

THE HIGH COURT

[2023] IEHC 614

Record No. 2022/3 R

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 949AQ OF THE
TAXES CONSOLIDATION ACT 1997 (AS AMENDED)

BETWEEN

THE REVENUE COMMISSIONERS

Appellant

- and -

MULLGLEN LIMITED

&

OLGARRY FISHING COMPANY LIMITED

Respondents

JUDGMENT of Ms. Justice Emily Egan delivered on the 9th day of November, 2023

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Introduction

1. This is a case stated for the opinion of the High Court pursuant to s. 949AQ and s. 949AX of the *Taxes Consolidation Act 1997, as amended* (“TCA 1997”) brought by the Revenue Commissioners (“Revenue”). It arises from a determination made by the Tax Appeals Commission (“TAC”) on 30th September, 2021 (the “TAC decision”), determining two discrete but related tax appeals, brought by the Respondents herein (the “taxpayers”) as Appellants before the TAC.

2. The taxpayers are two companies that operate fishing vessels. In 2015, the taxpayers incurred expenditure in acquiring additional fishing capacity¹ so as to allow for the licensing and operation of two large fishing vessels operating out of Killybegs. The expenditure on the acquisition of fishing capacity (much like the expenditure on the fishing vessels themselves) is capital in nature. Accordingly, the taxpayers are not permitted to deduct this expenditure from their income as a revenue item in the calculation of their tax liabilities. However, TCA 1997

¹ See para. 5 of this judgment as to the meaning of fishing capacity

provides for capital allowances in respect of certain capital expenditure incurred in the acquisition of tangible plant and machinery (s. 284 TCA 1997) and certain capital expenditure incurred in the provision of a “*specified intangible asset*”, as defined in s. 291A(1) TCA 1997 (“s. 291A(1)”). The scheme permits the deduction each year of a percentage of the relevant cost as against income. The taxpayers were permitted to deduct the monies spent on the modification and extension of their vessels as capital expenditure over a period of eight years. There is no dispute about this. The dispute is as to whether the taxpayers are also permitted to deduct the monies spent on the acquisition of fishing capacity as capital expenditure on a “*specified intangible asset*”. In particular the dispute is as to whether fishing capacity is an authorisation within the meaning of para. 291A(1)(h) TCA 1997 (“para. 291A(1)(h)”).

Legislative framework

3. Section 291A(1) defines a “*specified intangible asset*” for its purposes as meaning:

"an intangible asset, being-

- (a) *Any patent, registered design, design right or invention,*
- (b) *Any trade mark, trade name, trade dress, brand, brand name, domain name, service mark or publishing title,*
- (c) *Any copyright or related right within the meaning of the Copyright and Related Rights Act 2000,*
- (ca) *computer software or a right to use or otherwise deal with computer software other than such software or such right construed in accordance with section 291(3),*
- (d) *Any supplementary protection certificate provided for under Council Regulation (EEC) No. 1768/92 of 18 June 1992,*
- (e) *Any supplementary protection certificate provided for under Council Regulation (EC) No. 1610/96 of the European Parliament and of the Council of 23 July 1996,*
- (f) *Any plant breeder’s rights within the meaning of section 4 of the Plant Varieties (Proprietary Rights) Act 1980, as amended by the Plant Varieties (Proprietary Rights) (Amendment) Act 1998,*
- (fa) *any application for the grant or registration of anything within paragraphs (a) to (f),*
- (g) *secret processes or formulae or other secret information concerning industrial, commercial or scientific experience, whether protected or not by patent, copyright or*

a related right, including know-how within the meaning of section 768 and, except where such asset is provided directly or indirectly in connection with the transfer of a business as a going concern, customer lists,

(h) any authorisation without which it would not be permissible for –

(i) a medicine, or

(ii) a product of any design, formula, process or invention,

to be sold for any purpose for which it was intended, but this paragraph does not relate to a licence within the meaning of section 2 of the Intoxicating Liquor Act 2008,

(i) any rights derived from research, undertaken prior to any authorisation referred to in paragraph (h), into the effects of –

(i) a medicine, or

(ii) a product of any design, formula, process or invention,

(j) any licence in respect of an intangible asset referred to in any of paragraphs (a) to (i),

(k) any rights granted under the law of any country, territory, state or area, other than the State, or under any international treaty, convention or agreement to which the State is a party, that correspond to or are similar to those within any of paragraphs (a) to (j), or

*(l) goodwill to the extent that it is directly attributable to anything within any of paragraphs (a) to (k)."**(Emphasis added)***

4. Section 291A(2) TCA 1997 (“S.291A(2)”) provides that: “Where a company carrying on a trade has incurred capital expenditure on the provision of a specified intangible asset for the purposes of the trade”, the said specified intangible asset “shall be treated as machinery or plant ... provided for the purposes of the trade ... and ... shall be treated as belonging to that company” for capital allowance purposes “for so long as the company is the owner of the specified intangible asset or, where the asset consists of a right, is entitled to that right”.

The fishing sector

5. As fishing capacity is not a term of Irish law but of EU law, a brief explanation of the fishing sector, which is highly regulated, will contextualise the debate. The primogeniture for the national regulatory regime is to be found in *Council Regulation No. 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy* (“the 2013

Regulation”). Fishing capacity is defined by Article 4(1)(24) of the 2013 Regulation as “*a vessel’s tonnage in GT (Gross Tonnage) and its power in kW (Kilowatt)...*”. The total amount of fishing capacity available to the Irish fishing fleet is capped. In order for a fishing vessel to acquire fishing capacity, this must be matched by the removal of an identical amount of fishing capacity under an entry/exit system. When looked at from either a national or European perspective, the system ensures that the total size and power of the Irish fishing fleet and of the fishing fleets of the other member states (measured by reference to the combined tonnage and power of all fishing vessels in the relevant fleet) stays within the ceilings imposed by the 2013 Regulation.

6. Article 6(1) of *Council Regulation No. 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy* (“The 2009 Regulation”) provides that a fishing vessel may be used for the commercial exploitation of living aquatic resources only if it has a valid fishing licence. This is complimented by Article 39(1) of the same Regulation which prohibits fishing with a fishing vessel that is equipped with an engine the power of which exceeds that established in the fishing licence. The 2013 Regulation also defines “*fishing licence*” (by reference to the 2009 Regulation) as meaning an official document conferring on its holder the right, as determined by the national rules, to use a certain fishing capacity for the commercial exploitation of living aquatic resources. The fishing licence contains certain minimum requirements concerning the identification, technical characteristics and fitting out of the fishing vessel. “*Living aquatic resources*” is defined in *Council Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy* (“the 2002 Regulation”) as meaning available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life.

7. At national level, “*fishing licences*” are provided for by the *Sea Fisheries and Maritime Jurisdiction Act, 2006* (“the 2006 Act”) under which, in order for a person to be permitted to fish, they require a sea-fishing boat licence. Section 97 of the 2006 Act provides that a sea-fishing boat shall not be used for sea-fishing save in accordance with a sea-fishing boat licence granted or renewed in relation to the boat by the licencing authority. Essentially, a sea-fishing boat licence confers upon its holder the right to use a certain fishing capacity. As the fishing capacity of a fishing vessel is measured by reference to its size in gross tons and engine power in kilowatts, a sea-fishing boat licence therefore confers upon its holder the right to use a boat of a particular size and power as recorded on its licence.

8. *Council Regulation No. 1005/2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing* (IUU fishing) provides at Article 3(1) that a fishing vessel shall be presumed to be engaged in IUU fishing if it is shown that contrary to the conservation and management measures applicable in the fishing area concerned it has, *inter alia*, fished without a valid licence, authorisation or permit issued by the flag state or the relevant coastal state. Article 42(1) defines IUU fishing, and the conduct of business directly connected to IUU fishing, including the trade in/or the importation of fishery products, as a serious infringement.

Submissions before the TAC

9. In 2015, the taxpayers acquired the fishing capacity of the Atlantic Dawn, a vessel owned by another company for: (i) €7,325,000 in the case of Mullglen Limited; and (ii) €7,575,000 in the case of Olgarry Limited. The taxpayers duly modified two of their fishing vessels, increasing their tonnage and power. Revenue refused the taxpayers’ claim for capital allowances in respect of the expenditure incurred in the acquisition of fishing capacity. The taxpayers appealed this refusal to the TAC.

10. At the hearing before the TAC, the taxpayers, primarily,² claimed capital allowances on the basis that the fishing capacity was a ‘*specified intangible asset*’ within the meaning of para. 291A(1)(h) which concerns: “*any authorisation without which it would not be permissible for...a product of any design, formula, process or invention, to be sold for any purpose for which it was intended...*”.

11. Revenue’s submissions before the TAC were in summary as follows:

- I. The purpose of s. 291A(1) is to support the development of the knowledge economy by encouraging companies to locate the management and exploitation of their intellectual property in Ireland; s. 291A(1) therefore does not apply to the fishing industry; for clarity, I will refer to this as “Revenue’s overarching submission”.
- II. Para. 291A(1)(h) applies only to an authorisation in respect of a product of “*any design, formula, process or invention*”. As it is a natural resource, the fish harvested by the taxpayers could never be described as a product of “*any design, formula, process or invention*”.
- III. Even though the fish is subjected to certain operations on board the taxpayers’ vessels (in order to preserve it for hygiene and market value purposes) which might loosely be described as processing, such operations do not render the fish a product of “*any ... process*”.
- IV. Further, in light of the purpose of s. 291A(1), the “*process*” contemplated (i.e. that which produces the product authorised) must involve a significant degree of intellectual knowledge and creativity, and/or skill and innovation which is not the case in relation to any “low

² Although the taxpayers also placed some reliance upon para. 291(1)(k) and s. 291A(2), the TAC decision focused on the para. 291A(1)(h) argument as does this judgment.

level” processing of the fish that might occur on board the taxpayers’ vessels;

- V. In any event, fishing capacity is not an “*authorisation*” to do anything; the authorisation to fish is comprised by the grant of the sea-fishing boat licence and not the purchase of fishing capacity.

12. The taxpayers’ submissions before the TAC were in summary as follows:

- I. Section 291A(1) should not be confined to authorisations in the field of the knowledge economy and should apply broadly.
- II. The scope of s. 291A is not limited to particular types of company or by reference to the type of trade in which the relevant company might be engaged.
- III. In particular, the wide scope of para. 291A(1)(h) is evident from an amendment to the provision introduced by s. 43(1)(g) of the Finance Act 2010 (“FA2010”) which provides that para. (h) “*does not relate to a licence within the meaning of the Intoxicating Liquor Act 2008*”. Prior to this amendment, liquor licences must have qualified as “*authorisations*” within the meaning of para. 291A(1)(h). As the sale of intoxicating liquor is not an activity within the knowledge economy, this suggests that both 291A and 291A (1)(h) apply to a wide range of trades such as, for example, fishing.
- IV. The fish is processed on board the taxpayers’ vessels as a result of which it is, in their hands, a product of “*any ...process ...*”;
- V. Alternatively, the fish is processed by a third party (Sean Ward (Fish Exports) Limited) before it is brought to market at which point it becomes a product of “*any ...process ...*”;

- VI. Therefore, the fish, whilst on the taxpayers' vessel, or after processing by Sean Ward (Fish Exports) Limited, is or becomes the product of a process and the sale of that product would not be permissible had the taxpayers not first purchased the relevant fishing capacity.
- VII. Hence, fishing capacity could be considered an 'authorisation' as envisaged under para. 291A(1)(h).

Decision of the TAC

13. The TAC first considered Revenue's overarching submission and, relying in part on the amendment introduced by s. 43(1)(g) FA2010 (see para. 12 III above) concluded that para. 291A(1)(h) "*has a broader signification*" than that submitted by Revenue (case stated, para. 112).

14. In considering the remaining issues raised, the TAC held that the key question was whether, "*absent the authorisation, it would not be permissible for the product to be subjected to any process and sold for any purpose*" (case stated, para. 115). The TAC concluded that: "*having regard to the legal and regulatory framework for fishing, and having considered the facts, evidence and submissions herein, ... the absence of the requisite fishing capacity has the consequence that it would not be permissible for the fish to be sold for any purpose for which it was intended*". Accordingly, the TAC determined that "*the fishing capacity acquired by [the taxpayers] comes within section 291A(1)(h)*" (case stated, para. 116) and that the refusal of the capital allowances claimed in respect thereof "*should not stand*" (case stated, para. 117).

15. By notice dated 22nd October, 2021, Revenue expressed its dissatisfaction, pursuant to s. 949AP TCA 1997, with the TAC decision and requested that a case be stated for the High Court.

Questions of law posed by the TAC

16. The five questions of law, as ultimately set out in the case stated by the Chairperson of the TAC³ dated 10th January 2022, are as follows:

- a) *did the [TAC] err in law in the interpretation of s.291A(1)(h) TCA 1997, when focusing on the amendment made by the Finance Act 2010 that excluded licences under the Intoxicating Liquor Act 2008 from the scope of s.291A(1)(h)?*
- b) *did the [TAC] err in law in finding that the fishing capacity acquired by [the taxpayers] constituted a ‘specified intangible asset’ for the purposes of s.291A TCA 1997 and that this conclusion may be deduced from a contextual interpretation other than that contended for by [Revenue]?*
- c) *did the [TAC] err in law in failing to have any, or any adequate regard to [Revenue’s] arguments that the reference to “customer lists” in s.291A(1)(g) TCA 1997 falls to be seen within the context of that provision?*
- d) *did the [TAC] err in law in failing to provide reasons for [its] finding that a “company” carrying on a “trade” has a broader “signification than that submitted by [Revenue]”?*
- e) *did the [TAC] err in law in finding that “fishing capacity” may be regarded, for the purpose of section 291A(1)(h) TCA 1997 as an “authorisation without which it would not be permissible for...a product ... of any process...to be sold for any purpose for which it was intended”?*

17. Questions a), b), c) and d) concern Revenue’s overarching submission: namely that s. 291A(1) applies to the knowledge economy and not to a fishing enterprise such as that

³ The relevant Appeal Commissioner had vacated office prior to the Notice from Revenue under s. 949AP TCA 1997. Therefore, the case stated was prepared, with the consent of the parties, by the Chairperson of the TAC pursuant to s. 949AX.

undertaken by the taxpayers. As this is an issue which, if decided in Revenue's favour, would determine the appeal, I will consider it first.

18. I will then turn to question e) - which considers whether fishing capacity may be regarded, as "*an authorisation without which it would not be permissible for ...a product...of any process....to be sold for any purpose for which it was intended?*" This is of course the core question of statutory interpretation for the court. I will close by considering some consequential and miscellaneous issues.

Jurisdiction of the High Court

19. The law relating to this Court's jurisdiction in an appeal by way of case stated is well-settled. In *DA MacCarthaigh, Inspector of Taxes v. Cablelink Limited* [2003] 4 IR 510, in which the Supreme Court (citing Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] ILRM 421 at 426), approved the following principles articulated by Blayney J. in *Ó Culacháin v. McMullan Brothers Limited* [1995] IR 217 at 223:

"(1) *Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*

(2) *Inferences from primary facts are mixed questions of fact and law.*

(3) *If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*

(4) *If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*

(5) *Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them for we are not retrying the case)*

unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.”

The Court may not substitute its own view in relation to findings of fact - implications for this case

20. The taxpayers correctly observe that there is no appeal by Revenue against any finding of fact or inference drawn from primary fact by the TAC. Referring to *Byrne v Revenue Commissioners* [2021] IEHC 262, *Minister for Agriculture v Barry* [2009] 1 IR 215 and *Cintra Infrastructureas v Revenue Commissioners* [2023] IEHC 73, the taxpayers therefore emphasise that the Court may not substitute its own view for that of the TAC in relation to findings of fact and inferences drawn from findings of fact.

21. In particular the taxpayers observe that there is no appeal against the TAC’s findings (a) as to the nature of fishing capacity or (b) as to the consequence of not having such capacity. This is correct. However, neither of these findings constitute a finding on the central issue in the case stated which is whether fishing capacity constitutes an “*authorisation*” within the meaning of para. 291A(1)(h). This is a mixed question of fact and law. If the TAC’s conclusion shows that it has adopted a wrong view of the law, it can and must be set aside.

22. The taxpayer also argues that the TAC made a finding of fact that Mullglen Limited and Olgarry Limited engage in the processing of fish on their fishing vessels such that, in their hands, the fish may be seen as the “*product of...[a]... process....*”. I will consider this argument at para. 83 *et seq.* of this judgment.

Questions a), b), c) and d): Is the scope of s. 291A(1) limited to the field of intellectual property and/or the knowledge economy?

23. Revenue argues that s. 291A(1) is intended to apply in the fields of intellectual property and the knowledge economy and that it does not apply to the fishing industry.

24. The taxpayers submitted before the TAC that para. 291A(1)(h) should be given a broad remit and that it encompasses an authorisation for the fishing enterprise which they undertake. They contend that this enterprise comprises both the harvesting and processing of fish and that such processing renders the fish the product “*of. [a].. process..*” as set out in para. 291A(1)(h).

25. At para. 112 of the case stated, the TAC characterised the question of law arising from this particular dispute in the following manner:

“Should para. 291A(1)(h) be interpreted through the prism that the thrust of s. 291A pertains to intellectual property as submitted by the Revenue Commissioners?”

26. The TAC rejected Revenue’s argument as to the intended scope of the section. The case stated references several matters at para. 112 which it determined augured in favour of a broader rather than a narrower interpretation, including the inclusion of customer lists and the amendment to exclude liquor licences. Ultimately it states:

“In light of the foregoing, and applying the principles of statutory interpretation, para. 291A(1)(h) has a broader signification than that submitted by the Revenue Commissioners.”

27. For the reasons set out below, I can see no error of law in this aspect of the TAC decision.

28. In considering this issue, I note that, although the TAC framed Revenue’s argument more narrowly in the question of law it formulated (see para. 25 above), Revenue does not seek to limit the application of s. 291A(1) or para. 291A(1)(h) to the field of intellectual property

per se. Revenue's argument is that para. 291A(1)(h) also encompasses intangible assets consisting of authorisations in the wider knowledge economy. I will consider both aspects of Revenue's argument separately.

Is para. 291A(1)(h) limited to the field of intellectual property?

29. Section 291A(1) is clearly not limited to the field of intellectual property *per se*. Para. 291A(1)(h) is not defined in any way by reference to the holding of intellectual property rights, or even the existence of intellectual property rights, as it clearly could have been had the legislature so intended.

30. Indeed, the definition of '*specified intangible asset*' is expressly not limited to intellectual property rights (see for example para. 291A(1)(g) which includes secret processes or formulae or other secret information concerning industrial, commercial or scientific experience, whether or not protected by patent, copyright or a related right.)

31. Furthermore, the kinds of assets listed as falling within the definition of '*specified intangible asset*' are diverse. When read in the context of the numerous other specific provisions in the field of intellectual property, the rule against surplusage suggests that para. 291A(1)(h) is designed to cover '*authorisations*' of a type not already specified in those other paragraphs.

32. In addition, the words "*a product of any design, formula, process or invention*" in para. 291A(1)(h) may be contrasted with the reference to "*secret processes or formulae*" in para. 291A(1)(g). This contrast implies that the process or formula in issue in para. 291A(1)(h) is not necessarily proprietary.

33. Finally, para. 291A(1)(l) provides that the purchase of "*goodwill*" directly attributable to any of the other specified intangible assets is itself a specified intangible asset and para. 291A(1)(j) provides that any licence in respect of an intangible asset referred to in (a) to (i) is

itself a specified intangible asset. As both licences and goodwill qualify, the implication is that the asset purchased does not need to be “intellectual property” in order to constitute a specified intangible asset within the meaning of the section.

34. It is true to say that the qualifying “*authorisation*” in para. 291A(1)(h) is clearly not just any authorisation but an authorisation of a particular type, namely one ‘*without which it would not be permissible for ... a product of any design, formula, process or invention to be sold for any purpose for which it was intended...*’. Such an authorisation, however, does not necessarily need to provide the holder with any rights over the intellectual property in the product itself. It is simply an intangible asset in the form of a right, absent which, the product could not be sold.

Is para. 291A(1)(h) limited to intangible assets associated with the wider knowledge economy?

Arguments of Revenue

35. Revenue’s argument does not seek to confine s. 291A(1) or para. 291A(1)(h)) to intellectual property. It submits that both s. 291A(1) as a whole and para. 291A(1)(h) in particular concern activities supporting the development of creations, inventions and innovations and the wider knowledge economy; as well as encouraging enterprises to locate the management and exploitation of their intellectual property and related rights in Ireland.

36. Whilst acknowledging that the first and most important port of call is the words of para 291 A(1) (h) (ii) itself, Revenue emphasise the importance of context in statutory interpretation. This includes the immediate context of the sentence within which the relevant words are used, the language of the immediately proximate para. 291A(1)(h)(i), the language of the other paragraphs of s. 291A(1) and the purpose of the provision as a whole.

37. One ought not isolate the critical words and consider only if they have a plain or literal meaning in the abstract. Nor can one isolate the words “*a product of any...process ...*” from the broader para. (ii) of para. 291A(1)(h) which references a product of any “*design, formula... or invention*”. Revenue argues that the principle of *noscitur a sociis* – known from associates - means that the words “*a product of any...process ...*” take their colour from the words surrounding, i.e. “*design, formula... or invention*”. One should also consider the association of the words “*a product of ... a process ...*” with the words “*a medicine*” which appears in para. (i) of para. 291A(1)(h). All of this, it is said, indicates that a significant degree of intellectual knowledge and/or skill is necessary in order for the qualifying “*process*” to produce the product in question.

38. Further, Revenue submits that one cannot isolate para. 291A(1)(h) from the broader section of s. 291A(1), which provides its context. It argues that the interpretation for which it contends is supported by the immediate context of the next paragraph, para. 291A(1)(i) which refers expressly to para. 291A(1)(h) and, using very similar wording, concerns “*any rights derived from research undertaken prior to any authorisation referred to in para. (h) into the effects of a product of any design, formula, process or invention.*” Revenue contends that any “low level processing” of fish (essentially preserving it for hygiene and market value purposes) that might occur on the taxpayers’ vessels is incapable of giving rise to rights derived from research and would not meet the definition of “*a product of any design, formula, process or invention*” within the meaning of para. 291A(1)(ii).

39. Revenue considers that its contention that both s. 291A(1) and para. 291A(1)(h) are concerned with intangible assets within the field of the knowledge economy is supported by a consideration of the wording of each of the 14 sub-paragraphs of s. 291A(1). These cover patents, inventions, trademarks, domain names, service marks, copyright, computer software itself (as distinct from the right to use or otherwise deal in such software), publishing titles,

plant breeders' rights, processes or formulae or other secret information concerning industrial, commercial or scientific experience, whether or not protected by patent, copyright or a related right.

40. Revenue also submits that its interpretation is supported by certain amendments to the section as originally drafted which expand the section beyond intellectual property rights but maintain the focus on rights related to, ancillary to, or in the nature of intellectual property rights or similar rights in the wider knowledge economy:

- Section 43(1)(d) which introduced a new para. (ca) concerning *“computer software or a right to use or otherwise deal with computer software other than such software or such right construed in accordance with section 291(3)”*.
- Section 43(1)(e) FA2010 which inserted a new para. (fa) concerning *“any application for the grant or registration of anything within paras. (a) to (f)”*.
- Section 43(1)(f) FA2010 which inserted a new para. (g) into s. 291A(1), which concerns *“secret processes or formulae or other secret information concerning industrial, commercial or scientific experience whether protected or not by patent, copyright or related right, including know-how within the meaning of Section 768”*

Arguments of the taxpayers

41. The taxpayers lay emphasis upon para. 291A(1)(k). This provides that a ‘*specified intangible asset*’ includes: *“any rights granted under the law of any country, territory, state or area, other than the State, or under any international treaty, convention or agreement to which the State is a party, that correspond to or are similar to those within any of paras. (a) to (j).”*

It appears therefore that a right granted under say, French law, is a specified intangible asset merely if it is *“similar to”* the rights listed in (a) to (j). It is argued that a provision of this type does not sit easily with the submission that the section is intended to be restrictive in scope.

42. The taxpayers argue that their interpretation that the reach of the section is broader than the fields of either intellectual property or the knowledge economy is supported by two amendments:

- Section 40(1)(b)(i) of the Finance Act 2014 inserted the following additional text into para. (g) after the reference to s. 768: “*and, except where such asset is provided directly or indirectly in connection with the transfer of a business as a going concern, customer lists*”.⁴

The taxpayers argue that the TAC was correct to conclude that the inclusion of “*customer lists*” was inconsistent with the proposition that the section was confined to the field of intellectual property or the knowledge economy.

In response Revenue argue that inclusion of “*customer lists*” does not detract from its interpretation because customer lists, although not intellectual property rights in themselves, may comprise rights that are akin to intellectual property rights within the scope of the *Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11th March 1996 on the legal protection of databases* (“the Database Directive”) and the Copyright and Related Rights Act 2000. Therefore, the inclusion of “*customer lists*” does not in fact detract from, let alone diminish, the overall intellectual-property-rights-and-related-rights thrust of the amendments introduced.

- Section 43(1)(g) FA2010 which provides that para. 291A(1)(h) “*does not relate to a licence within the meaning of the Intoxicating Liquor Act 2008*”.⁵

⁴ This is the subject of question c) in the case stated: “*did the [TAC] err in law in failing to have any, or any adequate regard to [Revenue’s] arguments that the reference to “customer lists” in s.291A(1)(g) TCA 1997 falls to be seen within the context of that provision?*”

⁵ This is the subject of question a) in the case stated: “*did the [TAC] err in law in the interpretation of s.291A(1)(h) TCA 1997, when focusing on the amendment made by the Finance Act 2010 that excluded licences under the Intoxicating Liquor Act 2008 from the scope of s.291A(1)(h)?*”

The taxpayers argue that this amendment was required because liquor licences had previously been included within the scope of para. 291A(1)(h) which implies that its reach is not limited to the field of intellectual property, or the knowledge economy as contended by Revenue. Therefore, para. 291A(1)(h) applies to authorisations more generally; in particular it applies to necessary authorisations in the fishing sector.

Revenue denies that the amendment introduced by s. 43(1)(g) FA2010 implies that liquor licences had previously qualified as an “*authorisation*” within the scope of para. 291A(1)(h). They argue that this was never the case. Revenue submits that, in harmony with the intended focus of s. 291A(1) on the wider knowledge economy, the purpose of the amendment was merely to put beyond doubt the exclusion of liquor licences from its scope.

Decision concerning the putative limitation of para. 291A(1)(h) to intangible assets associated with the knowledge economy

43. In light of my central conclusion that the qualifying authorisation for the purposes of para. 291A(1)(h) must be in respect of a product of “*any design, formula, process or invention*” and not in respect of a raw material, in this instance a fish, “a living aquatic resource”,⁶ it is not strictly speaking necessary to decide whether s. 291A(1) or para. 291A(1)(h) are confined to the knowledge economy. However, lest I am incorrect in that conclusion, I will explain why I have formed the view that neither s. 291A(1) nor para. 291A(1)(h) itself are so confined.

44. I am not convinced by the arguments of either party on s. 43(1)(g) FA2010. In my view, the amendment excluding liquor licences from the scope of para. 291A(1)(h) is of little assistance one way or another in divining whether the reach of the section is confined to the knowledge economy. If such licences were included before the amendment, then their removal

⁶ See central conclusion at para. 82 of this judgment together with preceding analysis commencing at para. 58.

or excision might well be taken to confirm an intention to confine the section to the knowledge economy. On the other hand, the reverse could also be the case; the deliberate excision of one non-knowledge economy authorisation may equally indicate that other licences of a more “everyday” nature may properly be said to fall within the section.⁷

45. Nor do I think that para. 291A(1)(g) is of huge relevance to discerning the overall scope of s. 291A(1). It refers only to “*customer lists*” simpliciter. It does not refer to customer lists which fall within the Database Directive or are governed by the Copyright and Related Rights Act 2000. Accordingly, whilst a given customer list may fall within one or both of those pieces of legislation, it is not a requirement of s. 291A(1) that they do so. The section cannot therefore be construed as though only customer lists of that type fall within its scope. Likewise, because customer lists may be used in any field of commerce, one cannot necessarily assume that the inclusion of customer lists within the definition of a specified intangible asset is a veiled reference to the knowledge economy. Nor would it be correct to infer that customer lists are necessarily compiled by dint of intellectual knowledge and/or skill. This may or may not be the case.

46. Of far more importance is the fact that para. 291A(1)(h) applies to “*any authorisation without which it would not be permissible for ... a product of any design, formula, process or invention to be sold for any purpose for which it was intended...*” (emphasis added). Section 291A(2) (set out above) applies where “*a company carrying on a trade has incurred capital expenditure on the provision of a specified intangible asset for the purposes of the trade*”. The multiple uses of the words “a” and “any” indicate that, insofar as concerns the kinds of authorisations, products, companies and trades in issue, the provision is intended to be reasonably broad in scope.

⁷ I deal further with the relevance (or otherwise) of this amendment below at para. 95 *et seq.* of this judgment.

47. The section does undoubtedly include intellectual property in that it lists, *inter alia*, patents, registered designs, trademarks, and copyright. It also embraces intangible assets consisting of computer software, formulae, industrial and scientific information falling within what can loosely be called the knowledge economy. Overall, therefore, I accept the taxpayers' submission that the section is also capable of covering a significantly broader array of intangible assets.

48. Words such as "*a product resulting from a creative or innovative process*" or "*a product involving intellectual effort*" are absent in para. 291(A)(1)(h). The provision makes no reference to such a requirement and provides no measure by which the creative or innovative nature of the product could be measured or assessed. The use of such qualifying criteria would provide no more than an amorphous criterion upon which to base the entitlement to capital allowances. Therefore, the construction of para. 291A(1)(h) being proposed by Revenue would in my view be impermissibly vague and essentially unworkable. In short, I reject Revenue's overarching submission.

Question e) of the case stated: may fishing capacity be regarded, as "an authorisation without which it would not be permissible for ...a product...of any process....to be sold for any purpose for which it was intended?"

49. First, some context. Paragraph 291A(1)(h), designates as a specified, intangible asset any authorisation, without which it would not be permissible for a product of any design, formula, process or invention, to be sold for any purpose, for which it was intended. In order to become a product of a design, formula, process, or invention, a product in its naturally occurring or raw state, a raw material if you will, must go through a process of design, formula, process or invention. Paragraph 291A(1)(h), is not concerned with an authorisation for the sale

of a raw material but with an authorisation for the sale of a product of a design, formula, process or invention.

50. With that context in mind, the question e) is best approached by reference to a number of enquiries, the first of which relates to the general interpretation of para. 291A(1)(h) and the second and third of which relate to the specific facts of this case.

Enquiry I

Does para. 291A(1)(h) apply to an authorisation pertaining to a raw material, without which authorisation the product (into which that raw material might be ultimately incorporated by way of design, formula, process, or invention), could not be sold (“the raw material authorisation interpretation”)? Alternatively, is para. 291A(1)(h) concerned, with an authorisation pertaining to the product (into which that raw material has been incorporated by way of design, formula, process, or invention) and without which that product could not be sold? (“the product authorisation interpretation”).

Enquiry II

In this case, what is said to be the relevant authorisation? Is it the “fishing capacity” and/or the “sea-fishing boat licence”? Can either be characterised as an authorisation without which it would not be permissible for “...*a product ... of any process...to be sold for any purpose for which it was intended*”? In other words what do fishing capacity and/or a sea-fishing boat licence authorise the holders thereof to do?

Enquiry III

What, in the context of the present case is the relevant “...*product of any design, formula, process or invention*”?

Lacunae in the TAC decision

51. It does not seem to me that the TAC decision explains its approach to these core issues. Rather, having found that s. 291A(1) did not fall to be interpreted through the prism of intellectual property, the TAC stated at para. 115 that, to come within para. 291A(1)(h), “*the consideration is whether absent the authorisation it would not be permissible for the product to be subjected to any process and sold for any purpose*”. It appears therefore that the TAC adopted the raw material authorisation interpretation. However, the following difficulties arise:

52. The TAC decision refers to an authorisation without which it would not be permissible for the product “*to be subjected to any process and sold for any purpose*”, rather than to an authorisation without which it would not be permissible for the product of any process to be sold. This formulation changes the language of para. 291A(1)(h).

53. This formulation also omits to state that para. 291A(1)(h) references an authorisation without which it would not be permissible for the product to be sold “*for any purpose for which it was intended*”. The TAC overlooks the fact that para. 291A(1)(h) therefore links the authorisation to the purpose or purposes for which the product is intended to be sold.

54. Segueing into the second sub-issue identified above, the TAC decision does not identify what precisely comprises the qualifying authorisation for the purposes of para. 291A(1)(h). One can perhaps infer from the terms of its decision that the TAC held that the relevant authorisation was the fishing capacity. The TAC concluded that, “*having regard to the legal and regulatory framework for fishing... the absence of the requisite fishing capacity had the consequence that it would not be permissible for the fish to be sold for any purpose for which it was intended*” and that therefore para. 291A(1)(h) was engaged.⁸

⁸ Revenue argues that this overlooks the distinction between fishing capacity and the sea-fishing boat licence. Revenue contends that the purchase of fishing capacity does not authorise one to do anything other than apply for a licence to engage in commercial sea fishing. Revenue states that it is therefore the sea-fishing boat licence and not the fishing capacity which authorises one to fish. I will deal with this issue at para. 71 *et seq.* of this judgment. For the moment I will assume that either the fishing capacity, or a combination of the fishing capacity and the licence, constitute the relevant authorisation to engage in commercial fishing.

55. However, there is no discussion of what precisely the relevant authorisation - the fishing capacity and/or the sea-fishing boat licence- actually authorises one to do.

56. Nor is there any discussion of either the subject matter of the relevant authorisation (i.e. what product is authorised for sale?) or any purposes authorised (i.e. what is the intended purpose of the product authorised?).

57. Yet, consideration of some, if not all, of these ingredients is essential to a finding that the relevant authorisation falls within para. 291A(1)(h)(ii). The omission to consider these ingredients appears to have contributed to the TAC's finding that the requirements of para. 291A(1)(h) could be satisfied by an authorisation without which it would not be permissible for the product to be "*subjected to any process and sold for any purpose*". The TAC repeats this formulation three times in the crucial para of the case stated (para. 115). In this, I believe, the TAC fell into error.

Enquiry I: Is the raw material authorisation interpretation or the product authorisation interpretation, correct?

58. Is para. 291(A)(1)(h) concerned with an authorisation pertaining to a raw material or with an authorisation pertaining to the product into which that raw material has been incorporated by way of design, formula, process, or invention?

59. In *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Ltd & the Attorney General* [2022] 2 ILRM 313, Murray J. emphasised that in approaching the task of statutory interpretation, the words of the statute are given primacy as they are the best guide to the result the Oireachtas wanted to bring about. The importance of that proposition he emphasised could not be overstated. Furthermore, although the aim of statutory interpretation is to give effect to the legislative intent, the best guide to the legislative purpose is the language of the statute as a whole. Again, the emphasis is on the primacy of the

words of the statute. Further, the Oireachtas usually enacts a composite statute, not a collection of dissociated provisions, and does so in a pre-existing context and for a pre-existing purpose. However, where context and purpose are deployed, they must be clear and specific. Where either context or purpose is wielded to displace the apparently clear language of a provision, they must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language.

60. One therefore starts with the words of para. 291A(1)(h), the following is evident. Although para. 291A(1)(h) uses the words “*any authorisations...*”, it does not apply to all authorisations. Rather, para. 291A(1)(h) applies to any authorisation without which it would not be permissible for specific products to be sold for any purpose for which they were intended.

61. Paragraph 291A(1)(h) is not engaged simply because a product might require an authorisation in order to be sold. It only applies if the product in question is a medicine or a product of any design, formula, process or invention.

62. The identification by the legislature of a medicine and/or a product of any design, formula, process or invention thus delineates both the kinds of products with which para. 291A(1)(h) is concerned and the kinds of authorisation with which it is concerned.

63. Therefore, to trigger para. 291A(1)(h), the product, the sale of which would not be permissible without authorisation, must be a medicine or a product of any design, formula, process or invention and logically, the authorisation must be in respect of such a product.

64. It follows that the authorisation with which para. 291A(1)(h) is concerned, is not of a product in its naturally occurring or raw state. This is so even if that raw material might in due course be subjected to a process or incorporated into a design, formula or invention, thereby potentially becoming the product of that process or a product of the relevant design, formula or invention. Although it is not necessary that at the time the relevant authorisation is obtained,

the product has already been subjected to the relevant process or incorporated into the relevant design, formula or invention, para. 291A(1)(h) is nonetheless concerned with authorisations of products, *qua* medicine or *qua* products of a design, formula, process or invention.

65. Turning from the theory of the above analysis to its practical application, the TAC's focus in the present case was of course on the "process" criterion, rather than the design, formula, or invention criteria. The TAC appears to have held that the authorisation in issue here (an authorisation⁹ to use a certain fishing capacity for the commercial exploitation of living aquatic resources – essentially a licence to fish) is a qualifying authorisation for the purposes of para. 291A(1)(h), because without it the fish – a living aquatic resource - could not any stage "*be subjected to any process*" and sold as a product of a process.

66. However, it is hard to conceive of any single physical substance (animal, vegetable or mineral) which is not subjected to some form of process before it is brought to market. If the TAC is correct, then every conceivable product requiring authorisation of any kind would seem to be caught by para. 291A(1)(h). Further, every conceivable raw material requiring authorisation of any kind would seem to be caught by para. 291A(1)(h). As a consequence, provided the relevant authorisations either have a monetary value or entail expenditure, they would constitute specified intangible assets to which the provision would apply.

67. If para. 291A(1)(h) were taken to apply to any authorisation, without which a raw material, once "*subjected to a process*" could not be sold, then it seems to be that the words "*of any design, formula, process or invention*" would be surplusage. Why specify that the authorisation in issue is in respect of a medicine or a product of any design, formula, process or invention if any authorisation in respect of any product at all - including any authorisation in respect of a raw material forming part of an end product - will suffice? Why would the

⁹ Which authorisation is comprised by the fishing capacity itself or by a combination of fishing capacity and a sea-fishing boat licence

provision not simply refer to an authorisation without which it would not be permissible “*for a product to be sold?*”

68. Furthermore, the reference in para. 291A(1)(h) to sale for any purpose “*intended*” connotes a product which can be said to have an intended purpose. This implies that the qualifying authorisation is not of a raw material which may or may not be designed, processed, formulated or invented to render it suitable for an intended purpose. Rather, it suggests that the relevant authorisation must at least in principle be capable of designating an intended purpose or purposes to which the product authorised may be put. As such, this implies that the qualifying authorisation is one further down the line of production, so to speak.

69. It may also be helpful to consider para. 291A(1)(h)(i). The authorisation without which a medicine could not be sold for its intended purpose is that which authorises the sale of the medicine, not that which authorises the sale of the individual ingredients or components of the medicine. This also suggests that to qualify as an authorisation pursuant to para. 291A(1)(h), the authorisation must be one without which the medicine or, in the case of para. 291A(1)(h)(ii), the product as processed, could not be sold for its intended purpose.

70. All of the above implies that para. 291(A)(1)(h) is concerned, with an authorisation pertaining to a product as designed, formulated, processed, or invented and not with an authorisation pertaining to the raw materials incorporated into the designed, formulated, processed, or invented product.

Enquiry II: In this case, what is the relevant authorisation and what does it authorise its holder to do?

71. Thus far, I have not considered the dispute as to whether it is the fishing capacity, the sea-fishing boat licence or a combination of the two, which can be said to constitute the relevant authorisation. As discussed above, the TAC appears to have held that fishing capacity is the

relevant “*authorisation*” as it permits Mullglen Limited and Olgarry Limited to operate a fishing vessel of a particular size and power for which they can apply to obtain a sea-fishing boat licence and thereby lawfully engage in commercial fishing.

72. Revenue argue that the acquisition of fishing capacity does not constitute an authorisation to conduct fishing operations but is merely the first step in a series of steps which must be taken prior to engaging in commercial fishing, the most important of which is the application for the sea-fishing boat licence. It is argued that the authorisation to fish is comprised not by the purchase of fishing capacity but by the grant of the sea-fishing boat licence.

73. The taxpayers, on the other hand argue that fishing capacity and the sea-fishing boat licence together authorise the lawful engagement in commercial fishing. They are, it is stated, two sides of the one coin.

74. In my view, it is conceptually difficult to interpret fishing capacity as an authorisation *per se*, particularly given its definition by reference to tonnage and power of a fishing vessel. In my view, the authorisation to engage in commercial fishing is comprised not by the fishing capacity but by the sea-fishing boat licence.

75. However, this is not the end of the matter. Even if the sea-fishing boat licence and not the fishing capacity, constitutes the relevant authorisation, the taxpayers could still potentially claim the relevant capital allowance. This is because s.291A(2) could potentially entitle the taxpayers to capital allowances in the amounts claimed on the basis that the price paid for the fishing capacity is capital expenditure incurred “*on the provision*” of the sea-fishing boat licence, a “*specified intangible asset*”.¹⁰

76. I will therefore further examine the taxpayers argument on the consequences of a failure to acquire fishing capacity and, on foot thereof, obtain a sea-fishing boat licence. The taxpayers

¹⁰ As to which see para. 100 *et seq.* of this judgment.

submit that if a fishing vessel does not have a sea-fishing boat licence, then any fish caught may never be subjected to any process and may never be sold for any purpose. As fishing capacity is essential to obtain a sea-fishing boat licence, it comprises the authorisation without which the fish, once processed – may not be sold for any purpose. Furthermore, the traceability requirements mean that a commercial quantity of fish products may only be sold when the fish have been caught and landed by a registered and licenced fishing vessel. Otherwise, the catching of the fish would constitute IUU fishing, in which case the first and every subsequent sale of the fish up to the final retail sale would also constitute IUU fishing. Those commercially exploiting the fish would be liable to potential criminal penalties and administrative sanctions. Although the taxpayers argue that Mullglen Limited and Olgarry Limited in fact catch, process and sell the fish - rendering it the product of a process¹¹ - this they say is unimportant because the relevant question is simply whether absent the authorisation it would be impermissible for the fish to be subjected to a process and sold by any person.

77. Leaving aside for the moment whether the authorisation to engage in commercial fishing is comprised by the fishing capacity, the sea-fishing boat licence or a combination of the two, I accept this summary of the consequences of engaging in commercial fishing without the appropriate fishing capacity and sea-fishing boat licence.

78. However, this does not alter the fact that the authorisation to fish – whether it is comprised of fishing capacity, the sea-fishing boat licence or a combination of the two – is not an authorisation in respect of a medicine or a product of any design, formula, process or invention. What fishing capacity and/or the sea-fishing boat licence authorise is the commercial exploitation of living aquatic resources or, to put it simply, fishing. As such, fishing capacity and/or the sea fishing boat licence authorise the harvesting of a raw material which permits its subsequent exploitation in a range of manners which may involve it ultimately becoming a

¹¹ As to which see para. 83 *et seq.* of this judgment.

product of a process and, as such, requiring authorisation for sale. That raw material - the living aquatic resource - may or may not become the product of a design, formula, process or invention. The fish could be made into sushi, thereby becoming the product of a process. The skin from the fish could be incorporated into a handbag, thereby becoming the product of a design. Certain of the fish enzymes could be incorporated into a face cream, thereby becoming the product of a formula. However, in all such cases, although the raw material - the living aquatic resource - may or may not eventually become the product of a design, formula or process and although it may or may not require further authorisation to enable it to be sold in that form, the authorisation to fish is not an authorisation in respect of a product of a design, formula, process or invention.

79. In short, it may be that, after extraction from the sea, part or all of the catch will become the “*product of any design, formula, process or invention*” within the meaning of para. 291A(1)(h) and sold for the purpose for which these operations prepared it. It may also be that the sale of the relevant end product is not legally permissible without some further authorisation. It may equally be that such authorisation of the relevant end product could not validly be obtained in the absence of a fishing license (which in turn requires the relevant fishing capacity). That, however, does not mean that the fishing license or the fishing capacity is an authorisation of a product of a process. It is not.

80. One could always argue that if the sale of the raw material is unauthorised, then the sale of the product as processed is also unauthorised and that para. 219A(1)(h) must therefore be engaged. But yielding to such an argument, would be to strike the words “*a product of any design, formula, process or invention*” from the statutory provision. I therefore do not view fishing capacity (or a sea-fishing boat licence or a combination of the two) as an authorisation in respect of a product of a process within the meaning of para. 291A(1)(h).

81. In addition, I also find it difficult to envisage how either fishing capacity or a sea-fishing boat licence could satisfy the second ingredient in para. 291A(1)(h): namely that the authorisation must be of a kind absent without which it would not be permissible to sell the product of any design, formula, process or invention for any purpose for which it was intended. Fishing capacity (or a sea-fishing boat licence or a combination of the two) authorises a boat of a particular size and power to engage in commercial fishing. They do not permit or authorise anything beyond the extraction of the living aquatic resource from the ocean. They do not in any sense authorise, regulate, restrict or concern the intended purpose to which the resource so harvested may be put.

82. Accordingly, my central conclusion on enquiries I and II is that para. 291A(1)(h) is concerned with an authorisation pertaining to a product as designed, formulated, processed, or invented. It does not concern an authorisation pertaining to the raw materials incorporated into the designed, formulated, processed, or invented product. In other words, I find that the product authorisation interpretation and not the raw material authorisation interpretation is the correct interpretation of para. 291A(1)(h). I further find that any authorisation conferred by the fishing capacity (or by the sea-fishing boat licence, or by a combination of the two) is simply an authorisation to harvest raw materials - living aquatic resources - from the sea. It is not therefore an authorisation within the meaning of para. 291A(1)(h).

Enquiry III

What, in the context of the present case is the relevant "...product of any design, formula, process or invention"?

83. In light of my central conclusion in answer to enquiries I and II, it is not strictly speaking necessary to decide this. However, lest the above analysis is incorrect, I will nonetheless consider the points argued.

84. It will be recalled that the TAC stated that “*absent the authorisation, it would not be permissible for the product to be subjected to any process and sold for any purpose.*”

85. The taxpayers submit that although this formulation appears to contemplate that the fish will be subjected to a future process (as opposed to already being the “*product of...[a]... process....*”), the TAC fully understood the requirements of the section and must therefore have concluded that the fish were the “*product of...[a]... process....*”.

86. It is common case that fish in the sea - the *living aquatic resource* - are not “*a product of any design, formula, process or invention.*” Nor do I understand the taxpayers to argue that the operation of harvesting the live fish from the sea is a “*process*” within the meaning of the section, such as to render them the product of a process. The taxpayers’ argument is that, as a result of operations they carry out on board the vessels (and as a subsidiary argument, as a result of further processing before the fish is brought to market), the fish is, or becomes, “*a product of any ... process...*” for the purposes of para. 291A(1)(h).

87. Indeed, the taxpayers go further and submit that the TAC made a finding of fact that Mullglen Limited and Olgarry Limited engage in the processing of fish on their fishing vessels such that, in their hands, the fish may be seen as the “*product of...[a]... process....*”.

88. In support of this submission, the taxpayers rely upon paras. 26 and 30 of the case stated which, under the heading “*Material findings of fact*”, set out the evidence of Mr. Callaghan, the current skipper of the vessel owned by Mullglen Limited. Mr. Callaghan outlined how he goes about catching and preserving the fish on board the fishing vessel and the direct impact which this has on the quality of the product and the potential to maximise the price commanded for the fish. The operations involved in catching the fish, transferring the fish onto the vessels and moving the fish into the large Refrigerated Sea Water (“RSW”) tanks are designed to ensure minimal physical damage to the fish and retard the production of enzymes which would otherwise cause rapid internal decay. The fish is preserved onboard the fishing vessels at a

temperature of 1.5 to 2 degrees centigrade in water which is cooled and circulated by the RSW system. The RSW system is itself a complex piece of computerised equipment consisting of compressors and coolers to cool the water as it passes through the system. At port, the fish is discharged from the vessels in a fresh state, transported to a factory and processed.

89. The TAC accepted all of the above evidence and noted that in modifying the vessels, the taxpayers had increased the number of refrigerated saltwater tanks and improved the cooling systems and decking arrangements on board. At para. 26 of the case stated the TAC stated that *“this resulted in improvements to the process of catching and preserving the fish on board, which helped maximise the price for the fish”*. At para. 30 of the case stated, the TAC again refers to the above as comprising *“the process”* of catching, transferring, moving and preserving the fish. The taxpayers contend that the TAC’s use of the word *“process”* was a finding of fact that the fish is the *“product of...[a]... process...”* on board their vessels.

90. I do not accept that the TAC’s use of the word *“process”* in describing these operations was necessarily intended to incorporate a finding of fact that the fish is the *“product of...[a]... process...”* carried out by the taxpayers on board their vessels. Indeed, as will appear below, one of the central difficulties in the TAC’s decision is that it did not adequately engage with this issue at all but rather appears to have overlooked the requirement that the subject matter of the putative para. 291A(1)(h) authorisation, in this case the fish, is the *“product of...[a]... process...”*. The TAC decision does not explain when or by what process the fish is, or is rendered, the *“product of...[a]... process...”*.

91. As such, although one of the taxpayers submissions before the TAC was that they processed the fish on board their vessels - rendering the fish the product *“of.. [a].. process..”*, I cannot discern any finding made on foot of this submission. The TAC decision is, in my view more consistent with a finding that, as per the taxpayers’ alternative submission that the fish is subjected to a process after it is brought in to harbour by third parties such as Sean Ward (Fish

Exports) Limited and thereby become the product “*of. [a].. process..*” within the meaning of para. 291A(1)(h).

92. In short, although the taxpayers contend that the fish, once brought onto its boat and subjected to the processes thereon, constitutes the product of a process, I am not satisfied that the TAC made any such finding in this regard.

93. If therefore it were necessary to determine whether or not the taxpayers process the fish on board their boat, then the matter would require to be remitted to the TAC for determination of that issue. However, I regard this issue as, no pun intended, a red herring. The question for this court is not whether the taxpayers or indeed Sean Ward (Fish Exports) Limited process the fish. The question is whether the authorisation invoked by the taxpayers (the fishing capacity or the sea-fishing boat licence or a combination of both) falls within para. 291A(1)(h).

94. It may well be that the fish is subjected to a process of manufacturing, broadly so speaking, on board the taxpayers’ fishing vessels. However, that is not what is authorised by the fishing capacity (or the sea-fishing boat licence or a combination of both). What is authorised is the engagement in commercial fishing. It does not seem to me to be necessary for this Court to remit this matter to the TAC to decide whether or not either the taxpayers or indeed the fish processor render the fish the product of a process and, if so when. The answer to that question cannot in my view influence the overall decision in the case. However, I will hear the parties on whether in light of my judgment there is any remaining requirement to remit this matter to the TAC in relation to this issue.

Does the amendment introduced by s. 43(1)(g) undermine this court’s interpretation?

95. In its decision, the TAC relied upon the amendment introduced by s. 43(1)(g) of the FA2010, to para. 291A(1)(h), whereby intoxicating liquor licences were expressly excluded from the scope of para. 291A(1)(h). Thus, at para. 111 of the case stated, the TAC stated that,

“if the Oireachtas introduced an amendment to exclude liquor licences from para. (h) in circumstances where, generally, the licensee purchases the product (intoxicating liquor) from a third party for sale and could not be said to subject the products to any “design formula, process”, then in conformity the consideration is whether absent the requisite fishing capacity, it would not be permissible for fish to be sold for any purpose.”

96. Overall, I am not convinced that the amendment to para. 291A(1)(h) excluding liquor licenses adds anything of value to the debate.

97. This is because, at risk of repetition, my central conclusion is that the qualifying authorisation for the purposes of para. 291A(1)(h) must be in respect of a product of *“any design, formula, process or invention”*. Intoxicating liquor is in fact a product of a process – and probably also a product of a formula. A license to sell intoxicating liquor is therefore an authorisation in respect of a product of *“any design, formula, process or invention”* which prior to the amendment might well have qualified as a para. 291A(1)(h) *“authorisation”*.

98. Therefore, the fact that the legislature felt it necessary to either exclude or to clarify the non-inclusion of a liquor licence within the meaning of s. 2 of the Intoxicating Liquor Act 2008 is really neither here nor there in terms of this Court’s interpretation. In short, the Court’s decision is unaffected by whether or not liquor licences were included within the scope of s. 291A(1)(h) prior to the amendment.

Para. 291A(1)(k) TCA 1997

99. Paragraph 291A(1)(k) TCA 1997 (“para. 291A(1)(k)”) includes in the definition of *“specified intangible assets”* any rights granted under the law of any country, territory, state or area other than the State or under any international treaty convention or agreement to which the State is a party, that correspond to or are similar to those within any of paras. (a) to (j). The TAC did not decide upon the taxpayers’ alternative argument that if the fishing capacity did

not fall within para. 291A(1)(h), it fell within para. 291A(1)(k) on the basis that it was a right granted under EU law that corresponded or was similar to that at paras. (a) to (j). I will hear the parties on whether in light of my judgment there is any remaining requirement, to remit this matter to the TAC in relation to this issue.

The s. 291A(2) dispute

100. I take the view that the sea-fishing boat licence and not the fishing capacity is the authorisation required to engage in fishing. Because of s. 291 A(2), this alone is not an answer to the taxpayers' claims to capital allowances. Rather, if I am incorrect in my central conclusion that neither the fishing capacity nor the sea-fishing boat licence (alone or in combination) can constitute an authorisation within the meaning of para. 291A(1)(h), then outlay on the acquisition of fishing capacity might constitute "*expenditure on the provision of a specified intangible asset*", the sea-fishing boat licence. Such expenditure could then potentially be the subject of capital allowances in accordance with s. 291A(2).

101. However, due to the treatment of this expenditure in the taxpayers' accounts, the parties are in dispute as to whether the sea-fishing boat licence¹² is an "*intangible asset*" ("the s. 291A(2) dispute"). Naturally, if the Revenue are correct in asserting that the sea-fishing boat licence is not an "*intangible asset*", then it cannot be a "*specified intangible asset*" within the meaning of s. 291 (A). The s. 291A(2) dispute was raised, but not determined, before the TAC.

102. If this Court were of the view that the sea-fishing boat licence could potentially constitute a specified intangible asset within the meaning of para. 291A(1)(h), then the potential application of s. 291A(2) would arise and it would be necessary to resolve the s. 291A(2) dispute. In such circumstances, the matter would require to be remitted to the TAC to consider

¹² By contrast, it is common case that fishing capacity is an "*intangible asset*".

the potential application of s. 291A(2) and to determine whether, in accordance with generally accepted accounting principles, the taxpayers can properly claim capital allowances; in other words it would be for the TAC in the first instance to adjudicate upon the potential application of s. 291A(2) and, if necessary, determine the s. 291A(2) dispute.

103. However, as I am not satisfied that the sea-fishing boat licence is capable of constituting an authorisation for the purposes of para. 291A(1)(h), it seems to me that s. 291A(2) does not arise.

104. I will nonetheless hear the parties on whether there is any remaining requirement to remit this aspect of the matter to the TAC.

Conclusion and answer to questions posed:

105. Fishing capacity (or the sea-fishing boat licence or a combination of the two) does not constitute a qualifying authorisation for the purposes of para. 291A(1)(h). As such, fishing capacity (or the sea-fishing boat licence or a combination of the two) does not fall within the para. 291A(1)(h) definition of a specified intangible asset.

(a) did the [TAC] err in law in the interpretation of s.291A(1)(h) TCA 1997, when focusing on the amendment made by the Finance Act 2010 that excluded licences under the Intoxicating Liquor Act 2008 from the scope of s.291A(1)(h)?

Yes

(b) did the [TAC] err in law in finding that the fishing capacity acquired by [the taxpayers] constituted a 'specified intangible asset' for the purposes of s.291A TCA 1997 and that this conclusion may be deduced from a contextual interpretation other than that contended for by [Revenue]?

Yes

(c) did the [TAC] err in law in failing to have any, or any adequate regard to [Revenue's] arguments that the reference to "customer lists" in s.291A(1)(g) TCA 1997 falls to be seen within the context of that provision?

No

(d) did the [TAC] err in law in failing to provide reasons for [its] finding that a "company" carrying on a "trade" has a broader "signification than that submitted by [Revenue]"?

No

(e) did the [TAC] err in law in finding that "fishing capacity" may be regarded, for the purpose of section 291A(1)(h) TCA 1997 as an "authorisation without which it would not be permissible for...a product ... of any process...to be sold for any purpose for which it was intended"?

Yes

I will list this matter for final orders and costs at 11.00am on Thursday, 23rd November, 2023.