, and the later non allocation of quotas to him in Tier 1 and Tier 2 in circumstances where his vessel did not qualify, and he maintains could not have qualified, on the basis of track record by reason of having been wrongfully reclassified. Whether the claim is framed as one seeking ordinary damages in negligence (either by act or omission); or Francovich damages/reparations arising from breach of EU law; or damages for breach of constitutional rights, or of rights under the European Convention on Human Rights; or a claim for declaratory relief in the terms of the declarations sought in the Statement of Claim; or some form of (unspecified) equitable relief (as is alluded to in the Plenary Summons); to succeed the plaintiff would have to challenge and successfully impugn the administrative decisions / exercises of discretion to which I have alluded or at least some of them.

74. In my judgment the plaintiff's proceedings do therefore represent a collateral attack on those administrative decisions / exercises of discretion in circumstances where no application was made for leave to seek appropriate reliefs in that regard by way of judicial review. Judicial review was the appropriate procedure by means of which to make such challenges as is clear from decisions such as *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301, and *Kildare Meats Limited & Kildare Chilling Company v. Minister for Agriculture and Food* [2004] 1 I.R. 92; although, as the High Court noted, a public law decision can sometimes be challenged in proceedings other than by means of judicial review, and in appropriate cases time may be extended if there is good reason for doing so. However, the later authorities make clear that even where a party seeks to challenge a public law decision other than by means of judicial review (and it should again be stressed that judicial review is the expected and normal way of doing so) judicial review time limits still apply (subject to the possibility of them being extended, if there is good reason for doing so). This is clear from the judgment of Clarke J in *Shell E&P Ireland Limited v. McGrath & Ors* [2013] 1 I.R. 247 where he said at para [43]:

> "It would make a nonsense of the system of judicial review if a party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend time if a party could simply by-pass that whole process by issuing a plenary summons?"

75. He later added at para [48]:

> "The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period."

76. He further observed:

> "I cannot see that it makes any difference that O'Donnell involved a direct challenge to a public authority whereas the challenge which the defendants seek to mount in this case is against both a public authority (insofar as that authority is a necessary defendant to any claim which asserts the invalidity of an action taken by the authority concerned) and also a private entity which sought to place reliance for the lawfulness of its actions on the validity of a measure taken by the relevant public authority. Either there is a binding time limit in place (subject to extension by the court) or there is not. It is hard to see how there could be any justification for requiring a person who wished simply to set aside a public measure to act within the time limits provided for in the rules for judicial review applications (either because the proceedings were judicial review proceedings or because judicial review time limits applied by analogy in the case of plenary proceedings) but not to apply the same time limits to a challenge which sought to go beyond seeking to have the public law measures concerned rendered invalid by seeking to use that invalidity as a basis for claiming damages against a party who placed reliance on the measures concerned."

77. Further, in *Express Bus Limited v. National Transport Authority* [2018] IECA 236, the point was made by Hogan J that in so far as the plaintiff in that case was seeking *Francovich* damages, his claim amounted to a contention that the NTA had violated relevant procurement rules and that he could not hope to demonstrate that the breach of EU law was "*grave and manifest*" or "*inexcusable*" without challenging the NTA's decision in that regard. The same can be said in the present case in so far as the claim is framed as one seeking *Francovich* damages.

78. I am further in complete agreement with the defendant's submission that the promulgation of the 2011 and 2012 Policy Directives did not give rise to the accrual of

any new or further or fresh cause or causes of action, and that consequences flowing from them merely represented further or continuing damage from the earlier administrative decisions / exercises of discretion. That this represents the reality is reflected in the Statement of Claim which seeks relief on the basis that the new system created by the Policy Directives that he seeks to impugn, "*combined with*" (my emphasis) the exclusion of the MFV Áine Íde from the over 65 ft mackerel and herring fisheries from 2006 to the present day, resulted in the exclusion of the plaintiff's vessel from the mackerel and herring fisheries altogether.

79. Accordingly, I consider that the High Court judge was correct in her primary findings that, notwithstanding how the proceedings have in fact been framed, the claim is in reality one which seeks to challenge decisions of a public law character, that accordingly judicial review time limits apply, and that the plaintiff did not initiate his proceedings within those time limits. Moreover, she was correct in her view that the plaintiff had not demonstrated any basis that could justify an extension of time in his case. I also agree with her subsidiary ruling that it was unnecessary in the circumstances of the case to render decisions with respect to s.11 (as amended) of the Statute of Limitations 1957.

80. In my view the High Court judge's judgment exhibits no error of principle, and she answered the questions for her determination as preliminary issues correctly. For the avoidance of doubt I consider that the position in EU law is *acte clair*, namely that Ireland is entitled as a matter of procedural autonomy to apply domestic judicial review time limits in circumstances such as the present case, where in reality it is sought to challenge decisions having a public law character, even if the claim has been framed in part as one for *Francovich* damages for an alleged breach of EU law, and further that there is nothing to suggest a failure to comply with the principles of effectiveness or equivalence. Accordingly, a preliminary reference is not required in my view.

81. I would dismiss the appeal.

82. With regard to costs, my provisional view is that as they follow the event, the defendants are entitled to the costs of this appeal. If the plaintiff wishes to contend for an alternative order, he will have 14 days to deliver a written submission not exceeding 2,000 words and the defendants will have 14 days to reply. In default, an order in the proposed terms will be made.

Donnelly J: I agree

Noonan J: I agree