BETWEEN/

136TACD2021

and

Appellants

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

[**1**] This appeal relates to a refusal of a claim for capital allowances under section 291A of the Taxes Consolidation Act, 1997. claimed capital allowances of €512,750. claimed capital allowances of €530,250. By agreement of the parties, the appeal of and the appeal of were heard and determined together.

Facts

(Company A)

[**2**] During the accounting period 1 January 2015 to 31 December 2015, Company A incurred expenditure of € on the acquisition of fishing capacity (comprising gross tonnes [GT] and kilowatts [kW]) from the . A tax return for the accounting period 1 January 2015 to 31 December 2015 included capital

allowances in the amount of €425,941. An amended tax return included capital allowances in the amount of €938,691. The amended tax return included a claim for capital allowances under section 291A of the Taxes Consolidation Act, 1997 in the amount of €512,750 (being % of €). By letter dated 21 June 2017, the Revenue Commissioners notified Company A that the claim for capital allowances attributed to specified intangible assets would be reduced from €512,750 to NIL. A Notice of Appeal was received by the Tax Appeals Commission on 19 July 2017. A Notice of Amended Assessment to Corporation Tax for the accounting period 1 January 2015 to 31 December 2015 issued on 24 July 2017.

[**3**] On **2014**, a Sea-Fishing Boat Licence for the ' ' for the period 1 January 2015 to 31 December 2015 was issued by the Licensing Authority for Sea-Fishing Boats to Company A and provides '*The boat being a sea-fishing boat particulars of which are set out in the Schedule hereto is hereby licensed for the purposes of section 4 of the Fisheries (Amendment) Act 2003 (as inserted by section 97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006) for the period commencing on 1 January 2015 and ending on 31 December 2015*'. The licence shows gross tonnage of GT and engine power of kW. The overall length was metres. The Conditions of Licence include:

"***General obligation to comply with EU and National law****: The owner and/or master of the boat to which this licence relates shall ensure that the boat and all persons on board shall comply with any requirements, for the time being in force, under EU Law and National Law applicable to the operation of fishing boats and their technical characteristics.*

...

Ownership and Registration*: This licence is valid for so long, and only for so long, as the person to whom it is granted is the owner of the boat to which it relates and the boat is entered on the Register of Fishing Boats.*

...

Vessel Modifications*: Any proposed structural modifications to the vessel, including changes to the vessel's engine,* ***must*** *be approved* ***in advance*** *by the Licensing Authority.*

Such modifications can have significant implications in terms of the licensing of the vessel, including replacement capacity requirements. The vessel may be required to be re-measured and a new licence application may be required to be submitted.

…

***Power to suspend or revoke Licence**: The Licensing Authority may suspend or revoke this licence, pursuant to section 4 of the Fisheries (Amendment) Act 2003 (as inserted by section 97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006), for a breach of any condition of the licence. In that event, the licence shall be surrendered to the Licensing Authority for Sea-Fishing Boats, Clogheen, Clonakilty, Co. Cork, or risk a Court fine of not more than €500.*"

[**4**] On **2015**, a Capacity Assignment Note shows the assignment of GT and kW to the '' from the . The Capacity Assignment Note provides:

"*ASSIGNMENT TO A THIRD PARTY*

I, , of , hereafter referred to as the 'VENDOR', agree to sell and assign to , of , hereafter referred to as the 'PURCHASER', the beneficial ownership of Gross Tonnes and Kilowatts removed from the register as follows:

GT removed from on .
KW removed from on .
KW removed from on .

The sale and assignment of the tonnage and engine power is without 'days at sea' effort and is absolute to the PURCHASER for the consideration of €, to be paid to the VENDOR on receipt by the PURCHASER of confirmation by the Department of

Agriculture, Food & the Marine that the said tonnage and engine power has been credited to the PURCHASER.

ASSIGNMENT TO VESSEL

I, [redacted]*, of* [redacted]*, hereby declare that I will assign* [redacted] *GT's and* [redacted] *KW's, from the registered sea-fishing vessel* [redacted] *and* [redacted] *KW's from* [redacted]*, to the* [redacted]*'.*"

[**5**] On [redacted] **2015**, a letter from the Licensing Authority for Sea-Fishing Boats to Company A states:

"*I refer to the assignment note dated* [redacted] *2015 detailing the purchase by you from* [redacted] *(…) of* [redacted] *gross tonnes and* [redacted] *kilowatts without Fishing Effort (i.e. Days at Sea) from the* [redacted].

Please note that this Division approves the proposed assignment as outlined. I should point out that, under current licensing policy, capacity removed from the Fishing Boat Register since 17 November 2003 (the date on which the current policy was introduced) must be re-introduced onto the Register within two years of its removal, otherwise the entitlement will be lost. The capacity from the [redacted] *must be re-introduced onto the Sea Fishing Boat Register by* [redacted].

The capacity from the [redacted] *will be re-introduced onto the Sea Fishing Boat Register once the* [redacted] *has been licensed and registered provided this process has been completed before* [redacted]."

A similar letter from the Licensing Authority for Sea-Fishing Boats to Company A dated [redacted] 2015 approved the proposed assignment from the [redacted] to the [redacted].

[**6**] On **2015**, a Sea-Fishing Boat Licence for the ' ' for the period 2015 to 31 December 2015 was issued by the Licensing Authority for Sea-Fishing Boats to Company A. The licence shows gross tonnage of GT and engine power of kW. The overall length was metres.

(Company B)

[**7**] During the accounting period 1 January 2015 to 31 December 2015, Company B incurred expenditure of € on the acquisition of fishing capacity (comprising GT and kW) from the . A tax return for the accounting period 1 January 2015 to 31 December 2015 included capital allowances in the amount of €917,000. The tax return included a claim for capital allowances under section 291A of the Taxes Consolidation Act, 1997 in the amount of €530,250 (being % of €). By letter dated 21 June 2017, the Revenue Commissioners notified Company B that the claim for capital allowances of €530,250 attributed to specified intangible assets would be reduced from €530,250 to NIL. A Notice of Amended Assessment to Corporation Tax for the accounting period 1 January 2015 to 31 December 2015 issued on 23 June 2017. A Notice of Appeal was received by the Tax Appeals Commission on 20 July 2017.

[**8**] On **2014**, a Sea-Fishing Boat Licence for the ' ' for the period 1 January 2015 to 31 December 2015 was issued by the Licensing Authority for Sea-Fishing Boats to Company B and provides '*The boat being a sea-fishing boat particulars of which are set out in the Schedule hereto is hereby licensed for the purposes of section 4 of the Fisheries (Amendment) Act 2003 (as inserted by section 97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006) for the period commencing on 1 January 2015 and ending on 31 December 2015*'. The licence shows gross tonnage of GT and engine power of kW. The overall length was metres. The Conditions of Licence include:

"***General obligation to comply with EU and National law****: The owner and/or master of the boat to which this licence relates shall ensure that the boat and all persons on board*

shall comply with any requirements, for the time being in force, under EU Law and National Law applicable to the operation of fishing boats and their technical characteristics.

...

***Ownership and Registration**: This licence is valid for so long, and only for so long, as the person to whom it is granted is the owner of the boat to which it relates and the boat is entered on the Register of Fishing Boats.*

…

***Vessel Modifications**: Any proposed structural modifications to the vessel, including changes to the vessel's engine, **must** be approved **in advance** by the Licensing Authority. Such modifications can have significant implications in terms of the licensing of the vessel, including replacement capacity requirements. The vessel may be required to be re-measured and a new licence application may be required to be submitted.*

…

***Power to suspend or revoke Licence**: The Licensing Authority may suspend or revoke this licence, pursuant to section 4 of the Fisheries (Amendment) Act 2003 (as inserted by section 97 of the Sea-Fisheries and Maritime Jurisdiction Act 2006), for a breach of any condition of the licence. In that event, the licence shall be surrendered to the Licensing Authority for Sea-Fishing Boats, Clogheen, Clonakilty, Co. Cork, or risk a Court fine of not more than €500.*"

[**9**] On [redacted] **2015**, a Capacity Assignment Note shows the assignment of [redacted] GT and [redacted] kW to the '[redacted]' from the [redacted]. The Capacity Assignment Note provides:

"*ASSIGNMENT TO A THIRD PARTY*

I, [redacted], of [redacted], hereafter referred to as the 'VENDOR', agree to sell and assign to [redacted], of [redacted], hereafter referred to as the 'PURCHASER', the beneficial ownership of [redacted] Gross Tonnes and [redacted] Kilowatts

(removed from the register on [redacted]) from the registered sea-fishing vessel [redacted], having the [redacted].

The sale and assignment of the tonnage and/or engine power is absolute to the PURCHASER for the consideration of €[redacted], to be paid to the VENDOR on receipt by the PURCHASER of confirmation by the Department of Agriculture, Food & the Marine that the said tonnage and/or engine power has been credited to the PURCHASER.

ASSIGNMENT TO VESSEL

I, [redacted], of [redacted], hereby declare that I will assign [redacted] Gross Tonnes and [redacted] Kilowatts, from the registered sea-fishing vessel [redacted], having the [redacted], to the [redacted]."

[**10**] On [redacted] **2015**, a letter from the Licensing Authority for Sea-Fishing Boats to Company B states:

"*I refer to the assignment note dated [redacted] 2015 detailing the purchase by you from [redacted] (...) of [redacted] gross tonnes and [redacted] kilowatts without Fishing Effort (i.e. Days at Sea) from the [redacted].*

Please note that this Division approves the proposed assignment as outlined. I should point out that, under current licensing policy, capacity removed from the Fishing Boat Register since 17 November 2003 (the date on which the current policy was introduced) must be re-introduced onto the Register within two years of its removal, otherwise the entitlement will be lost. The capacity from the [redacted] must be re-introduced onto the Sea Fishing Boat Register by [redacted].

The capacity from the [redacted] will be re-introduced onto the Sea Fishing Boat Register once the [redacted] has been licensed and registered provided this process has been completed before [redacted]."

[**11**] On [redacted] **2015**, a Sea-Fishing Boat Licence for the '[redacted]' for the period [redacted] 2015 to 31 December 2015 was issued by the Licensing Authority for Sea-Fishing Boats to Company B. The licence shows gross tonnage of [redacted] GT and engine power of [redacted] kW. The overall length was [redacted] metres.

Legislation

[**12**] Section 291A(1) of the Taxes Consolidation Act, 1997 provides:

"*(1) In this section –*

"authorised officer" means an officer of the Revenue Commissioners authorised by them in writing for the purposes of this section;

"intangible asset" shall be construed in accordance with generally accepted accounting practice;

"specified intangible asset" means 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 Regulation (EC) No. 1610/96 of the European Parliament and of the Council of 23 July 1996,

(f) *any plant breeders' 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);*

"profit and loss account", in relation to an accounting period of a company, has the meaning assigned to it by generally accepted accounting practice and includes an income and expenditure account where a company prepares accounts in accordance with international accounting standards."

[**13**] Section 291A(2) of the Taxes Consolidation Act, 1997 provides:

"*(2) 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, then, for the purposes of this Chapter and Chapter 4 of this Part—*

(a) the specified intangible asset shall be treated as machinery or plant,

(b) such machinery or plant shall be treated as having been provided for the purposes of the trade, and

(c) 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, that machinery or plant shall be treated as belonging to that company."

[**14**] Section 291A(3) of the Taxes Consolidation Act, 1997 provides:

"*(3) Subject to this section, where for any accounting period a wear and tear allowance is to be made under section 284 to a company which has incurred capital expenditure on the provision of a specified intangible asset for the purposes of a trade carried on by that company, subsection (2) of section 284 shall apply as if the reference in paragraph (ad) of that subsection to a rate per cent of 12.5 were a reference to a rate per cent determined by the formula –*

$$\frac{A}{B} \; X \; 100$$

where –

A is –

(a) *the amount, computed in accordance with generally accepted accounting practice, charged to the profit and loss account of the company, for the period of account which is the same as the accounting period, in respect of the amortisation and any impairment of the specified intangible asset, or*

(b) *where the period of account beginning in the accounting period is not the same as that accounting period, so much of the amount, so computed and charged in that respect to the profit and loss account of the company for any such period of account, as may be apportioned to the accounting period on a just and reasonable basis taking account of the respective lengths of the periods concerned and the duration of use and ownership of the asset in each of those periods,*

and

B *is the actual cost, within the meaning of paragraph (ad) of section 284(2), of the specified intangible asset or, if greater than the actual cost, the value of that asset by reference to which amortisation and any impairment have been computed for the period of account referred to in paragraph (a) or (b).*"

[**15**] Section 291A(4) of the Taxes Consolidation Act, 1997 provides:

"(*4)* *(a)* *Notwithstanding subsection (3), where a company makes an election under this subsection in respect of capital expenditure incurred on the provision of a specified intangible asset for the purposes of a trade carried on by the company, subsection (2) of section 284 shall apply as if the reference in paragraph (ad) of that subsection to 12.5 per cent were a reference to 7 per cent.*

(b) *An election by a company under paragraph (a) shall –*

(i) *be made in the return required to be made under Chapter 3 of Part 41A for the accounting period of the company in which the expenditure on the provision of the specified intangible asset is first incurred, and*

(ii) apply to all capital expenditure incurred on the asset."

Evidence

(Skipper)

[**16**] The witness relied on a written statement dated 5 February 2021 as evidence in this appeal. The witness also produced a short video presentation. The witness was subject to examination and cross-examination at the hearing of the appeal. I have carefully considered the written statement, the short video presentation and the transcript of the evidence of the witness at the hearing in the adjudication and determination of this appeal. For the purposes herein, I propose to summarise the oral evidence of the witness.

[**17**] The witness is the current skipper of the '', a owned by Company A. The witness oversaw the building of the original in . The witness was involved in planning and designing the work that was undertaken to lengthen both the and the in 2015. Company A and Company B have a which allows both companies to . For to achieve optimum results it is important that both fishing vessels are . It is for this reason that the work to lengthen both the and the was undertaken on a collaborative basis. The witness stated that the and the are in the of the fishing sector which means fishing for . In Ireland, there are .

[**18**] The witness stated that the proposed structural modifications to lengthen the and the were required to be approved in advance by the licensing authority. The witness was informed that the proposed modifications would require the companies to have additional fishing capacity. Subsequent to the modifications, the fishing vessels were re-measured to ensure that the proposed modifications were the actual modifications

undertaken on the [redacted] and the [redacted]. Both the [redacted] and the [redacted] were lengthened by approximately [redacted] metres.

[**19**] The witness stated that owning the requisite fishing capacity is a precondition to being able to obtain a sea-fishing boat licence. It is fishing capacity appropriate to the size and power of the fishing vessel that is required in order to obtain a boat licence. The boat licence will state the fishing capacity at which the fishing vessel is permitted to operate. The witness stated that if Company A and Company B did not hold boat licences the companies could not engage in fishing from the [redacted] and the [redacted] and it would be illegal for Company A and Company B to sell or buyers to purchase the fish caught by the companies.

[**20**] The witness stated that Company A and Company B approached the [redacted] in 2015 to purchase additional fishing capacity which was in excess of that company's requirements. Company A purchased fishing capacity of [redacted] GT and [redacted] kW from the [redacted] for €[redacted]. If Company A and Company B did not purchase the additional fishing capacity the companies would not have been permitted to operate the lengthened [redacted] and [redacted].

[**21**] The witness stated that the structural modifications to the fishing vessels facilitated a number of important changes to the vessels which positively impacted on the trade of Company A and Company B. This included increasing the number of [redacted], improving the cooling systems and improving the decking arrangement. This resulted in improvements to the process of catching and preserving the fish on board, which helped maximise the price for the fish. The lengthened fishing vessels hold [redacted] tonne of fish rather than the previous [redacted] tonne which meant that the vessels would make less fishing trips for the same overall yield and consume less fuel for the same overall yield which justified returning to [redacted] with the fish to support the local economy. The companies are allocated a fishing quota each year in [redacted]. The current fishing quota equates to [redacted] fishing trips per year for the [redacted] and the [redacted].

The witness described the operations performed on board the fishing vessels and the skills deployed to catch the fish and preserve the quality of the fish. The short video presentation was filmed on board the [redacted] and showed the witness moving around the fishing vessel while describing the operations being performed and explaining the equipment being used.

[**22**] The witness described the legal and regulatory framework within which Company A and Company B must operate including a satellite monitoring system on board the fishing vessels for 24/7 tracking, an electronic log book, the landing declaration and the on board inspection by officials on landing at a port. The witness described the operations performed at the port to transfer the fish from the fishing vessels to the transport vehicles belonging to [redacted].

[**23**] The witness stated that the Irish Fleet Register is a public register of fishing vessels in Ireland which includes details on overall length, gross tonnage and engine power. There are [redacted]. The amount of fishing capacity is capped. It is unusual for fishing capacity to become available. The witness stated that he noticed that the [redacted] had available fishing capacity and approached the company with a view to purchasing its available fishing capacity.

[**24**] Under cross-examination, the witness was questioned on the references to authorisations in his written statement. The witness stated that there are separate fishing authorisations for each species (for example, fishing authorisation for [redacted], fishing authorisation for [redacted]) as well as the boat licence. There is an annex to the authorisations which details the allocation of allowable catch (quota) for that species. If there is a quota adjustment during the year, this will generate a further document. The witness stated that the yearly fishing quota can be reasonably anticipated, however, there is a degree of uncertainty as the total allowable catch is influenced by external factors at national level, EU level and international level. The witness stated that he is not required to make an application to obtain a boat licence every year unless the fishing vessel is modified. The witness stated that the fishing capacity governs the size and power of the fishing vessels.

The boat licence and the fishing capacity must correspond to the fishing vessel being used for fishing. The witness stated that the modifications to the [redacted] and the [redacted] were designed to ensure that the companies operated as efficiently as possible within [redacted]. In 2015, the quota was twice the current quota, which shows the impact of Brexit on the fishing sector.

[**25**] The witness stated that if fishing capacity is removed from the Fishing Boat Register, it must be re-introduced onto the register within a specified period otherwise the fishing capacity is lost. The witness stated that if the fishing capacity acquired from the [redacted] had not been re-introduced onto the Fishing Boat Register by [redacted], then the lengthened [redacted] and [redacted] could not be operated as it would not be possible to obtain a boat licence. The witness stated that once the structural modifications commenced on the [redacted] and the [redacted] in 2015, then the Sea-Fishing Boat Licence that issued on [redacted] 2014 was no longer valid. In effect, making modifications to the fishing vessels deregisters the vessels. This is shown in the letter from the Licensing Authority for Sea-Fishing Boats on [redacted] 2015 which states '*The capacity from the* [redacted] *will be re-introduced onto the Sea Fishing Boat Register once the* [redacted] *has been licensed and registered*'. This is also shown in the Sea-Fishing Boat Licence that issued on [redacted] 2015 as the 'effort limitations' were reduced from [redacted] days (for the period 1 January 2015 to 31 December 2015) to [redacted] days (for the period [redacted] 2015 to 31 December 2015).

[**26**] In re-examination, the witness stated that purchasing a fishing vessel does not permit a person to engage in commercial fishing. It would be necessary to acquire fishing capacity appropriate to the size and power of the fishing vessel. An application to obtain a boat licence could be submitted to the licensing authority to register the fishing vessel but the vessel could only be registered if the vessel has fishing capacity appropriate to the size and power of the vessel. There is also the required fishing authorisation that the licensed fishing vessel is allowed to catch a specific species (for example, [redacted]) and annexed to the authorisation is the allocation of allowable catch for that species. The witness stated

that if any of these components are missing, then there can be no catching, no selling or anything.

[redacted] (Skipper)

[**27**] The witness relied on a written statement dated 5 February 2021 as evidence in this appeal but subject to the examination and cross-examination of [redacted]. I have carefully considered the written statement in the adjudication and determination of this appeal.

[redacted]

[**28**] The witness relied on a written statement dated 5 February 2021 as evidence in this appeal. The witness was subject to examination and cross-examination at the hearing of the appeal. I have carefully considered the written statement and the transcript of the evidence of the witness at the hearing in the adjudication and determination of this appeal. For the purposes herein, I propose to summarise the oral evidence of the witness.

[**29**] The witness is the [redacted] in [redacted]. The witness stated that [redacted] are more susceptible to spoilage than [redacted]. This means that the entire process from catching, handling, cooling and transporting are vital in maintaining the quality of the fish. The witness stated that as part of the approval process with the Sea-Fisheries Protection Authority (SFPA) to be an approved factory, the company must have a HACCP (Hazard Analysis and Critical Control Point) policy. The HACCP policy for the company includes a procedure on traceability and labelling. The witness stated that the company is regulated by the SFPA and subject to inspections and audits. It is a highly regulated sector, with checks at every stage. For example, the factory has cameras which provide a live feed (24 hours a day) to the SFPA.

[**30**] The witness stated that the company discharges the fish from the [redacted] and the [redacted] in a fresh state at the port. The fish is transported to the factory and processed. The witness described the requirements of the company to meet its legal obligations including the uploading of an electronic sales note to a centralised system administered by the SFPA. The information uploaded includes the vessel name, vessel owner, landing port, landing date/time and log sheet number from the vessel. The witness stated that the [redacted] must also be submitted to the SFPA which includes details of the weighing process and the total weight of fish discharged from the fishing vessels. The witness stated that his company would not be able to upload the electronic sales note if the company purchased fish from a fishing vessel which was not licensed and registered as the vessel would not appear on the SFPA system.

[**31**] Under cross-examination, the witness stated that the company can only purchase fish from a licensed and registered fishing vessel meaning the vessel is registered on the Fishing Boat Register, has a fishing authorisation for [redacted] (or whichever fish) and the quantity does not exceed the allocation of allowable catch for that vessel. There would be serious consequences for his company if the company purchased from a fishing vessel which was not licensed and registered. The witness stated that a fishing vessel must also have an authorisation to land. This means that his company cannot commence discharging fish from a fishing vessel until an authorisation to land has been issued by the SFPA. This generally means that officials from the SFPA will board the fishing vessel to inspect and perform checks on the vessel before issuing an authorisation to land.

Submissions on behalf of the Appellant

[**32**] In 2015, Company A and Company B incurred expenditure on the acquisition of fishing capacity. The fishing capacity was in use for the purposes of the trade of Company A and Company B at year end 31 December 2015. It is agreed between the parties that the expenditure by Company A and Company B on the acquisition of fishing capacity is an 'intangible asset' within the meaning of section 291A(1). In short, the issue for consideration is whether fishing capacity comes within 'specified intangible asset' as enumerated in section 291A(1)(a) to section 291A(1)(l). The Appellants submit that fishing capacity falls within the scope of section 291A(1)(h). Alternatively, the Appellants submit that fishing capacity falls within the scope of section 291A(1)(k).

[**33**] Fishing capacity is the capacity of a fishing vessel measured by reference to size in gross tonnes (GT) and engine power in kilowatts (kW). The total amount of fishing capacity available to the Irish fishing fleet is capped. Therefore, in order for a fishing vessel to acquire fishing capacity, it must be matched by the removal of an identical amount of fishing capacity under an entry/exit system. When looked at from a national or EU-wide perspective, this system ensures that the total size and power of the Irish or other Member State fishing fleet (measured by reference to the combined size and power of all fishing vessels in that fleet) stay within ceilings imposed by the EU through Council Regulation (EU) No 1380/2013 (Part V and Annex II) and in accordance with the United Nations' 'International Plan of Action for the Management of Fishing Capacity'. The fishing capacity ceiling for Ireland is 77,568 GT and 210,083 kW.

[**34**] Prior to purchasing the additional fishing capacity, Company A was permitted to operate the [redacted] to a maximum size and power of [redacted] GT and [redacted] kW and Company B was permitted to operate the [redacted] to a maximum size and power of [redacted] GT and [redacted] kW. Accordingly, had Company A and Company B increased the size/power of the [redacted] or the [redacted] or replaced those fishing vessels with new larger vessels those vessels could

not legally be used for commercial fishing without Company A and Company B purchasing additional fishing capacity.

[**35**] The Appellants submit that the relevant national and EU law applying to fishing establishes two propositions. First, that Company A and Company B could not legally have operated the lengthened fishing vessels in the [redacted] of the fishing sector without having first purchased the additional fishing capacity and obtained a new licence. Second, that it would not be permissible for (i) Company A and Company B (ii) the buyer to whom Company A and Company B sold the fish or (iii) any other participant in the supply chain (right up to the final retailer), to sell the fish or any other product produced from that fish if Company A and Company B had caught the fish without possession of the requisite fishing capacity and a licence.

[**36**] Council Regulation (EEC) No 2930/1986 of 22 September 1986 (defining characteristics for fishing vessels) provides at Article 4(1) that '*The tonnage of a vessel shall be gross tonnage as specified in Annex I to the International Convention on Tonnage Measurement of Ships*'. Article 5(1) provides '*The engine power shall be the total of the maximum continuous power which can be obtained at the flywheel of each engine and which can, by mechanical, electrical, hydraulic or other means, be applied to vessel propulsion. However, where a gearbox is incorporated into the engine, the power shall be measured at the gearbox output flange. No deduction shall be made in respect of auxiliary machines driven by the engine. The unit in which engine power is expressed shall be the kilowatt (kW)*'.

[**37**] The fishing sector is highly regulated. An overview of the legal and regulatory framework for fishing shows that fishing capacity is an authorisation without which it would not be permissible for fish to be sold for any purpose for which it was intended. Council Regulation (EC) No 1005/2008 of 29 September 2008 (establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (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: (a) fished without a valid licence, authorisation or permit issued by the flag State or the relevant costal State; (...)'. Article 42(1) provides '*For the purpose of this Regulation, serious infringement means: (a) the activities considered to constitute IUU fishing in accordance with the criteria set out in Article 3; (b) the conduct of business directly connected to IUU fishing, including the trade in/or the importation of fishery products; (c) the falsification of documents referred to in this Regulation or the use of such false or invalid documents*'. Council Regulation (EC) No 1224/2009 of 20 November 2009 (establishing a Community control system for ensuring compliance with the rules of the common fisheries policy) defines 'fishing licence' as '*an official document conferring on its holder the right, as determined by national rules, to use a certain fishing capacity for the commercial exploitation of living aquatic resources. It contains minimum requirements concerning the identification, technical characteristics and fitting out of a Community fishing vessel*'. Article 6(1) provides '*A Community fishing vessel may be used for commercial exploitation of living aquatic resources only if it has a valid fishing licence*'. Article 38(1) provides '*Member States shall be responsible for carrying out the necessary checks in order to ensure that the total capacity corresponding to the fishing licences issued by a Member State, in GT and in kW, shall at any moment not be higher than the maximum capacity levels for that Member State established in accordance with: (...)*'. Article 39(1) provides '*It shall be prohibited to fish with a fishing vessel that is equipped with an engine the power of which exceeds the one established in the fishing licence*'. Article 56(1) provides '*Each Member State shall be responsible for controlling on its territory the application of the rules of the common fisheries policy at all stages of the marketing of fisheries and aquaculture products, from the first sale to the retail sale, including transport*'. Article 58(1) provides '*Without prejudice to Regulation (EC) No 178/2002, all lots of fisheries and aquaculture products shall be traceable at all stages of production, processing and distribution, from catching or harvesting to retail stage*'.

[**38**] An overview of the legal and regulatory framework for fishing shows that fishing capacity is a right granted under an international treaty, convention or agreement to which the State is a party. The objective of the Common Fisheries Policy (CFP) includes the conservation and sustainable exploitation of fishing resources. The adjustment of fishing capacity is included in measures intended to achieve this objective. Council Regulation (EU) No 1380/2013 of 11 December 2013 (on the common fisheries policy) defines 'fishing capacity' as '*a vessel's tonnage in GT (Gross Tonnage) and its power in kW (Kilowatt) as defined in Articles 4 and 5 of Council Regulation (EEC) No 2930/86*'. Article 2(5) provides '*The CFP shall, in particular:.. (d) provide for measures to adjust the fishing capacity of the fleets to levels of fishing opportunities consistent with paragraph 2, with a view to having economically viable fleets without overexploiting marine biological resources*'. Article 7(1) provides '*Measures for the conservation and sustainable exploitation of marine biological resources may include, inter alia, the following:…(c) measures to adapt the fishing capacity of fishing vessels to available fishing opportunities*'. Article 22(1) provides '*Member States shall put in place measures to adjust the fishing capacity of their fleet to their fishing opportunities over time, taking into account trends and based on best scientific advice, with the objective of achieving a stable and enduring balance between them*'. Article 22(7) provides '*Member States shall ensure that from 1 January 2014 the fishing capacity of their fleets does not exceed at any time the fishing capacity ceilings set out in Annex II*'. Annex II provides that the capacity ceiling for Ireland is 77,568 GT and 210,083 kW. Article 23(1) provides '*Member States shall manage entries into their fleets and exits from their fleets in such a way that the entry into the fleet of new capacity without public aid is compensated for by the prior withdrawal of capacity without public aid of at least the same amount*'. The operation of the entry/exit system can be observed in the acquisition of the fishing capacity by Company A and Company B from the [redacted].

[**39**] The fundamental importance of fishing capacity in order to lawfully engage in fishing is reflected in the European Union (Common Fisheries Policy) (Point System) Regulations 2014 which were operative from 20 January 2014. These regulations were the

subject of a legal challenge and subsequently revoked. However, the 2014 regulations were operative at the time Company A and Company B purchased the additional fishing capacity. Regulation 8(1) provides '*Subject to this Regulation or the deletion of any points, points assigned to a holder of an Irish licence in accordance with Regulation 5 and Article 126 of the Commission Regulation attach to the fishing capacity associated with the licence and remain attached regardless of any transfer, division or sale of that fishing capacity, or any de-registration of the Irish sea-fishing boat concerned*'.

Interpretation of Taxing Statutes

[**40**] The Appellants submit that this appeal centres on the interpretation of section 291A rather than case-law. The Appellants referred to ***Crilly -v- T&J Farrington Limited*** [2001] 3 I.R. 251 (11 July 2001) and the statements made by Murray J. (as he was then) on the role of the courts in the interpretation of statutes. The Appellants referred to ***Bookfinders Limited -v- The Revenue Commissioners*** [2020] IESC 60 (29 September 2020). Although O'Donnell J. in ***Bookfinders*** warns against seeking to reduce the process of statutory interpretation '*to a small number of selected quotations from judgments, taken in the abstract'* it is submitted that the following extracts from his judgment provides an accurate summation of the core principles:

"***51.*** *In this regard, it is worth noting dicta on the matter from a number of different cases. In Kiernan, Henchy J. at p. 121 said that:-*
"[a] word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein". (Emphasis added)…

52. *The task of statutory interpretation in any context is the ascertainment of meaning communicated in the highly formal context of legislation… It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or*

background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in Kiernan, the words should then be construed "strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language".

…

54. *… It means, in my view, that it is a mistake to come to a statute – even a taxation statute – seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.*

…

56. *I would merely add that the principle of strict construction is, like many other principles of statutory interpretation, a principle derived from the presumed intention of the legislature, which is not to be assumed to seek to impose a penalty other than by clear language. That approach should sit comfortably with other presumptions as to legislative behaviour, such as the presumption that legislation is presumed to have some object in view which it is sought to achieve. A literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision.*"

[**41**] The Appellants submit that the foregoing is consistent with the observations of McKechnie J. in ***Dunnes Stores -v- The Revenue Commissioners*** [2019] IESC 50 (4 June 2019):

"*63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (Craies on Statutory Interpretation (7th Ed.) Sweet &Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" Direct United States Cable Company v. Anglo – American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question. McCann Limited v. Ó'Culacháin (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*"

[**42**] The Revenue Commissioners submit that the purpose of section 291A is to support the development of the knowledge economy by encouraging companies to locate the management and exploitation of their intellectual property in the State and that section 291A should be interpreted accordingly. The Appellants submit that an examination of the wording in section 291A shows that the section applies broadly and without limitation as regards the type of company or trade that may obtain the benefit of the capital allowances unlike other provisions of the Tax Acts. Section 291A(2) provides '*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, then, for the purposes of this Chapter and Chapter 4 of this Part – (a) the specified intangible asset shall be treated as machinery or plant (…)*'. [emphasis added] The section is not confined to a company carrying on a trade in the knowledge economy. The definitions of 'intangible asset' and 'specified intangible

asset' in section 291A(1) are not narrowed to intellectual property. An examination of section 291A(1)(a) to section 291A(1)(l) shows that the asset does not need to be intellectual property in order to constitute a specified intangible asset. For example, in section 291A(1)(g) there is a reference to customer lists; and in section 291A(1)(h) there is a reference to liquor licences.

[**43**] The Appellants submit that the placement of section 291A(1)(h), which follows a lengthy enumeration of other intangible assets constituting specified intangible assets, must have significance when interpreting section 291A(1)(h). Section 291A(1)(h) is a type of 'sweeping-up' paragraph. It is in the context of the overall wording of section 291A(1) that paragraph (h) must be considered. Furthermore, the wording in section 291A(1)(h) is cast broadly in referring to '*any 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*'. [emphasis added] The Appellants submit that this wording, and when read in the context of the other paragraphs, clearly shows that paragraph (h) is designed to sweep up other rights which are not captured in the other paragraphs. The Appellants submit that the amendment made to section 291A(1)(h) in 2010 is noteworthy, particularly given that section 291A was only inserted by Finance Act, 2009. Section 43(1)(g) of the Finance Act, 2010 introduced the following words of limitation into paragraph (h) '*but this paragraph does not relate to a licence within the meaning of section 2 of the Intoxicating Liquor Act 2008*'. The Appellants submit that the insertion of these words is a clear recognition by the Oireachtas of the broad scope of paragraph (h). The impact of not having an authorisation in this appeal is more stark than a liquor licence, in that, the absence of the requisite fishing capacity would not merely render it impermissible for Company A and Company B to catch, process and sell the fish, it would render it impermissible for anyone else to do so.

Section 291A(1)(h)

[**44**] The Appellants submit that the expenditure incurred by Company A and Company B on fishing capacity was capital expenditure on the provision of a specified intangible

asset for the purposes of the trade. It is agreed that fishing capacity is an intangible asset within the meaning of section 291A(1). The Appellants submit that fishing capacity constitutes a specified intangible asset coming within section 291A(1)(h) as '*any 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*'. The Appellants submit that Company A and Company B would not be entitled to engage in fishing without fishing capacity. Consequently, fishing capacity is an authorisation to operate a fishing vessel of a particular size and power which confers the authority on Company A and Company B to apply to obtain a sea-boat fishing licence and thereby lawfully engage in commercial fishing. Simply because there may be a number of steps involved does not mean that section 291A applies only when all steps are complete.

[**45**] The Appellants submit that the legal and regulatory framework for fishing in the [redacted] of the fishing sector establishes that in order to lawfully engage in commercial fishing, a fishing vessel must, *inter alia*:

(A) be entered in the Fishing Boat Register;
(B) hold sufficient fishing capacity; and
(C) be licensed by the Licensing Authority.

[**46**] The Appellants submit that the combined effect of the traceability requirements in respect of fish products, the licensing requirements in respect of fishing vessels and the registration requirements in respect of operators means that a commercial quantity of fish products may legally only be caught and landed by a registered and licensed fishing vessel (a precondition to which is that the vessel has the requisite fishing capacity). In addition, the EU regulatory framework provides that fish products may legally only be sold when the fish have been caught and landed by a registered and licensed fishing vessel and in accordance with the prescribed traceability requirements. The possession of the requisite fishing capacity is a cornerstone of this framework as without fishing capacity the fishing

vessel could not have a valid sea-fishing boat licence. The legal consequences that would arise where the fishing vessel does not have the requisite fishing capacity would be that:

(A) the catching of the fish by the fishing vessel would be unlawful and a criminal offence on the basis that the catching of fish without a valid sea-fishing boat licence is illegal, unreported and unregulated (IUU) fishing;

(B) the first sale of the fish would be unlawful and a criminal offence on the basis that it would be an illegally caught commercial quantity of fish by an unlicensed vessel;

(C) the subsequent sale of the fish would be unlawful and a criminal offence on the basis that the subsequent sale would not be fish that is traceable to a lawfully obtained catch;

(D) the transport of the fish would be unlawful as the fish would not be traceable to a lawfully obtained catch; and

(E) the retail sale of the fish would be unlawful as the fish would not be traceable to a lawfully obtained catch.

[**47**] The Appellants submit that if a fishing vessel does not have the requisite fishing capacity at the time of catching the fish it would, in a legal sense, 'poison' or 'contaminate' the lawfulness of the sale and supply of the fish from the point of catch to the retail sale of the fish. This is because fish (in a commercial quantity) that are caught by an unlicensed vessel (and a vessel without the requisite fishing capacity could not have a valid licence) would be the product of IUU fishing and subject to potential criminal penalties and administrative sanctions. In view of the traceability requirements for the sale and supply of commercial quantities of fish, the illegal nature of catching the fish would not, at any point in the supply chain up to and including the retail sale, be 'cured' or 'repaired'.

[**48**] The Appellants submit that it is not a requirement of section 291A(1)(h) that Company A and Company B undertake the process or sell the product. It is a requirement of subsection (2) that in order to obtain the benefit of the capital allowances the '*company carrying on a trade [have] incurred capital expenditure on the provision of a specified intangible asset for the purposes of the trade*' but insofar as the definition of '*specified*

intangible asset' is concerned the question is whether the nature of the fishing capacity is such that, absent that authorisation it would render it impermissible for '*a product of any… process*' to be sold. This question can be answered, it is submitted, by reference to the nature of fishing capacity and that which, absent possession of the fishing capacity, would be rendered impermissible. It would be impermissible to catch, process and sell fish absent Company A and Company B being in possession of the requisite fishing capacity.

[**49**] The Appellants submit that section 291A(1)(h) focuses on the nature of the authorisation and asks whether absent the authorisation (namely the fishing capacity) it would be impermissible for any person to subject the fish to a process and sell them. It is not necessary to consider whether Company A and Company B in fact catch, process or sell fish since the relevant question is simply whether, absent the authorisation, it would be impermissible for the fish to be subjected to a process and sold. In this regard, it is important to note that the absence of the requisite fishing capacity would not merely render it impermissible for Company A and Company B to catch, process and sell fish, it would render it impermissible for anyone else to do so.

[**50**] The Appellants submit that the Revenue Commissioners are contending for a narrow construction of the words '*a product of any… process*'. The basis for this approach to the interpretation of section 291A(1)(h) is unsupported by the case-law. In any event, the Appellants submit that there is no merit to the submission. As stated above, the Appellants submit that section 291A(1)(h) must be viewed in its context, it is a type of sweeping-up paragraph designed to sweep up other rights which are not captured in the other paragraphs of section 291A(1). Moreover, there is strong authority that the concept of a 'process' in the Tax Acts is a broad one.

[**51**] The Appellants submit that it can be instructive, in construing the word 'process' in section 291A(1)(h), to consider other provisions of the same enactment that particularise an understanding of 'process'. A number of cases have been decided by the Irish courts on questions related to Part 14 of the Taxes Consolidation Act, 1997 on the taxation of

companies engaged in manufacturing trades. Although the legislation under consideration ceased to have effect from 1 January 2012, it is submitted that the case-law is nonetheless relevant. The cases broadly concerned a number of companies that claimed to have carried out the process of 'manufacturing' and therefore allowed the company to become liable to corporation tax on the attributable profits at a reduced 10% rate, rather than the prevailing (40%) rate. Some important and well-known cases involving the ripening of bananas (***Charles McCann Limited -v- Ó'Culacháin (Inspector of Taxes)*** [1986] I.R. 196) and the pasteurisation of milk (***Cronin (Inspector of Taxes) -v- Strand Dairy Limited*** [1985] 3 ITR 441) were found in favour of the relevant taxpayers. These cases are relevant in two respects; first, for what they say about the process the court adopted in deciding whether the bananas and milk were 'manufactured goods' and second what the legislation introduced following these cases convey about the Oireachtas' understanding of the word 'process'.

[**52**] In ***McCann*** the Supreme Court concluded that bananas which had been subjected to a ripening process were 'goods manufactured within the State'. In the judgment, the Court underlined the importance of interpreting the words in context wherein it was stated (McCarthy J.):

"*It is true that one may eventually put the question, as stated by Carroll J. – whether an ordinary person would attribute the word 'manufacture' to the ripening process, not whether the ordinary person in the street would describe the bananas which have been subjected to the ripening process as 'manufactured goods', but one must ensure that the ordinary person, as so contemplated, is one adequately informed as to those matters identified in the judgment of Murphy J. which I have cited. The scheme and purpose of the relevant part of the statute appear to me to be the very context within which the word is used and the requirements of which must be examined in order to construe it. It is manifest that Part IV of the Act of 1976 was, by tax incentives, to encourage the creation of employment within the State and the promotion of exports - naturally, outside the State - objectives of proper, social and economic kind which the State would be bound to*

encourage. Employment is created by labour intensive processes and exports by the creation of saleable goods. The operation described in the case stated clearly comes within both categories; in my judgment, it is then a matter of degree, itself a question of law, as to whether or not what the company has done to the raw material makes it goods within the definition in section 54."

[**53**] Following these cases, the Oireachtas amended the relevant section to restrict the scope of activities that would be considered 'manufacturing'. The relevant section was incorporated into section 443(6) of the Taxes Consolidation Act, 1997 which provides:

"*(6) Without prejudice to the generality of subsection (1) and subject to subsections (2) to (4) and (8) to (15), goods shall not for the purposes of this section be regarded as manufactured if they are goods which result from a process –*

(a) which consists primarily of any one of the following –

(i) dividing (including cutting), purifying, drying, mixing, sorting, packaging, branding, testing or applying any other similar process to a product, produce or material that is acquired in bulk so as to prepare that product, produce or material for sale or distribution, or any combination of such processes,

(ii) applying methods of preservation, pasteurisation or maturation or other similar treatment to any foodstuffs, or any combination of such processes,

(iii) cooking, baking or otherwise preparing food or drink for human consumption which is intended to be consumed, at or about the time it is prepared, whether or not in the building or structure in which it is prepared or whether or not in the building to which it is delivered after being prepared,

(iv) improving or altering any articles or materials without imposing on them a change in their character, or

(v) repairing, refurbishing, reconditioning, restoring or other similar processing of any articles or materials, or any combination of such processes," [emphasis added]

[**54**] Section 443 of the Taxes Consolidation Act, 1997 was deleted by Finance Act, 2012 with effect from 1 January 2012. Section 291A was inserted by Finance Act, 2009. Accordingly, section 291A was inserted into an enactment which contemplated a broad understanding of what constitutes a 'process'. There is remarkable similarity between 'goods which result from a process' and 'the product of any process'. The Appellants referred to ***Director of Public Prosecutions -v- Brown*** [2019] 2 I.R. 1 (21 December 2018) regarding the presumption that the same word used in the same enactment bears the same meaning wherein the Court stated (McKechnie J.):

"*106 In the absence of any such restricting words in that section, one would have thought it logical that the default presumption is that the same word should be given the same meaning when it is used in different parts of the enactment, unless the context should dictate otherwise. As stated by Henchy J. in The State (McGroddy) v. Carr [1975] I.R. 275 at pp. 285 and 286, it is a 'fundamental rule of interpretation that when expressions are repeated in the same instrument, and more especially in a particular part of the same instrument, they should be given a common force and effect unless the context requires otherwise'*."

[**55**] The Appellants are not contending that section 443(6) contains a definition of 'process' which is binding on the interpretation of section 291A but merely that there is a presumption that the understanding which the Oireachtas had of the term 'process' when it used that word in section 443(6) was the same as that which it had in mind when it inserted section 291A. Certainly, there is nothing in section 291A to suggest that the Oireachtas had a different (and radically more limited) understanding of that word.

[**56**] The Appellants submit that the fish which Company A and Company B sell to [redacted] are the 'product of a process' and the sale of that product

would not be permissible if Company A and Company B had not purchased the fishing capacity. [redacted] subject the fish to further processes and it would not be permissible for that company to sell the fish for any purpose if Company A and Company B had not purchased the fishing capacity. Moreover, it would not be permissible for any person to purchase the fish, subject the fish to any process and sell the fish for any purpose if Company A and Company B had not purchased the fishing capacity.

[**57**] The Appellants submit that the relevant question which section 291A(1)(h) poses is simply whether absent the authorisation it would '*not be permissible*' for the fish to be subjected to any process and then sold, rather than requiring a consideration of whether Company A and Company B or their immediate purchaser are subjecting the fish to such a process. In any event, evidence was given on the process involved in catching and preserving the fish on board the fishing vessels and the direct impact which those processes have on the quality of the product. The process involved in catching the fish, transferring the fish onto the vessels, moving the fish into the large [redacted] 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 are preserved on board the fishing vessels at a temperature of -1.5 to -2.0 degrees centigrade in water which is cooled and circulated by the [redacted]. The [redacted] is a complex piece of computerised equipment consisting of compressors and coolers to cool the water as it passes through the system. In the circumstances, the Appellants submit that the fish which Company A and Company B lands in [redacted] are clearly the product of a process on any construction of those words.

[**58**] In replying to the submissions on behalf of the Revenue Commissioners, the Appellants stated that Company A and Company B have a legal obligation under Council Regulation (EC) No 853/2004 of 29 April 2004 (laying down specific hygiene rules on the hygiene of foodstuffs) wherein Annex III, Section VIII, Chapter I(I)(B)(3) provides '*In vessels equipped for chilling fishery products in cooled clean seawater, tanks must incorporate devices for achieving a uniform temperature throughout the tanks. Such devices must achieve a chilling rate that ensures that the mix of fish and clean seawater*

reaches not more than 3°C 6 hours after loading and not more than 0°C after 16 hours and allow the monitoring and, where necessary, recording of temperatures'. As regards section 291A(1)(i), there has been research undertaken on the impact of chilling on fish and the production of histamine and how [redacted] can best be operated to produce optimal results. In any event, there is nothing in section 291A(1)(h) to require section 291A(1)(i) to be satisfied before paragraph (h) can apply. It would radically diminish the scope of section 291A(1)(h) if section 291A(1)(i) was required to be satisfied in order to fall within paragraph (h).

[**59**] The Revenue Commissioners submit that an undefined 'novel' threshold must be achieved in order to come within section 291A(1)(h). However, given that section 291A(1)(h) pertains to matters not coming within the other paragraphs (a) to (g), it is difficult to imagine the 'novel' characteristics that a product must possess to come within section 291A(1)(h). The Revenue Commissioners submit that the fishing capacity relates to the fishing vessel rather than the product. However, the absence of the fishing capacity has a bearing on the sale of the product. A liquor licence prohibits a licensee (the holder of the licence) from selling the product (intoxicating liquor) whereas the absence of fishing capacity renders the product illegal. If a fishing vessel does not have the requisite fishing capacity at the time of catching the fish it renders the sale and supply of the fish illegal from the point of catch to the retail sale of the fish.

[**60**] The Appellants submit that section 291A(1)(h) cannot apply only to self-executing unconditional authorisations as this would limit the scope of paragraph (h) even in the context of the knowledge economy. The wording of section 291A(1)(h) is not 'any authorisation which entitles the holder' but rather '*any authorisation without which it would not be permissible*'.

Section 291A(1)(k)

[**61**] In the alternative, the Appellants submit that fishing capacity constitutes a specified intangible asset coming within section 291A(1)(k) as '*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)*'.

[**62**] The Appellants submit that fishing capacity has been granted '*under* [an] *international treaty, convention or agreement to which the State is a party*', namely the numerous European treaties to which the State is party and by the terms of which the State is bound. This is clear in the fundamental requirement that the overall capacity of the national fishing fleet must not exceed the prescribed ceiling for that Member State. This creates the entry/exit system that is central to the CFP management of capacity (and which is developed further by Commission Implementing Regulation (EU) No 404/2011). Clearly, this requirement is a requirement of EU law and so originates in an obligation of the State under an international treaty or an international agreement. The provisions of Irish law, and those licensing and regulatory procedures of Irish agencies such as the Licensing Authority for Sea-Fishing Boats and the Sea-Fisheries Protection Authority, that govern fishing capacity, merely give effect to this EU-mandated regime, as indeed the State is required to do under those same treaties and under the European Communities Acts. For all the reasons submitted in respect of section 291A(1)(h), fishing capacity is a right that *'correspond to'* or is *'similar to'* that within paragraph (h).

[**63**] Council Regulation (EC) No 2371/2002 of 20 December 2002 (on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy) provides at Article 20(1) that '*The Council, acting by qualified majority on a proposal from the Commission, shall decide on catch and/or fishing effort limits and on the allocation of fishing opportunities among Member States as well as the conditions associated with those limits. Fishing opportunities shall be distributed among Member States in such a way as*

to assure each Member State relative stability of fishing activities for each stock or fishery'. 'Fishing opportunity' means '*a quantified legal entitlement to fish, expressed in terms of catches and/or fishing effort*'. 'Fishing effort' means '*the product of the capacity and the activity of a fishing vessel*'. The Appellant submits that this shows that fishing capacity comes within section 291A(1)(k) as fishing capacity is granted under EU law. The Revenue Commissioners accept that section 291A(1)(k) incorporates rights granted under EU law.

Section 291A(2)

[**64**] The Appellants submit that if the sea-fishing boat licence is the specified intangible asset within section 291A(1)(h) (rather than the fishing capacity) (given the submission of the Revenue Commissioners that a licence could be interpreted to be an authorisation), then the expenditure incurred on the acquisition of fishing capacity is '*capital expenditure on the provision of a specified intangible asset for the purposes of the trade*'. [emphasis added] The Appellants referred to ***Inland Revenue Commissioners -v- Barclay Curle & Company Limited*** [1969] 1 WLR 675 (19 February 1969) in which the question was whether the cost of excavation incurred by the company to construct a dry dock for use in its trade was '*capital expenditure on the provision of machinery or plant*'. Lord Reid in the House of Lords stated:

"*So the question is whether, if the dock is plant, the cost of making room for it is expenditure on the provision of the plant for the purposes of the trade of the dock owner. In my view, this can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed: until then it is of no use for the purposes of the trade. This plant, the dock, could not even be made until the necessary excavating had been done. All the commissioners say in refusing this part of the claim is that this expenditure was too remote from the provision of the dry dock. There, I think, they misdirected themselves. If the cost of the provision of plant can include more than the cost of the plant itself, I do not see how expenditure, which must be incurred before the plant can be provided, can be too remote*."

[**65**] The Appellants submit that as section 284(1) which deals with capital allowances on tangible assets and section 291A(2) are identical in that both sections include '*on the provision of*' then ***Barclay*** is persuasive in determining the meaning of 'on the provision of' in the case of intangible assets. Without incurring the capital expenditure on acquiring the fishing capacity, Company A and Company B could not obtain a boat licence. This shows the interdependent nature of the two assets (fishing capacity and boat licence) and shows that ***Barclay*** is directly analogous by viewing the fishing capacity as the excavation and the boat licence as the dry dock. The reliance by the Revenue Commissioners on ***Ben-Odeco Limited -v- Powlson (Inspector of Taxes)*** [1978] 2 All E.R. 1111 (27 July 1978) is misplaced. In that case, the question was whether interest and commitment fees paid in respect of a loan to finance the acquisition of machinery and plant was capital expenditure incurred on the provision of machinery or plant. In the House of Lords it was stated by Lord Wilberforce:

"*An important principle of the laws of taxation is that, in the absence of clear contrary direction, taxpayers in, objectively, similar situations should receive similar tax treatment… The words 'expenditure on the provision of' do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant, not limiting it necessarily to the bare purchase price, but including such items as transport and installation, and in any event not extending to expenditure more remote in purpose. In the end the issue remains whether it is correct to say that the interest and commitment fees were expenditure on the provision of money to be used on the provision of plant, but not expenditure on the provision on plant and so not within the subsection. This was the brief but clear opinion of the Special Commissioners and of the judge and little more is possible than after reflection to express agreement or disagreement. For me, only agreement is possible*."

This case may serve as authority for the proposition that Company A and Company B could not claim capital allowances under section 291A for interest paid on monies borrowed to

fund the acquisition of the fishing capacity. However, it is clear that the capital expenditure incurred on the acquisition of the fishing capacity was incurred on the provision of the boat licence in a manner that is directly analogous to the facts in ***Barclay***.

[**66**] The Revenue Commissioners submit that the sea-fishing boat licence is not an 'intangible asset' within the meaning of section 291A(1) as the licence has not been recognised in the accounts of Company A and Company B. Section 291A(1) provides '*'intangible asset' shall be construed in accordance with generally accepted accounting practice*'. The word in section 291A(1) is 'construed' rather than 'recognised'. The question of recognition of the cost of an intangible asset is neither explicit nor implicit in the definition in section 291A(1). On its own terms, section 291A does not refer to the cost being recognised in order to constitute an intangible asset. Section 291A seeks to provide a meaning for 'intangible asset' which cannot alter depending on (i) the standard which a particular company applies in preparing its accounts (ii) whether the asset has been recognised in the accounts, or (iii) whether there are any accounts prepared at all. The phrase '*shall be construed in accordance with*' appears in numerous sections of the Tax Acts. For example, in section 76A (as at Finance Act, 2017) a number of terms are required to be '*construed in accordance with generally accepted accounting practice*'. The terms in question are '*accounting policy'*, '*a change in accounting policy'*, '*accounting standard'*, '*retrospective'* and '*opening reserves'*. It is clear that in those sections, as in section 291A, it is the terms which are being construed. In other words, in section 76A, the phrase '*construed in accordance with generally accepted accounting practice*' in effect means that the definition to be 'read in' for the purposes of the Tax Acts is the same as that in generally accepted accounting practice (GAAP). It is submitted that it is the term 'intangible asset' (and not any question of recognition) which is, as a term, to be construed in accordance with GAAP. Financial Reporting Standard (FRS) 10 includes a definition of 'intangible assets' as '*non-financial fixed assets that do not have physical substance but are identifiable and are controlled by the entity through custody or legal rights*'. Financial Reporting Standard (FRS) 102 provides '*intangible asset - an identifiable non-monetary asset without physical substance. Such an asset is identifiable when: (a) it is separable, ie*

capable of being separated or divided from the entity and sold, transferred, licensed, rented or exchanged, either individually or together with a related contract, asset or liability; or (b) it arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations'. International Accounting Standards (IAS) 38 includes a definition of 'intangible asset' as '*an identifiable non-monetary asset without physical substance*'. Therefore, an 'intangible asset' construed in accordance with GAAP is an identifiable non-monetary asset without physical substance.

[**67**] In ***Sulaimon -v - Minister for Justice Equality and Law Reform*** [2012] IESC 63 (21 December 2012) the Supreme Court interpreted the phrase 'shall be construed in accordance with' in a manner to give effect to the purpose of the scheme as a whole. There the appellant sought to rely on section 4(1) of the Immigration Act, 2004 which provides '*Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as 'a permission')*'.The appellant in that case submitted that the permission in fact given by the Minister was not a 'permission' properly so called because the definition section of the Immigration Act, 2004 provides '*In this Act, except when the context otherwise requires… permission shall be construed in accordance with section 4*' [emphasis added] The Court (Hardiman J.) held, however, that "*Section 4 certainly creates a power in an immigration officer to grant a permission 'on behalf of the Minister'. To judge from the context and, most obviously, the shoulder note, ('Permission to Land') this envisages a permission granted by an official at a seaport or airport and in no way trenches on the Minister's inherent or statutory power to grant such permission. (I agree with Mr. Justice O'Donnell for the reasons which he gives, that regard may be had to the shoulder note). Indeed, this ministerial power is restated in s.4 and s.5. This empowering of an immigration officer in relation to permission to land, or to remain by no means divests the Minister of his own power to grant permission to remain himself, as his own Department's correspondence records him as doing on 7th July 2005.*" The Court then dealt with the

argument that the words 'shall be construed in accordance with' confined the meaning of 'permission' only to a permission granted by an officer on behalf of the Minister and not by the Minister. The Court stated "*Section 1 does not require a special and artificial definition of the word. Rather, it merely provides, save where the context otherwise requires, that the word 'permission' shall be construed in accordance with s.4. In my view this means no more than that any ministerial permission shall be of the same nature (rather than form) as the permission which is granted under s.4. This indeed is consistent with a broader view of the Act. The Act does not provide any details about the grant of a ministerial permission and does not set out any procedure for either an application for such permission or the manner in which application is to be approached. It seems unlikely therefore that it would require precision as to the manner of the communication of any permission, particularly when that would be achieved only by indirect reference to construction in accordance with s.4. Furthermore even if (contrary to the view expressed above) the word 'permission' is to be normally read in the Act as meaning either a permission under s.4(1) or in the same form, I would consider that for the reasons already discussed, in the case of a ministerial permission, the context does otherwise require and it should be given its ordinary and natural meaning.*" [emphasis added]

[**68**] The Appellants submit that it would be unwise to pluck words such as these from a judgment dealing with an entirely different section and seek to imbue a fixed meaning on the words '*shall be construed in accordance with*' in every context. However, subject to this important caveat, it is submitted that regard should be had to the approach taken by the Supreme Court which is to look at the purpose of the section as a whole and to give the words in question a meaning in that context. A review of section 291A(2) has shown that there is no requirement for recognition to obtain the benefit of the capital allowances under section 291A. In any event, in the ordinary use of the term 'intangible asset', and construed in accordance with GAAP, a sea-fishing boat licence is an identifiable non-monetary asset without physical substance and, consequently, comes within section 291A(1).

[**69**] The Appellants submit that if the Revenue Commissioners interpretation of 'intangible asset' is correct, namely it is a requirement of GAAP that in order *to be* an intangible asset within the meaning of section 291A(1) the asset must be recognised in the accounts of Company A and Company, this is a question of fact that would require expert evidence. That this is a question of fact requiring expert evidence is clear from a number of cases. In ***Murnaghan Brothers Limited -v- O'Maoldomhnaigh (Inspector of Taxes)*** [1991] 1 I.R. 455 (2 October 1990) Murphy J. reaffirmed an earlier judgment of Carroll J. wherein the Court stated:

"*In Carroll Industries plc .v. Ó' Culacháin [1988] IR 705, Carroll J. cited with approval a passage from the judgment of Pennycuick V.C. in Odeon Associated Theatres Ltd .v. Jones [1971] 1 WLR 442 at p.454 in the following terms:- "I ought to say a few words by way of explanation of the time-honoured expression 'ordinary principles of commercial accountancy'. The concern of the court in this connection is to ascertain the true profit of the taxpayer. That and nothing else, apart from express statutory adjustments, is the subject of taxation in respect of a trade. In so ascertaining the true profit of a trade the court applies the correct principles of the prevailing system of commercial accountancy. I use the word 'correct' deliberately. In order to ascertain what are the correct principles it has recourse to the evidence of accountants. That evidence is conclusive on the practice of accountants in the sense of the principles on which accountants act in practice. That is a question of pure fact, but the court itself has to make a final decision as to whether that practice corresponds to the correct principles of commercial accountancy. No doubt in the vast proportion of cases the court will agree with the accountants, but it will not necessarily do so"*." [emphasis added]

[**70**] In ***In the Matter of Irish Life and Permanent Plc*** [2010] 3 I.R. 513 (21 December 2009) Clarke J. (as he was then) had to consider whether a particular reserve would be a 'profit' within the meaning of section 45 of the Companies (Amendment) Act, 1983. This lead to a consideration of section 148 of the Companies Act, 1963 and the duty of a

company to prepare accounts, *inter alia*, in accordance with International Financial Reporting Standards (IFRS). Clarke J. noted:

"*Thus it is clear that accounts of companies, in order that they might comply with the Act as amended, must be prepared in accordance with the relevant standards. For reasons which it is not necessary to detail here, the standard applied so far as both old ILP and new ILP is the IFRS individual accounts standard.*

...

As to the proper accounting treatment, in accordance with the IFRS standard, of those transactions I have had the benefit of the evidence of Úna Curtis, a director with responsibility for technical accounting matters in the Department of Professional Practice of KPMG Chartered Accountants. I accept the evidence given by Ms. Curtis…"

If the question of the interpretation of IFRS was a question of law then it would not have been permissible to have regard to the evidence of Úna Curtis as expert evidence of Irish law is inadmissible in civil proceedings.

[**71**] In addition to the foregoing Irish cases, this matter was recently considered in the Upper Tribunal (Tax and Chancery Chamber) in the UK in which the question was whether the interpretation of the accounting standards was a question of law or a question of fact. In ***Ball (UK) Holdings Limited -v- Revenue and Customs Commissioners*** [2019] STC 193 (10 December 2018) the Upper Tribunal held:

"*30 At the heart of this appeal is the question whether the correct interpretation of accounting standards, and specifically FRS 23, can be characterised as a matter of law or fact. If it is a question of law then this Tribunal may consider the question afresh. If it is a question of fact then, since an appeal may only be made on a point of law, the role of this Tribunal is limited to determining whether the FTT's conclusions were unsupported (or not sufficiently supported) by the evidence, such that the findings were not ones that it was entitled to make (…)*"

[**72**] The Upper Tribunal then set out the submissions of the parties (Ms. Shaw arguing that it was a question of law and Mr. Henderson arguing that it was a question of fact) and continued:

"*36 At first sight, Ms Shaw's submissions seemed convincing. The interpretation of documents, in the manner referred to by Nugee J in Veolia, is generally said to be a matter of law and not fact. However, we are persuaded that this is not the correct approach to take to accounting standards.*

37 Accounting standards are not legal documents. They are not statutes or contracts. This is also not a case where public law concepts, such as the doctrine of legitimate expectation, are engaged in a way that means that the document in question may form the basis of a legal right (as in Veolia and Davies, for example). So it is not necessary to construe them to determine any legal effect to be given to them. They are documents written by accountants for accountants, and are intended to identify proper accounting practice, not law. No accountant would consider turning to a lawyer for assistance in their interpretation, and nor should they. Where appropriate, interpretations are provided by the relevant accounting standards board itself, not only in notes, the 'Basis of Conclusions' and other accompanying material published with standards, but also via committees whose function is to provide interpretations (SIC-19, for example, was published by such a committee).

...

40 In our view the question of what is generally accepted accounting practice, as well as the question whether a particular set of accounts are prepared in accordance with it, is a question of fact to be determined with the assistance of expert evidence. Professional accountants are best placed to understand accounting statements in their context, and in particular their 'spirit and reasoning'...

41 What is a matter for a court or tribunal, however, is the proper assessment of expert evidence. Clearly a judge may prefer the evidence of one expert to that of another, but this should be fully reasoned and the judge should not simply 'develop his own theory' (…)."

Submissions on behalf of the Revenue Commissioners

Interpretation of Taxing Statutes

[**73**] As regards the interpretation of section 291A, the Revenue Commissioners referred to ***Keane -v- An Bord Pleanála*** [1997] 1 I.R. 184 (18 July 1996) wherein the Supreme Court made reference to an approach of statutory interpretation advanced by Lord Warrington of Clyffe in ***Barrell -v- Fordree*** [1932] AC 676 where he observed that '*the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases*'.

[**74**] The Revenue Commissioners submit that in relation to tax relief provisions such as those contained in section 291A, the Appellants must come squarely within the terms of the relief to be entitled to avail of same and benefit from a reduction of its tax liability. It is submitted that the words in section 291A(1)(a) to (l) is the pre-eminent indicator of the Oireachtas' intention of what particular intangible asset is to be covered by the section. In that regard, the maxim *noscitur a sociis* (known from associates) expresses that statutory words are liable to be affected by other words with which they are associated. In ***United States Tobacco International Inc -v- Minister for Health*** [1990] 1 I.R. 394 (9 September 1987) Hamilton J. stated that he must have regard to the maxim *noscitur a sociis* and endorsed the view of Stamp J. in the oft-cited ***Bourne (Inspector of Taxes) -v- Norwich Crematorium Limited*** [1967] 2 All E.R. 576 (7 March 1967) that '*English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases and then put back into the sentence*…'. This statement was cited with approval by Henchy

J. in ***Dillion -v- Minister for Posts and Telegraphs*** [Unreported, Supreme Court] (3 June 1981). Cross in ***Statutory Interpretation*** states that, where words are found, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category, unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification.

[**75**] The Revenue Commissioners submit that it is well established in law that the interpretative approach to be applied to the interpretation of taxing statutes is a literal one as supported by a long history of jurisprudence which includes ***Revenue Commissioners -v- Doorley*** [1933] I.R. 750, ***Inspector of Taxes -v- Kiernan*** [1982] ILRM 13, ***Cape Brandy Syndicate -v- Inland Revenue Commissioners*** [1921] 1 K.B. 64 and ***Texaco (Ireland) Ltd -v- Murphy*** [1991] 2 I.R. 449. The ordinary (literal) meaning rule and the plain meaning rule of statutory interpretation provide that words or phrases should be given their ordinary and natural meaning and where that meaning results in a provision being entirely plain and unambiguous, then the interpreter's job is at an end, and effect must be given to that plain meaning. These rules are long standing and have been emphasised on many occasion. Barron J. in ***O'H -v- O'H*** [1990] 2 I.R. 558 (22 June 1990) quoted from the decision in ***Powys -v- Powys*** [1971] 3 WLR 154 (23 April 1971) wherein Brandon J. summarised the rules '*The true principles to apply are in my view these: that the first and most important consideration in construing a statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it*'. Dodd in ***Statutory Interpretation in Ireland*** states that despite the difficulties in parsing further what is meant by 'ordinary meaning' the phrase is capable of being discussed from a number of perspectives and he goes on to cite a number of examples including (i) the first impression meaning (ii) the proximate contextual meaning *i.e.* by reference to the sentence or prose in which it appears (iii) the meaning

understood from the perspective of the maker with a particular purpose or objective in mind (iv) the audience derived meaning and (v) the applied meaning.

[**76**] The Revenue Commissioners submit that expenditure on the acquisition of fishing capacity does not come within specified intangible asset in section 291A(1). The Revenue Commissioners submit that it is clear that the correct interpretation to give effect to the legislative intention of the scheme in section 291A is that it is aimed at supporting the development of creations and inventions and as such a knowledge economy, and to encourage companies to locate the management and exploitation of their intellectual property in the State. This is apparent from a consideration of the wording of each paragraph of section 291A(1)(a) to (l). The Revenue Commissioners submit that the interpretation submitted by the Appellants, whereby the acquisition of fishing capacity, which has nothing to do with the knowledge economy but relates to meeting licensing requirements under national and EU law for fishing vessels, is said to constitute a specified intangible asset within the scope of section 291A is one that is artificial and strained.

[**77**] The Revenue Commissioners submit that this is borne out by a consideration of the ordinary and natural meaning of the words in section 291A(1). Section 291A(1)(a) to (g) on their plain meaning relate to intellectual property rights, of which fishing capacity in respect of a fishing vessel for the purpose of obtaining a boat licence, is manifestly not one. Nor plainly can fishing capacity fall within section 291A(1)(h), as it is not akin to (and may not on any reasonable interpretation be considered as similar to) an '*authorisation'* without which 'a *medicine, or a product of any design, formula, process or invention*' could not '*be sold for the purpose for which it* [namely the said product of a design, formula, process or invention] *was intended*'. Furthermore, it is not a right, as referred to in section 291A(1)(i), which is '*derived from research, undertaken prior to any* [such] *authorisation*' into the effects of a medicine or a product of any design, formula, process or invention. This shows that the authorisation must relate to a matter which could be the subject matter of research. Nor, is it, for the purpose of section 291A(1)(k), a right granted under the law of another country, territory, state or area, or under an international treaty, convention or

agreement to which the State is a party, which right corresponds to, or is similar to, '*any of the rights referred to in any of paragraphs (a) to (j)*'. The Revenue Commissioners agreed that the reference to 'customer lists' in section 291A(1)(g) would not, in broad terms, come within the category of intellectual property.

Section 291A(1)(h)

[**78**] The Revenue Commissioners submit that the *noscitur a sociis* comes from the reference to '*medicine*' in section 291A(1)(h) and is informative of the context of the paragraph. In addition, the entirety of '*a product of any design, formula, process or invention*' must be considered. In this appeal, the product is the fish caught by Company A and Company B. However, this does not result from a creative or innovative process or involve intellectual effort. Fish are living aquatic resources and not 'a product of any design, formula, process or invention'. It is a natural product.

[**79**] The legal requirements to engage in commercial fishing are to have a sea-fishing boat licence and a fishing authorisation for a specific species of fish. Having fishing capacity may form part of the licensing process to obtain a boat licence but that does not equate to fishing capacity being an authorisation. The fishing capacity relates to a fishing vessel rather than the product. The boat licence relates to operating a fishing vessel rather than the product. The legal and regulatory framework for fishing centres on the fishing activity. If there is a breach or infringement in the fishing activity, it is the boat licence that is revoked or suspended but the fishing capacity remains. The ordinary and natural meaning of 'authorisation' is a permission to do something. Fishing capacity is not a permission to do something. The definition of fishing capacity as '*a vessel's tonnage in GT and its power in kW*' clearly shows that fishing capacity is not an authorisation. Given the breadth of the legal and regulatory framework for fishing, if fishing capacity was intended to come within 'authorisation' in section 291A(1)(h) it would have been so particularised.

[**80**] The licensing process in relation to a sea-fishing boat licence includes Section 97 of the Sea-Fisheries and Maritime Jurisdiction Act, 2006 which amended section 4 of the Fisheries (Amendment) Act, 2003 and provides:

"*(2) A sea-fishing boat to which this section applies shall not be used for sea-fishing (whether within the exclusive fishery limits of the State or otherwise) nor shall a person on board such a boat fish for sea-fish or attempt so to fish, save under and in accordance with a licence ('sea-fishing boat licence') granted or renewed for the purposes of this section and in relation to the boat by the licensing authority.*

(3) (a) The licensing authority may grant sea-fishing boat licences for such period as is specified in the licence.

(b) An application for a sea-fishing boat licence shall be –

(i) made to the licensing authority,

(ii) in such form and contain such particulars as the licensing authority may specify, and

(iii) made by or on behalf of the owner of the boat in respect of which the application is made.

(c) Where an application is made for a sea-fishing boat licence, the licensing authority may, subject to subsection (5), allow or refuse the application.

…

(4) (a) The licensing authority may renew a sea-fishing boat licence, without the holder or the licensee making an application under subsection 3(b), for such period or periods as he or she may consider appropriate.

…

(8) (a) The licensing authority may attach to a sea-fishing boat licence such terms (including terms specifying an event or other circumstances on the occurrence of which the licence is to come into force or cease to be in force) and conditions (including conditions precedent to the licence's becoming operative) as he or she shall think fit and he or she may also attach further terms or conditions to or vary the terms or conditions already attached to such a licence or remove any such terms or conditions."

[**81**] The Revenue Commissioners submit that section 291A(1)(h) is not a broad sweeping-up paragraph and the insertion made by Finance Act, 2010 regarding liquor licences does not alter the position that the thrust of section 291A relates to intellectual property. Section 291A(1)(h) must be interpreted by giving the words their ordinary and natural meaning having regard to the context of the whole provision which clearly relates to intellectual property. A liquor licence is a tradeable asset separate from the licensed premises. Similarly, fishing capacity is a tradeable asset separate from the fishing vessel. A liquor licence was specifically excluded from section 291A(1)(h) which clearly shows that section 291A is aimed at intellectual effort. A licence could be interpreted to be an authorisation depending on the circumstances. The relationship between section 291A(1)(h) and section 291A(1)(j) could be that the reference to 'any licence' in section 291A(1)(j) may relate to licences given to a third party following the authorisation referred to in section 291A(1)(h).

[**82**] As regards 'process', the Revenue Commissioners referred to section 317 of the Taxes Consolidation Act, 1997 which is within Part 9 (Principal Provisions Relating to Relief for Capital Expenditure) and headed 'Treatment of Grants'. Section 317 includes the following definition of 'processed food':

"'*processed food' means goods manufactured in the State in the course of a trade by a company, being goods which –*

(a) are intended for human consumption as food, and

(b) have been manufactured by a process involving the use of machinery or plant whereby the goods produced by the application of that process differ substantially in form and value from the materials to which the process has been applied and whereby, without prejudice to the generality of the foregoing, the process does not consist primarily of –

(i) the acceleration, retardation, alteration or application of a natural process, or

(ii) the application of methods of preservation, pasteurisation or any similar treatment;"

[**83**] The Revenue Commissioners referred to the examples of 'processed food' included in Notes for Guidance (Finance Act 2020 Edition) which states:

"*The definition of 'processed food' would exclude pasteurised milk, washed, graded and packaged produce which has not been subjected to any manufacturing process, frozen 'fresh' fish which has been frozen whole without any other treatment, and whole fresh fruit irrespective of what process it has been subjected to.*

The definition would include products such as butter or cheese, tinned, frozen or dried produce where the product has been shelled, peeled, diced or otherwise altered in form, tinned fish, 'fish-fingers', 'breaded plaice' and other fish which has been processed in some way, fresh meat, poultry etc which has been butchered, cleaned or otherwise prepared for consumption, and bread and similar produce (though not commonly considered to be 'processed' food, bread and similar produce could not reasonably be excluded from qualification)."

[**84**] The Revenue Commissioners submit that this shows what the Oireachtas had in mind when referring to 'process'. Company A and Company B catch fish and use machinery to preserve the fish. The expenditure incurred on the machinery has obtained the benefit of capital allowances. For commercial reasons, Company A and Company B are preserving the quality of the fish to achieve the maximum price. It is not related to an authorisation without which it would not be permissible for a product to be sold. Council Regulation (EC) No 853/2004 of 29 April 2004 (laying down specific hygiene rules on the hygiene of foodstuffs) provides at Annex I a definition of 'fresh fishery products' as '*unprocessed fishery products, whether whole or prepared, including products packaged under vacuum or in a modified atmosphere, that have not undergone any treatment to ensure preservation other than chilling*'. The operations performed on board the fishing

vessels relate to chilling. Annex III, Section VIII, Chapter I provides that '*Food business operators must ensure that (1) vessels used to harvest fishery products from their natural environment, or to handle or process them after harvesting, comply with the structural and equipment requirements laid down in Part I; and (2) operations carried out on board vessels take place in accordance with the rules laid down in Part II*'. These obligations fall on [redacted] and not Company A and Company B. Therefore, Company A and Company B are not performing a process which has a bearing on the sale of the product. The wording in section 291A(1)(h) does not encompass obligations on a third party. The Revenue Commissioners submit that chilling may be a process in a general sense, however, when interpreting section 291A(1)(h) the word 'process' must be construed in the context of the entirety of '*a product of any design, formula, process or invention*'.

Section 291A(1)(k)

[**85**] The Revenue Commissioners submit that although section 291A(1)(k) would incorporate rights granted under EU law, the matters coming within section 291A(1)(k) must relate to intellectual property given that the rights granted should '*correspond to*' or be '*similar to*' those within section 291A(1)(a) to (j). It would not include matters pertaining to fishing. In any event, the definition of fishing capacity as '*a vessel's tonnage in GT and its power in kW*' clearly shows that fishing capacity does not involve any rights being granted to Company A and Company B.

[**86**] Furthermore, fishing capacity is not granted because it remains the fishing capacity of the Member State. It may be allocated to a fishing vessel. It is the exclusive competence of the EU to reduce fishing capacity. Council Regulation (EC) No 2371/2002 of 20 December 2002 (on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy) provides at Article 20(1) that '*The Council, acting by qualified majority on a proposal from the Commission, shall decide on catch and/or fishing effort limits and on the allocation of fishing opportunities among Member States as well as*

the conditions associated with those limits. Fishing opportunities shall be distributed among Member States in such a way as to assure each Member State relative stability of fishing activities for each stock or fishery'. The relevant definitions in Article 3 include:

(A) '*fishing vessel*' means any vessel equipped for commercial exploitation of living aquatic resources.

(B) '*fishing effort*' means the product of the capacity and the activity of a fishing vessel; for a group of vessels it is the sum of the fishing effort of all vessels in the group.

(C) '*fishing capacity*' means a vessel's tonnage in GT and its power in kW, as defined in Articles 4 and 5 of Council Regulation (EEC) No 2930/86.

(D) '*fishing opportunity*' means a quantified legal entitlement to fish, expressed in terms of catches and/or fishing effort.

[**87**] The compliance requirements emanating from EU law relate to the control of the fishing activity rather than the product. For example, a review of Council Regulation (EC) No 1224/2009 of 20 November 2009 (establishing a Community control system for ensuring compliance with the rules of the common fisheries policy) includes the following definitions:

(A) '*fishing activity*' means searching for fish, shooting, setting, towing, hauling of a fishing gear, taking catch on board, transhipping, retaining on board, processing on board, transferring, caging, fattening and landing of fish and fisheries products.

(B) '*fishing licence*' means an official document conferring on its holder the right, as determined by national rules, to use a certain fishing capacity for the commercial exploitation of living aquatic resources. It contains minimum requirements concerning identification, technical characteristics and fitting out of a Community fishing vessel.

(C) '*fishing authorisation*' means a fishing authorisation issued in respect of a Community fishing vessel in addition to its fishing licence, entitling it to carry out specific fishing activities during a specified period, in a given area or for a given fishery under specific conditions.

Section 291A(2)

[**88**] The Revenue Commissioners submit that, if (which is denied) the sea-fishing boat licence of Company A and Company B is a specified intangible asset, Company A and Company B must establish that the expenditure incurred on the provision of the sea-fishing boat licence was capital, rather than revenue, in nature. The Revenue Commissioners submit that the favoured test for distinguishing between capital and revenue expenditure is generally considered to be that set down by Viscount Cave in ***Atherton (Inspector of Taxes) -v- British Insulated and Helsby Cables Limited*** 10 TC 155 (11 December 1925) wherein it is stated '*When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such expenditure as properly attributable not to revenue but to capital*'. As Lord Dunedin had earlier noted in ***Vallambrosa Rubber Company Limited -v- Farmer (Surveyor of Taxes)*** 5 TC 529 (16 March 1910), it is not a bad criterion of what is '*capital expenditure as against what is income expenditure to say that capital expenditure is a thing which is going to be spent once and for all and income expenditure is a thing which is going to recur every year*'. The Revenue Commissioners submit that a sea-fishing boat licence, which is issued for a maximum period of 12 months, is an asset or advantage which does not constitute '*an enduring benefit of the trade*' and, accordingly, any expenditure incurred on the provision of same may not be regarded as capital in nature. Furthermore, if Company A and Company B did establish that the expenditure incurred on the provision of the sea-fishing boat licence was capital expenditure, given that a new sea-fishing boat licence is issued every year, the Revenue Commissioners submit that the expenditure incurred in purchasing the additional fishing capacity was not incurred 'on the provision of' a specific sea-fishing boat licence and, consequently, not on a (singular) specified intangible asset for the purposes of section 291A(2).

[**89**] The Revenue Commissioners submit that the essence of the majority speeches of the House of Lords in ***Inland Revenue Commissioners -v- Barclay Curle & Company Limited*** [1969] 1 WLR 675 (19 February 1969) was that the majority agreed with the Special Commissioner finding that the dry dock in question '*played an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river*'. Therefore, the expenditure in question was properly to be considered as capital expenditure on the provision of the plant (dry dock). The Revenue Commissioners submit that the facts in this appeal are too far removed from the facts in ***Barclay*** for that case to be considered relevant. In ***Ben-Odeco Limited -v- Powlson (Inspector of Taxes)*** [1978] 2 All E.R. 1111 (27 July 1978), Lord Hailsham stated:

"*Equally I do find analogous the case of Inland Revenue Comrs v Barclay Curle & Co Ltd which decided that the excavation of the necessary basin for the construction of a dry dock was physically part of the same operation, and ranked for allowance as part of the expenditure on the provision of the dry dock itself. Neither of these cases really touches the question whether the words 'expenditure on the provision of machinery or plant' are wide enough to include money spent on the acquisition of money the main purpose of which was to pay for machinery or plant, as distinct from money actually expended in order to pay for the construction (or purchase), transport and installation of the machinery or plant itself.*"

Lord Wilberforce stated '*The words 'expenditure on the provision of' do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant, not limiting it necessarily to the bare purchase price, but including such items as transport and installation, and in any event not extending to expenditure more remote in purpose.*' Lord Russell stated '*In my view the question to be asked is: what is the effect of particular capital expenditure? Is it the provision of finance to the taxpayer, or is it the provision of plant to the taxpayer? In my opinion the effect of the expenditure was the provision of finance and not the provision of plant*.'

The Revenue Commissioners submit that the effect of the expenditure by Company A and Company B was the provision of fishing capacity and not the provision of any particular sea-fishing boat licence. The expenditure on the acquisition of the fishing capacity is remote in purpose from the sea-fishing boat licence.

[**90**] The Revenue Commissioners submit that in construing the term 'intangible asset' in section 291A(1) the asset must meet all the criteria to be regarded as an intangible asset under generally accepted accounting practice (GAAP), including the recognition criteria. The Revenue Commissioners submit that the rules governing the recognition and measurement of assets, liabilities, income and expenses are determined by accounting standards and, accordingly, it follows that the words '*construed in accordance with generally accepted accounting practice*' must represent an observance of those rules. The Revenue Commissioners consider that, under GAAP, an intangible asset refers to an identifiable non-monetary asset without physical substance which is recognised in accounts as an intangible asset if the cost of the asset can be readily measured and it is probable that future economic benefits attributable to the asset will flow to the entity.

[**91**] The Revenue Commissioners submit that section 291A(1) refers to '*in this section*' which clearly shows that the definitions are for the purposes of section 291A. In those circumstances, seeking to interpret section 291A(1) by reference to other provisions of the Tax Acts is misguided. The Revenue Commissioners submit that support for construing 'intangible asset' in section 291A(1) as meaning the asset must meet all the criteria to be regarded as an intangible asset under GAAP, including the recognition criteria, can be drawn from the parallel reference to 'generally accepted accounting practice' in section 291A(3). Section 291A(3) refers to a rate per cent being determined by a formula in which 'A' in the formula means '*the amount, <u>computed</u> in accordance with generally accepted accounting practice, charged to the profit and loss account of the company*'. [emphasis added] This shows that the Oireachtas clearly envisaged that the value of the specified intangible asset the subject of the claim for capital allowances must be capable of being recognised in the accounts of the taxpayer. Section 4(1) of the Taxes Consolidation Act,

1997 (as amended) defines the term 'generally accepted accounting practice' as meaning '*(a) in relation to the affairs of a company or other entity that prepares accounts (in this section referred to as 'IAS accounts') in accordance with international accounting standards, generally accepted accounting practice with respect to such accounts; (b) in any other case, Irish generally accepted accounting practice*'. [emphasis added] If the Oireachtas intended to simply import the definition of intangible asset simpliciter from GAAP and no other criteria (including the recognition criteria) into section 291A(1), this could have been expressly stated by the Oireachtas.

[**92**] The Revenue Commissioners submit that the interpretation of 'intangible asset' in section 291A is a question of law. The Revenue Commissioners referred to an article published in the Harvard Law Review (1890) – '*Law and Fact in Jury Trials*' by Thayer – wherein it is stated:

"*… it is enough for our present purpose, that, unless there be a question as to a rule or standard which it is the duty of a judicial tribunal to apply, there is no question of law. The inquiry whether there be any such rule or standard, the determination of the exact meaning and scope of it, the definition of its terms, and the settlement of incidental questions, such as the conformity of it, in the mode of its enactment, with the requirements of a written constitution, are all naturally and justly to be classed together; and these are questions of law…*"

[**93**] The Revenue Commissioners submit that the question is not the factual application of GAAP but rather a question of law as to the interpretation of the words '*construed in accordance with generally accepted accounting practice*' for the purposes of section 291A. The Revenue Commissioners submit that the approach should be (1) determine the correct statutory interpretation of the term 'intangible asset' which is a question of law. The Revenue Commissioners submit that in construing 'intangible asset' in section 291A(1) the asset must meet all the criteria to be regarded as an intangible asset under GAAP including the recognition criteria; (2) if it is determined that the Revenue Commissioners are correct

regarding the interpretation of 'intangible asset', then it must be determined whether the sea-fishing boat licence of Company A and Company B does, in fact, meet all the criteria to be regarded as an intangible asset under GAAP including the recognition criteria. The Revenue Commissioners submit that if the application of a legal rule, such as the interpretation of 'intangible asset' under section 291A(1), requires a fact to be proved, then it is for the Appeal Commissioner to decide whether or not it is proven. In this appeal, the Revenue Commissioners submit that as the accounts of Company A and Company B were prepared in accordance with GAAP, and having regard to the position that the boat licences are not recorded in the accounts, the Appeal Commissioner can determine that, even if sea-fishing boat licences were capable, in principle, of coming within the meaning of 'intangible asset', the licences in this appeal do not meet the recognition criteria. In light of the foregoing, the Revenue Commissioners submit that the Appeal Commissioner need not hear any further evidence (expert or otherwise) regarding the boat licences and is entitled to determine the issue arising having regard to the documentary evidence, the oral evidence and the submissions herein. The Revenue Commissioners submit that the Appeal Commissioner can determine that the sea-fishing boat licences in this appeal are not, when construed in accordance with GAAP, an intangible asset within the meaning of section 291A(1). Furthermore, the Revenue Commissioners submit that if the sea-fishing boat licences were determined to be an intangible asset within the meaning of section 291A(1), the boat licences would not come within 'specified intangible asset' in section 291A(1).

Analysis and Findings

[**94**] This appeal relates to a refusal of a claim for capital allowances under section 291A. Company A and Company B claimed capital allowances on expenditure incurred on the acquisition of fishing capacity. Company A incurred expenditure of €[redacted] on acquiring fishing capacity from the [redacted] in 2015. Company B incurred expenditure of €[redacted] on acquiring fishing capacity from the [redacted] in 2015.

[**95**] Section 291A(2) provides '*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, then, for the purposes of this Chapter and Chapter 4 of this Part— (a) the specified intangible asset shall be treated as machinery or plant (...)*'. Section 284(1) provides '*Subject to the Tax Acts, where a person carrying on a trade in any chargeable period has incurred capital expenditure on the provision of machinery or plant for the purposes of the trade, an allowance (in this Chapter referred to as a 'wear and tear allowance') shall be made to such person for that chargeable period on account of the wear and tear of any of the machinery or plant which belongs to such person and is in use for the purposes of the trade at the end of that chargeable period or its basis period and which, while used for the purposes of the trade, is wholly and exclusively so used*'. In broad terms, capital expenditure incurred by a person carrying on a trade on the provision of tangible and intangible assets used for the purposes of the trade can obtain the benefit of capital allowances. In this appeal, Company A and Company B incurred capital expenditure on an intangible asset (fishing capacity) which is used for the purposes of the trade (fishing). The Revenue Commissioners have refused a claim for capital allowances on this expenditure under section 291A.

[**96**] It is agreed between the parties that the expenditure incurred by Company A and Company B on the acquisition of fishing capacity is 'capital expenditure' and that fishing capacity is an 'intangible asset' within the meaning of section 291A(1). In short, the issue for consideration is whether fishing capacity comes within 'specified intangible asset' as enumerated in section 291A(1)(a) to section 291A(1)(l).

[**97**] Fishing capacity is the capacity of a fishing vessel measured by reference to size in gross tonnes (GT) and engine power in kilowatts (kW). Council Regulation (EEC) No 2930/1986 of 22 September 1986 (defining characteristics for fishing vessels) provides at Article 4(1) that '*The tonnage of a vessel shall be gross tonnage as specified in Annex I to the International Convention on Tonnage Measurement of Ships*'. Article 5(1) provides '*The engine power shall be the total of the maximum continuous power which can be*

obtained at the flywheel of each engine and which can, by mechanical, electrical, hydraulic or other means, be applied to vessel propulsion. However, where a gearbox is incorporated into the engine, the power shall be measured at the gearbox output flange. No deduction shall be made in respect of auxiliary machines driven by the engine. The unit in which engine power is expressed shall be the kilowatt (kW)'.

[**98**] The Appellants submit that fishing capacity falls within the scope of section 291A(1)(h). Section 291A(1)(h) operative when Company A and Company B acquired the fishing capacity provides '*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*'. It is instructive to examine the exclusion within section 291A(1)(h) when considering the scope of the section. Section 291A was inserted by Finance Act, 2009 and applied to expenditure incurred after 7 May 2009. Section 291A(1)(h) was amended by Finance Act, 2010 which had effect as respects an accounting period commencing on or after 1 January 2010.

[**99**] Section 2 of the Intoxicating Liquor Act, 2008 defines 'licence' as '*a licence for the sale of intoxicating liquor, whether granted on production or without production of a certificate of the Circuit Court or District Court*'; 'licensed premises' as '*premises in respect of which a licence is in force and, in relation to a licensee, means the licensed premises of the licensee*'; and 'licensee' as '*the holder of a licence*'. Given the amendment by Finance Act, 2010 it could be said that, prior to the amendment, a liquor licence was considered to come within the category of an '*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*'. A liquor licence relates to the sale of intoxicating liquor. Generally, the licensee (as holder of the licence) purchases the product (intoxicating liquor) from a third party for sale and could not be said to subject the product to any '*design, formula, process or invention*'. A liquor licence relates to the sale of the product rather than the product. The Revenue Commissioners submit that the category of specified intangible

asset falling within the scope of section 291A pertains to intellectual property and to come within section 291A(1)(h) the product should result from a creative or innovative process or involve intellectual effort. On that submission, a liquor licence would not come within section 291A(1)(h). The Revenue Commissioners refer to parallels between a liquor licence being a tradeable asset separate from the licensed premises and fishing capacity being a tradeable asset separate from the fishing vessel. It is noted that the amendment by Finance Act, 2010 specified liquor licences as being excluded from section 291A(1)(h). The transfer of liquor licences may be more widely known and commonplace than the transfer of fishing capacity in the [redacted] of the fishing sector. This may be reflected in the amendment being introduced to have effect as respects accounting periods commencing on or after 1 January 2010 given that section 291A(1)(h) had been operating for a short period in that it applied to expenditure incurred after 7 May 2009.

[**100**] Should section 291A(1)(h) be interpreted through the prism that the thrust of section 291A pertains to intellectual property as submitted by the Revenue Commissioners? As stated in ***Bookfinders Limited -v- The Revenue Commissioners*** [2020] IESC 60 (29 September 2020) '*the task of statutory interpretation in any context is the ascertainment of meaning*' and that '*the purpose of interpretation is to seek clarity from words*'. The Court continued '*the function of the court is to seek to ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision*'. In ***Dunnes Stores -v- The Revenue Commissioners*** [2019] IESC 50 (4 June 2019) the Court stated '*if the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail*'. The case-law also refers to the immediate and proximate context of the words. As regards this appeal, section 291A(2) provides '*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*'. [emphasis added] Section 291A(1)(h) provides '*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(1)(h) was amended by

Finance Act, 2010 to provide that paragraph (h) did not relate to liquor licences. The Revenue Commissioners agreed that the reference to 'customer lists' in section 291A(1)(g) would not, in broad terms, come within the category of intellectual property. In light of the foregoing, and applying the principles of statutory interpretation, section 291A(1)(h) has a broader signification than that submitted by the Revenue Commissioners.

[**101**] In my view, having regard to the legal and regulatory framework for fishing, and having considered the facts, evidence and submissions herein, fishing capacity permits Company A and Company B to operate a fishing vessel of a particular size and power for which Company A and Company B can apply to obtain a sea-boat fishing licence and thereby lawfully engage in commercial fishing. In this appeal, prior to purchasing the fishing capacity from the , Company A was permitted to operate the to a size and power of GT and kW and Company B was permitted to operate the to a size and power of GT and kW. Subsequent to purchasing the fishing capacity from the , Company A was permitted to operate the to a size and power of GT and kW and Company B was permitted to operate the to a size and power of GT and kW. There is a fishing capacity ceiling for Ireland which is 77,568 GT and 210,083 kW for the entire Irish fishing fleet. Within this ceiling, the capacity position of the of the fishing sector is approximately GT and kW. In order for a fishing vessel to acquire fishing capacity, it must be matched by the removal of an identical amount of fishing capacity under an entry/exit system.

[**102**] Section 97 of the Sea-Fisheries and Maritime Jurisdiction Act, 2006 amended section 4 of the Fisheries (Amendment) Act, 2003 and includes '*(8) (a) The licensing authority may attach to a sea-fishing boat licence such terms (including terms specifying an event or other circumstances on the occurrence of which the licence is to come into force or cease to be in force) and conditions (including conditions precedent to the licence's becoming operative) as he or she shall think fit and he or she may also attach further terms or conditions to or vary the terms or conditions already attached to such a*

licence or remove any such terms or conditions'. The Sea-Fishing Boat Licence issued on [redacted] 2014 for the [redacted] and the [redacted] included as a condition of the licence that '*Any proposed structural modifications to the vessel, including changes to the vessel's engine, must be approved in advance by the Licensing Authority. Such modifications can have significant implications in terms of the licensing of the vessel, including replacement capacity requirements. The vessel may be required to be re-measured and a new licence application may be required to be submitted*'. There were structural modifications to the [redacted] and the [redacted] in 2015. The letters from the Licensing Authority for Sea-Fishing Boats in 2015 refer to the approval by the Licensing Authority of the proposed assignment of fishing capacity from the [redacted] and that '*The capacity from the (...) will be re-introduced onto the Sea Fishing Boat Register once the* [redacted] *has been licensed and registered provided this process has been completed before* [redacted]. The Capacity Assignment Notes include '*The sale and assignment of the tonnage and engine power is without 'days at sea' effort and is absolute to the PURCHASER for the consideration of €(...), to be paid to the VENDOR on receipt by the PURCHASER of confirmation by the Department of Agriculture, Food & the Marine that the said tonnage and engine power has been credited to the PURCHASER.*' It is noted that, within the EU framework, fishing opportunity is defined as '*a quantified legal entitlement to fish, expressed in terms of catches and/or fishing effort*' and fishing effort is defined as '*the product of the capacity and the activity of a fishing vessel*'.

[**103**] Section 291A(1)(h) refers 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*'. Having regard to the wording of the section and applying the principles of statutory interpretation, in my view, to come within section 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. If the Oireachtas introduced an amendment to exclude liquor licences from section 291A(1)(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 product to any '*design, formula, process or*

invention' then in conformity 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. In this appeal, having regard to the legal and regulatory framework for fishing, and having considered the facts, evidence and submissions herein, I find that 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.

[**104**] In the circumstances, having regard to the foregoing, I determine that the fishing capacity acquired by Company A and Company B comes within section 291A(1)(h) and constitutes a 'specified intangible asset' for the purposes of section 291A. In circumstances where a determination can be made in this appeal which establishes the correct liability to tax of Company A and Company B having regard to section 291A(1)(h), I will proceed to discharge my statutory function in that manner.

Determination

[**105**] Based on a review of the facts and a consideration of the evidence, submissions, legislation and case-law, I determine that the refusal of the claim for capital allowances under section 291A should not stand. The assessments to corporation tax should be amended accordingly. This appeal is hereby determined in accordance with section 949AK of the Taxes Consolidation Act, 1997.

FIONA McLAFFERTY
APPEAL COMMISSIONER

30 SEPTEMBER 2021

The Appeal Commissioners have been requested to state and sign a case for the opinion of the High Court under Chapter 6, Part 40A of the Taxes Consolidation Act, 1997.