IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65
Date: November 27, 2018
Docket Number: 201601H0063

BETWEEN:

FISHERY PRODUCTS INTERNATIONAL LTD. APPELLANT

AND:

RICHARD THOMAS ROSE FIRST RESPONDENT

AND:

LORNE ROSE SECOND RESPONDENT

Coram: Green, White and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 200801T1113
(2016 NLTD(G) 52)

Appeal Heard: November 16, 2017
Judgment Rendered: November 27, 2018

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Green and White JJ.A.

Counsel for the Appellant: Sheri Wicks and David Hearn
Counsel for the Respondents: John Sinnott Q.C.

O'Brien J.A.:

OVERVIEW

[1] A purse seine is a net used for fishing.

[2] Purse seines can come in various sizes. The seine in question in this appeal was, apparently, substantial. It was described by one witness as measuring 1,300 feet in length (more than a third of a kilometre) and weighing 18 tons (more than 16,000 kilograms). A flatbed truck was required to transport it.

[3] As such, presumably it would not easily be misplaced or go missing. However, in this case the seine did, in fact, go missing.

[4] To date it has not been found.

[5] Richard Thomas Rose and Lorne Rose are father and son. They have been involved in the commercial fishery for many years and they own the seine. The seine was stored at the facilities of Fishery Products International Ltd. (FPI) with FPI's consent and agreement. When the Roses asked FPI to return it, so they could use it in a commercial fishery, they were advised that it could not be located. It has never been returned to the Roses.

[6] As a result the Roses commenced a legal claim against FPI in the Supreme Court of Newfoundland and Labrador.

[7] FPI conceded that the seine had been in its care and control and that it had not complied with its legal duty to return it to the Roses.

[8] The sole issue raised by FPI in defending the claim was that it has a limitations defence. It argues that the Roses' legal action was not brought in the time required by law and should be dismissed. The Roses argue that their legal action was commenced within the required time period and that the claim should be allowed to proceed.

[9] As this was the only issue in dispute, the parties agreed that it should be determined by a summary trial in the Supreme Court. They agreed that if the trial judge held that the claim was not commenced in time, FPI would be successful and the claim would be dismissed. They further agreed that if the trial judge held the claim was commenced in time, the Roses would be successful and judgment would be entered accordingly.

[10] The trial judge made several findings of fact and concluded that the claim by the Roses was brought within the time required by law. Judgment was entered for the Roses (2016 NLTD(G) 52).

[11] On appeal FPI argues that the trial judge, in assessing the evidence of the witnesses at trial, made "palpable and overriding errors" in his factual determinations and in the inferences he made based on those determinations. FPI contends that the trial judge's errors were material to his conclusions, and that his ultimate decision cannot stand.

[12] Additionally, FPI argues that the trial judge made errors in dealing with other issues at trial. Specifically, it submits that the trial judge erred in drawing an adverse inference against FPI, in applying the wrong standard of proof, in failing to provide adequate reasons, and in his finding with respect to when the limitation period commenced.

[13] For the reasons which follow I would conclude that the trial judge made no legal or factual errors, and that his factual findings and inferences are entitled to deference.

[14] As a result, I would dismiss the appeal.

BACKGROUND

[15] In 1994, the Roses purchased the seine and FPI agreed to store it at FPI's fish plant in Port Union, NL.

[16] It remained there until 1998, when the Port Union plant was refurbished and the net could no longer be accommodated there. In 1998 it was moved to another FPI fish plant in Burin, NL and stored there. There is no dispute on this point.

[17] The net was lost while in storage at Burin. Conflicting evidence was presented as to when the Roses became aware that the net was missing and would not be returned to them.

[18] After considering all the evidence, the trial judge made a finding of fact in this respect. He found, at paragraph 43 of the judgment, that it was "at least five or six years after the seine was moved to Burin that it was known to have been missing". Therefore the trial judge found, as a fact, that the net was not known to have been missing until 2003 or 2004 at the earliest, which was "at least five or six years" after it was moved to Burin in 1998.

[19] The trial judge's finding of fact is significant to the operation of the limitation period.

[20] The parties agreed at trial, and on appeal, that the relevant limitation period for an action to be commenced by the Roses was six years, as provided for in section 6 of the *Limitations Act*, SNL 1995, c. L-16.1, which states:

> 6. (1) Following the expiration of 6 years after the date on which the right to do so arose, a person shall not bring an action
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> (a) for damages for conversion or detention of goods;
>
> (b) to recover goods wrongfully taken or retained;
>
> …

[21] Given the trial judge's finding of fact that it was at least five or six years from 1998 that the net was known to have been missing, the limitation period would not have started running before 2003 or 2004 (i.e. five or six years after 1998). Thus, in order to have complied with the six-year limitation period, a claim would need to have been commenced against FPI within six years from that time, meaning it would need to have been commenced by 2009 or 2010.

[22] The record at trial indicated that a Statement of Claim by the Roses against FPI was issued out of the Supreme Court on March 6, 2008. Therefore, the claim was brought before 2009 or 2010, when the limitation period would have otherwise expired.

[23] As a result, the trial judge concluded that the Roses' claim was commenced in time, and was not barred by operation of the six-year limitation period.

ISSUES

[24] (1) Did the trial judge, in assessing the evidence provided by the witnesses at trial, make palpable and overriding errors in his factual determinations or in the inferences made based on those determinations?

(2) Did the trial judge make errors in dealing with other issues? Specifically, did the trial judge err in drawing an adverse inference against FPI, in applying the wrong standard of proof, in failing to

> provide sufficient reasons, or in his finding with respect to when the limitation period commenced?

STANDARD OF REVIEW

[25] The standard of review to be applied depends on the nature of the review undertaken. In reviewing questions of law, the standard of review is correctness. For questions of fact or mixed fact and law (unless there is an extricable issue of law involved) the standard of review is that of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

ANALYSIS

Issue 1: Did the trial judge, in assessing the evidence provided by the witnesses at trial, make palpable and overriding errors in his factual determinations or in the inferences made based on those determinations?

[26] FPI claims that the trial judge made errors in his factual findings and inferences arising from these findings. To warrant appellate intervention, it must be shown that a palpable and overriding error was made in respect of these factual findings and inferences.

Palpable and overriding errors

[27] The case law is instructive in delineating exactly what a palpable and overriding error means in this context.

[28] In *Housen*, the Supreme Court of Canada defined a palpable error as one that is obvious or clearly seen, stating:

> [5] What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

[29] This Court in *Ross Estate v. Hiscock*, 2007 NLCA 2, 262 Nfld. & P.E.I.R. 343 at para. 14, described an overriding error as one which is significant; that is it must be an error that goes not just to the periphery but to the root of the challenged finding of fact, such that the fact cannot remain, survive, or "stand".

> … An overriding error is one that "is sufficiently significant to vitiate the challenged finding of fact. … The appellant must demonstrate that the error goes to the root of

> the challenged finding of fact such that the fact cannot safely stand in the face of that error" [citations omitted] …

[30] The Supreme Court of Canada considered the meaning of "palpable and overriding error" in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352. The Supreme Court referenced the descriptive language chosen by appellate courts to illustrate just how very obvious and substantial an error must be, in order to be deemed palpable and overriding.

[31] Justice Wagner, at paragraphs 38 and 39 of *Benhaim*, stated:

> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
> > Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77, [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

(Emphasis added.)

[32] In reviewing factual determinations and inferences made from factual findings then, as in the present case, an appellate court must be mindful of these attributes of a palpable and overriding error - readily seen, obvious, significant, material, etc.

[33] As was so lucidly stated in the passages referred to above, a palpable and overriding error is compelling, like "a beam in the eye", and undeniable, like the force required to fell the entire factual "tree".

[34] Palpable and overriding errors are to be distinguished from other, alleged errors which may not be so patently obvious or which may not be so significant as to go directly to the "root" of the factual finding or the inference in issue.

[35] If an error is palpable and overriding, appellate intervention is warranted. However, where (again, to invoke the illustrative language of the passages cited above) a search for a needle in a haystack is required to discover the error, or

where the "tree" (i.e. the factual finding or inference) remains intact and standing after a challenge, there is no basis for appellate intervention.

[36] Notably this deferential, palpable and overriding standard applies not only to findings of fact, but also to inferences based on factual findings. This was determined by the Supreme Court of Canada in *Housen*, and confirmed by the Supreme Court in subsequent cases, including *Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138. In *Nelson* the Supreme Court of Canada, at paragraph 38, citing *Housen*, stated on this point that:

> … The standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself (*Housen*, at para. 23). …

[37] Where palpable and overriding error is the standard of review, significant deference is to be afforded to a trial judge by an appellate court. The level of deference afforded to factual findings and inferences is, in comparison, greater than that invoked when considering alleged errors of law.

[38] This Court in *Rich v. Bromley Estate*, 2013 NLCA 24, 336 Nfld. & P.E.I.R. 107, leave to appeal to SCC refused, 355 Nfld. & P.E.I.R. 81, indicated that, when considering whether a palpable and overriding error has been made, the reviewing court begins the analysis from a position of deference which is not readily displaced. As Chief Justice Green noted in *Rich*:

> [18] … the phrase "palpable and overriding error" encapsulates the highest level of appellate deference. It is not enough for the appellant to show that the trial judge considered one irrelevant factor, or that he or she failed to consider one relevant one. An appellate court will only intervene if the error is significant enough to displace the strong arguments in favour of deference.

[39] This deferential position is the starting point when considering the first issue in this appeal. This issue requires a review to determine whether the trial judge, in assessing the evidence provided by the witnesses at trial, made palpable and overriding errors in his factual determinations or in the inferences made based on those determinations.

The trial judge's factual findings

[40] The trial judge's primary factual determination under appeal concerns when the Roses became aware that the net was missing and would not be returned.

[41] Five witnesses provided evidence on this issue, and the evidence conflicted.

[42] The trial judge found that the evidence of four witnesses supported the Roses' position. These were Mr. Richard Thomas Rose (Tom Rose), his son Mr. Lorne Rose, as well as two former employees of FPI, Mr. Gerald Cotter and Mr. Clayton Adams, both of whom worked with FPI during the relevant time period and were familiar with the storage of the net through their employment.

[43] The fifth witness was Mr. Gabriel Gregory, a former FPI executive who had worked at FPI's corporate head office in St. John's. Mr. Gregory's evidence supported FPI's position.

[44] FPI submits that the trial judge made a palpable and overriding error by not finding the evidence of Mr. Gregory determinative of the limitations issue. FPI also asserts that the judge erred in his assessment of the reliability of the evidence.

[45] The trial judge considered the entirety of the evidence and made a factual finding that it was <u>at least five or six years</u> from the time the net was moved from Port Union to Burin, in 1998, to when it was known to be missing. He made this determination at paragraph 43, stating:

> … I am satisfied that it is more likely than not that it was at least five or six years after the seine was moved to Burin that it was known to have been missing. That is my finding of fact on this issue, and I will apply it to the discussion which follows.

[46] This finding of fact is challenged on appeal. FPI maintains that the judge's determination was a palpable and overriding error, as it was not supported by the evidence at trial.

[47] I am satisfied that the trial judge did not make a palpable and overriding error in this respect.

[48] Rather, a review of the trial judge's assessment of the evidence reveals that his factual determinations and inferences are supported by and grounded in

the evidence. The reasons for judgment indicate the judge undertook a measured review of the evidence of each witness, and assessed credibility, reliability, and weight with respect to the evidence presented.

[49] The reasons also show that the trial judge attempted to resolve conflicting evidence and, where appropriate, made determinations regarding which evidence he would rely on, and provided reasons why he preferred certain evidence.

[50] The determinations and inferences made, based on the evidence, would all fall clearly within the domain and responsibility of the trial judge. No palpable and overriding error is indicated.

[51] A review of the trial judge's assessment of key points of evidence is provided below.

The trial judge's assessment of Mr. Clayton Adams' evidence

[52] Mr. Clayton Adams provided a specific, first-hand account of when the net was stored in Burin, and when it was lost. The trial judge found Mr. Adams to be credible and persuasive.

[53] The judge noted that Mr. Adams had worked at the Port Union plant and was later transferred to the FPI plant in Burin. He would have seen the net on a regular basis during his employment, both at Port Union and Burin.

[54] In his evidence, Mr. Adams described when the net first arrived in Port Union, when it was transferred to Burin and when it disappeared from Burin. He testified that he had personal knowledge of these events.

[55] The trial judge commented on Mr. Adams' proximity to the purse seine in the many years it was in FPI's custody, noting at paragraph 29 that Mr. Adams "actually saw the seine and dealt with it". The trial judge stated:

> [14] … Clayton Adams was an employee of the Defendant at Port Union in the 1990's. He deposed, and confirmed in testimony, that he was the shore captain in charge of the twine loft, and was aware that a purse seine was stored in the carpenter shop. The carpenter shop and the twine loft were in the same building. He said the seine and its attachments were in perfect condition.
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> [15] In 1998 the Defendant decided to convert the plant at Port Union to a shrimp processing facility. The space in which the seine was stored was required, and the Plaintiff was informed that it would be moved to the Burin plant. By this time,

> Clayton Adams had been transferred to the Burin plant. He said he was present when it arrived on a flatbed pulled by a transport truck. He confirmed that as it was unloaded, he could see that it was in perfect condition.
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> …
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> [17] After its transfer to Burin, things seemed to go wrong for the seine. … At some point, he said, the seine disappeared. He said it was there one day, and gone the next. He was aware of a truck loading something in the general vicinity of the place where it was stored. The next day, the seine was gone.

[56] Significantly, and given that Mr. Adams was employed at FPI's Burin plant for the entire time the net was stored there, the trial judge carefully considered Mr. Adams' evidence regarding the number of years the seine was kept at the Burin plant before it went missing.

[57] The judge accepted Mr. Adams' evidence that the net arrived in Burin in 1998 and was stored there between <u>five and seven years</u> before it disappeared. He stated on this critical point:

> [24] ... Clayton Adams said he was present when [the seine] arrived in Burin in 1998. He said it was in perfect condition. In his affidavit he said it ". . . remained there a long time, for five or six years, a good five or six years." In his *viva voce* testimony, he said it stayed in Burin for 6 or 7 years.
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> [25] He gave evidence that he remembers the time it disappeared. It was there one day at 4:00 pm when he left work. A day or two later it was gone. … Based on his testimony, this was after the seine had been there, variously, five or six years, or six or seven years from its arrival in 1998.

[58] Clearly the trial judge found Mr. Adams' testimony to be relevant and significant. He also found Mr. Adams' evidence regarding the number of years the seine was stored in Burin (five to seven years) was consistent with evidence provided by the Roses. The trial judge stated:

> [41] But the most persuasive evidence was from Clayton Adams. While he was vague on exact dates, I was satisfied that his testimony about the length of time the seine was at Burin before he noticed it was missing was believable. His evidence of "five or six years", and later of "six or seven years" would be more or less consistent with the testimony of both Plaintiffs, who said they asked about the seine in 2003 in conjunction with what they saw as a change in the fishery prompting their wish to begin using the seine. Adams was at Burin when the seine was delivered in 1998. He says he was there when it disappeared. …

[59] The trial judge was entitled to consider and assess Mr. Adams' evidence as he did when making factual determinations in this matter. This would obviously include Mr. Adams' belief that the seine remained in Burin for five to seven years after it was brought there in 1998, a key point at trial.

The trial judge's assessment of Mr. Gerald Cotter's evidence

[60] The judge considered the evidence of Mr. Gerald Cotter, again especially regarding the key issue of the length of time the seine was in storage in Burin before it went missing.

[61] Mr. Cotter was the plant manager of the FPI plant at Bonavista, NL, which is close to Port Union. He knew Mr. Tom Rose and, at Mr. Rose's request, obtained permission for Rose to store the seine, originally, at the FPI plant in Port Union.

[62] Even though Mr. Cotter worked in Bonavista and the seine was first stored in Port Union, the trial judge noted that the Roses often inquired of Mr. Cotter about the net while it was in storage at Port Union.

> [16] There was evidence that the Roses were regularly in touch with Gerald Cotter at the Bonavista plant. They were successful crab fishermen and would unload their catch for processing at the plant. Cotter said that two or three times a year there would be a discussion about the seine and he would reply that it was fine. That was until the seine was moved to Burin.

[63] The trial judge found that this pattern of Mr. Tom Rose asking Mr. Cotter about the seine continued even after it was moved to Burin. The judge noted the regular inquiries made by Mr. Tom Rose relating to the seine, stating:

> [34] [Mr. Tom Rose] also remembers speaking with Gerald Cotter regularly when he would be in Port Union landing fish. He said he would often ask him about the seine, even after it went to Burin. Cotter appeared to have been his main contact with the company, and he said "they promised they would look after it." Cotter verified that he spoke often with both Roses as they were landing their catch at the plant.

[64] Mr. Cotter, the judge observed at paragraph 39, was "the one who communicated with Rose about the storage, and, it appears, had the most contact with them in subsequent years".

[65] Therefore, the judge was particularly interested in Mr. Cotter's evidence relating to the number of years that Mr. Tom Rose would have continued to inquire about the seine after it was moved to Burin in 1998. The judge observed

that Mr. Cotter indicated such inquiries would have continued for "a good many years" (paragraph 40).

[66] He found Mr. Cotter's reference to "a good many years" was consistent with Mr. Clayton Adams' evidence that the seine was in Burin for five to seven years before it went missing.

[67] With respect to Mr. Cotter's evidence on this point, the trial judge stated:

> [40] … [Mr. Cotter] said he had contact with Tom Rose after the seine was moved to Burin. He said Rose mentioned the seine a few times during that period, even though Cotter was in Bonavista, and he had no direct knowledge of the circumstances in Burin. He said "it was a long time before I heard anything about it" and that he continued to have contact with Rose through his normal dealings, and "it was a good many years" during which he would occasionally ask about the status of the seine. …

[68] The judge indicated that Mr. Cotter's evidence corroborated the evidence of Mr. Adams regarding the length of time the net was stored in Burin before it disappeared, and that it was also consistent with the Roses' version of the timeline of events relating to the storage of the seine at Burin.

<u>The trial judge's assessment of Mr. Lorne Rose's evidence</u>

[69] Mr. Lorne Rose and his father Mr. Tom Rose worked together in the commercial fishing industry.

[70] Mr. Lorne Rose testified that he and his father did not require the seine until 2003. The reason for this, he testified, was that the Roses made a business decision that they would enter into a specific fishery (the mackerel fishery) in late 2003. This fishery, unlike the fisheries the Roses had been engaged in until that time, would require the use of the seine.

[71] Mr. Lorne Rose's evidence was that there was simply no reason for the Roses to obtain the seine until 2003, and no reason to request its return until that time. The trial judge stated:

> [19] The Plaintiffs say they were not concerned about using the seine until 2003, when they decided they wanted to retrieve it to use it in the mackerel fishery. … They had no need for it, and intended to store it for a later time. In 2003, according to Lorne Rose, they were expecting a decline in shrimp landings; costs, in particular of fuel, were high. When they asked the Defendant about retrieval, it was not available.
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> …

> [35] Lorne Rose provided some of the detail of their decision-making process at that time. In his affidavit, he noted that they expected catch rates for shrimp would likely decline, and reliance on one species put the enterprise at risk. He also noted that the cost of fuel was rising, and described how use of the seine was more economical. He indicated those discussions were in 2003, and that's why they asked the Defendant to return the seine at that time.

[72] The judge found Mr. Lorne Rose's rationale to be consistent with the Roses making inquiries about the seine and requesting its return in 2003, when it was required, and not before.

[73] The evidence of Mr. Lorne Rose appears to have been uncontested with respect to the business decisions made by the Roses in 2003, the change in the type of fishery undertaken, and the very specific and practical reason the net would have been required in 2003.

The trial judge's assessment of Mr. Tom Rose's evidence

[74] Mr. Tom Rose testified that he purchased the seine with his son, Mr. Lorne Rose, and that arrangements were made to store the seine originally in Port Union, and subsequently in Burin.

[75] He indicated that he spoke frequently to Mr. Cotter about the net, before and after it went to Burin, describing Mr. Cotter as his contact at FPI. Mr. Rose also testified that he saw the seine while it was stored in Burin.

[76] With respect to Mr. Gabriel Gregory, Mr. Rose testified that he spoke to Mr. Gregory about the missing seine subsequent to Mr. Gregory's retirement from FPI in 2001, and recalled being told by Mr. Gregory that he [Mr. Rose] should go to FPI and tell them to pay for it.

[77] The trial judge noted that much of Mr. Rose's evidence was corroborated by the testimony of other witnesses.

The trial judge's assessment of Mr. Gabriel Gregory's evidence

[78] Mr. Gabriel Gregory was Executive Vice-President of Operations with FPI in St. John's, NL until he retired in 2001.

[79] FPI's main argument is that the evidence of Mr. Gregory was, essentially, determinative of the limitations issue, and that the trial judge should have accepted Mr. Gregory's evidence unreservedly, and rejected the evidence of the witnesses supporting the Roses' position.

[80] FPI contends that the trial judge made a palpable and overriding error in not doing so.

[81] Mr. Gregory testified that he met with Mr. Tom Rose at Mr. Gregory's FPI office in St. John's, to discuss the seine. According to Mr. Gregory, this meeting took place before he retired from FPI in 2001.

[82] FPI contends that this date is significant because, as Mr. Gregory retired from FPI in 2001, the meeting must have occurred by 2001 at the latest. Mr. Gregory's 2001 retirement, FPI contends, is an objective milestone which the trial judge should have used to anchor a finding of fact that the net was known to have been missing by 2001.

[83] Consequently, FPI argues that the six-year limitation period should have been found to commence in 2001 at the latest. This, FPI submits, would mean that the Roses' claim, which was commenced in 2008, was outside the six-year limitation period and should be precluded from proceeding.

The trial judge's conclusion that Mr. Gregory's evidence was not determinative

[84] The trial judge provided several reasons for his conclusion that Mr. Gregory's evidence was not determinative of the limitations issue. These reasons are based on factual determinations made by the trial judge after a review of the evidence. Absent a palpable and overriding error, these findings are to be accorded deference.

[85] First, the trial judge found as a fact that the meeting between Mr. Gregory and Mr. Tom Rose, which occurred before 2001, was not the only meeting Mr. Gregory had with the Roses to discuss the seine. Mr. Gregory himself testified that he also met with Mr. Tom Rose and his son Mr. Lorne Rose to discuss the net after Mr. Gregory retired from FPI in 2001.

[86] Second, and related to the first point, the trial judge found as a fact that it was not at all clear from the evidence whether Mr. Gregory stated unequivocally (in the meeting held before he retired in 2001) that the seine was missing and would not be returned to the Roses. According to the Roses, they were not so advised until after 2001.

[87] This is obviously an important consideration in respect of the commencement of the limitation period, and the trial judge reviewed the evidence closely on this point.

[88] The evidence indicated that, after retiring from FPI in 2001, Mr. Gregory worked as a consultant for another company, referred to at trial as "Quinlans" or "Quinlan Brothers". This company was also involved in the fish harvesting and processing industry.

[89] Mr. Tom Rose, Mr. Lorne Rose and Mr. Gregory all testified that the three met to discuss the seine at Mr. Gregory's office while he was working at Quinlans, after 2001. The judge noted at paragraph 21 that Mr. Tom Rose "contacted [Mr. Gregory] on several occasions while he was working at Quinlans".

[90] The Roses' position was that it was as a result of the post-2001 discussions with Mr. Gregory, at Quinlans' offices in St. John's after Mr. Gregory's retirement from FPI, that the Roses would have been made aware that the net was missing and would not be returned. The Roses' position was that this would have occurred in 2003.

[91] The trial judge considered both the pre and post-2001 meetings and concluded that Mr. Gregory's evidence was inconclusive regarding when Mr. Gregory would have advised the Roses that the net was missing. The judge noted on this point:

> [59] … Gregory also agreed that he had contact with the Roses after he left the company, and his advice was that the company was obligated to return it, and they should take it up with them. While I am satisfied that Gregory had contact with them before and after he left the company, I am not as satisfied that he was able to remember the exact nature of their discussions at the relevant times, and equally I am not satisfied that his evidence pinpoints the time when he says he told the Roses that the seine was missing. On both issues of fact I find the Plaintiffs' version persuasive.

[92] The above excerpt contains findings of fact. The trial judge was well-placed to make these factual findings, and no palpable or overriding error is evident on the face of these findings.

[93] Third and perhaps most importantly, the trial judge found that, overall, the evidence of the other witnesses, including Mr. Tom Rose, Mr. Lorne Rose and former FPI employees, Mr. Gerald Cotter and Mr. Clayton Adams, was consistent with and supported the Roses' contention that they would not have known that the net was missing and would not be returned until at least 2003.

[94] The trial judge did not assess Mr. Gregory's evidence on a stand-alone basis, in a vacuum, on this point. Rather the judge reviewed all the evidence and

considered Mr. Gregory's evidence in the overall evidentiary context. He concluded that, when considered in the context of all the evidence, Mr. Gregory's evidence was not determinative.

[95] The judge also noted at paragraphs 27 and 29 that Mr. Gregory's evidence was "sincere" but his "recollection appeared flawed". He made several observations regarding problems with Mr. Gregory's evidence. For example the judge noted that Mr. Gregory's evidence was not consistent with respect to the date of the meeting with Mr. Tom Rose before 2001. This is important as this is when Mr. Gregory is alleged to have told Mr. Rose that the net was lost, and could not be returned.

[96] Mr. Gregory first recalled that this meeting would have occurred in the late 1990's, but subsequently agreed that it could have occurred later. He ultimately testified that the meeting was held sometime before he retired in 2001.

[97] The judge noted as significant the discrepancies in Mr. Gregory's evidence on this key point concerning when the meeting with Mr. Rose occurred, stating:

> [20] … [Mr. Gregory] says it was in the late 1990's when he was contacted by Tom Rose about the seine. It was only at that point he became aware that the company had stored the seine. …
>
> [21] Mr. Gregory was firm that Rose contacted him in the late 1990's. In any event, he said it had to be before he left the company in 2001, because he remembers specifically making the inquiries while he was still employed there. …
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> …
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> [23] Gregory said in his affidavit that he knew nothing about the seine until contacted by Thomas Rose in the late 1990's (from paragraph 4 of his affidavit). …

[98] The trial judge found at paragraph 27 that Mr. Gregory's recollection was "somewhat flawed" on this important point:

> [27] Gregory was quite sincere in his evidence that he told Tom Rose that it was missing before he left in 2001. However, in my view, his recollection is somewhat flawed. He said variously that this event happened in the late 1990's, and later that it was before 2001. …

[99] The judge also noted that Mr. Gregory's evidence, and timeline, was inconsistent with the evidence of other witnesses, including Mr. Cotter and Mr. Adams, who had more direct involvement with the seine. He preferred the evidence of other witnesses to that of Mr. Gregory on conflicting points, stating:

> [24] Gregory's recollection is at odds with the affidavit and testimony of an employee of the company [Clayton Adams] who worked at the Burin facility. …
>
> …
>
> [28] Gregory's evidence is also at odds with some of what Gerald Cotter said. …
>
> [29] Gregory's recollection appeared flawed in his recounting of the timing of the various events he described. His story is at odds on several points with several witnesses who were close to the scene and actually saw the seine and dealt with it. Gregory never saw it. …
>
> …
>
> [39] The main difficulty with Gregory's evidence is that it is inconsistent in some important elements with that of the Roses, but also of Gerald Cotter and Clayton Adams…

[100] The above excerpts indicate that the trial judge properly considered the evidence of Mr. Gregory and was alive to the fact that Mr. Gregory's version of events, and his timeline, conflicted with that of others. It was ultimately open to the trial judge to conclude, based on the reasons he provided, that he was not compelled to accept Mr. Gregory's evidence and reject the evidence of others.

The trial judge's consideration of the reliability of the evidence

[101] The trial judge observed, in his reasons for judgment, that the evidence of certain witnesses merited comment in terms of their memories of events and reliability.

[102] For example and as noted above, the trial judge found, at paragraphs 27 and 29, Mr. Gregory's evidence to be "sincere", but observed that at times his "recollection appeared flawed".

[103] Similarly, the judge also commented on the evidence provided by Mr. Tom Rose and Mr. Clayton Adams in terms of reliability. He acknowledged, with regard to Mr. Tom Rose and Mr. Adams, that there were instances of imprecision, confusion and failure to recall specific details in their evidence.

[104] However, on key points the judge accepted their evidence and noted that their evidence was corroborated by others. The trial judge did not rely solely on the evidence of these witnesses, but rather made his factual determinations and inferences after considering the evidence as a whole.

[105] For example, the judge stated the following with regard to issues with Mr. Tom Rose's evidence, and also noted the corroboration of this evidence by others:

> [31] … Mr. Tom Rose was quite sincere in his testimony, but his recollection of events was obviously flawed. For example at one point he thought they had purchased the seine in the late 1980's, when in fact it was after the cod moratorium in 1992. He presented as somewhat frail and a little confused. He acknowledged that at the age of 77, his memory was not as good as it used to be.
>
> …
>
> [33] There are significant parts of the testimony of the senior Rose, however, which are corroborated by other evidence. He remembers speaking with Gregory both before and after he left the Defendant's employ. Gregory corroborated this testimony. He remembered discussions with his son in 2003 about using the seine in the mackerel fishery. That was his reason for seeking return of the seine at that time.

[106] Similarly, with respect to Mr. Adams, the judge acknowledged issues with respect to clarity, for example in providing precise dates, but he concluded that Mr. Adams' evidence was reliable, stating:

> [26] Mr. Adams was clear on some parts of his evidence, but unclear on others. He was certain about seeing the seine on the Burin plant's premises after 1998. He was unclear about the timing of certain events. He was quite forthcoming in saying that he was no good at remembering dates. …
>
> …
>
> [41] … While he was vague on exact dates, I was satisfied that [Mr. Adams'] testimony about the length of time the seine was at Burin before he noticed it was missing was believable. His evidence of "five or six years", and later of "six or seven years" would be more or less consistent with the testimony of both Plaintiffs, who said they asked about the seine in 2003 in conjunction with what they saw as a change in the fishery prompting their wish to begin using the seine. …

Appellate deference to reliability determinations

[107] In *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, the Supreme Court of Canada indicated that, when dealing with evidence containing inconsistencies, which might impact reliability, the totality of the evidence needs to be considered. The Court stated:

> [58] … The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[108] Clearly, a trial judge must address inconsistencies or other warning signs that evidence may be lacking in terms of reliability and credibility. A judge cannot be oblivious to potential red flags in this respect.

[109] However, the Supreme Court of Canada has indicated that where witness reliability is an issue at trial, and the reasons for judgment indicate that this issue has been appropriately considered and assessed by the trial judge such that the judge is clearly "alive" to the issue, then (absent a palpable and overriding error) appellate intervention is unwarranted. In *F.H. v. McDougall* the Court stated on this point:

> [70] …Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.
>
> [71] … Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

[110] Similarly the Ontario Court of Appeal in *R. v. Sanichar*, 2012 ONCA 117, 288 O.A.C. 164, rev'd 2013 SCC 4, [2013] 1 S.C.R. 54 considered the issues of witness reliability and credibility. Laskin J.A. whose reasons in dissent were adopted by a majority of the Supreme Court of Canada noted, first, the distinction between credibility and reliability, stating;

> [69] I accept that reliability is not the same as credibility; that is well established. Credibility has to do with the honesty or veracity of a witness' testimony. Reliability has to do with the accuracy of a witness' testimony. Many

> cases of mistaken identification have shown that a credible witness may give unreliable evidence.
>
> [70] The reliability of a witness' testimony is often gauged by the witness's ability to observe, recall and recount the events at issue: see *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41. The passage of time may have an effect on the witness' ability to do so accurately. …

[111] Justice Laskin indicated that a trial judge's assessments of credibility and reliability are factual determinations which will generally be "deserving of deference". He stated:

> [72] Further, although credibility and reliability are distinct concepts, they both involve factual determinations that, as my colleague notes, attract significant deference from a reviewing court: see *R. v. R.W.B.* (2003), 174 O.A.C. 198, at para. 9. An appellate court should not interfere with a trial judge's assessment of the reliability of a complainant's evidence simply because it would have arrived at a different result.
>
> …
>
> [82] Throughout his reasons the trial judge appreciated that he had to assess the reliability as well as the credibility of the complainant's evidence; he did so. His assessment is deserving of deference and I am not persuaded of any basis to interfere with it.

[112] In my view, the reasoning in *F.H. v. McDougall* and *R. v. Sanichar* is wholly applicable to the present case.

[113] It is clear from the reasons for judgment that the trial judge was alive to the issue of reliability of the evidence of several witnesses, and that he addressed the issue directly. It is also evident from the decision that reliability was assessed and considered in the context of the evidence as a whole, and taken into account when facts were determined and inferences were made.

<u>Conclusion on the trial judge's assessment of the evidence</u>

[114] A fair review of the trial judge's reasons indicates that the findings of fact, inferences made from those findings, and determinations of credibility were all based on the judge's evaluation of the evidence presented.

[115] The judge assessed conflicting evidence, articulated why certain evidence was compelling and persuasive, and indicated how the evidence supported his conclusions, factual findings, and inferences made.

[116] The judge's findings of fact and inferences are deserving of deference and should not be displaced unless a palpable and overriding error is shown to have been made.

[117] I would conclude that no such palpable and overriding error is evident in the judge's assessment of the evidence. There is no error so patently obvious, significant and consequential as to constitute the "beam in the eye", referenced above, required for a palpable and overriding error.

[118] As a result, I would dismiss this ground of appeal.

Issue 2: Did the trial judge make errors in dealing with other issues?

[119] FPI, in its notice of appeal, factum, and oral argument on appeal, submits the trial judge made factual or legal errors relating to a number of other issues.

[120] FPI alleges the following errors:

(i) The trial judge erred in drawing an adverse inference against FPI;

(ii) The trial judge applied the wrong standard of proof;

(iii) The trial judge erred in failing to provide sufficient reasons for accepting testimony which FPI considers to be unreliable; and

(iv) The trial judge erred in finding that the limitation period did not begin to run until a demand for the return of the seine was made.

[121] In my view, for the reasons provided below, none of these constitute palpable and overriding errors or errors of law.

(i) Adverse inference

[122] FPI submits that the trial judge erred in making an adverse inference regarding FPI's failure to call a particular witness, Mr. Stanley McCarthy, to give evidence. Mr. McCarthy was the manager of the FPI plant in Burin, NL.

[123] Mr. Gregory testified that he had contacted Mr. McCarthy about the Roses' missing net. There was evidence that Mr. Tom Rose had also contacted Mr. McCarthy concerning the net. Further, Mr. Clayton Adams testified that he had told Mr. McCarthy, his supervisor at the relevant time, that the net had gone missing from the Burin plant.

[124] The trial judge commented on this at paragraph 30:

> [30] One further point: the person who may have had the best knowledge was Stanley McCarthy who was the manager at the Burin plant. He wasn't called by the Defendant, and perhaps should have been. Tom Rose said he contacted the manager at Burin and frequently asked him about the seine. If McCarthy had been called as a witness, he could have provided some insight into the various communications, as well as perhaps given some evidence as to what happened to the seine. From Adams' evidence it seemed clear that McCarthy knew about the removal of the seine from the Burin plant.

[125] The judge considered whether an adverse inference should be drawn against FPI for failure to call Mr. McCarthy to give evidence. The trial judge noted in paragraph 42:

> [42] … In light of its failure to either call Mr. McCarthy, or explain why he was not available to be called, I believe I may draw an adverse inference against the Defendant on this point.

(Emphasis added.)

[126] From the above, and the judge's statement, "I believe I may draw an adverse inference", it is not clear whether the judge actually drew an adverse inference, or was simply indicating he had the right to do so should he so decide. However, whether or not the judge was entitled to draw an adverse inference, and whether he actually did so, is not significant in this circumstance.

[127] This is because, in paragraph 43, when the judge made his key finding of fact about when the net was known to have been missing, he indicated that this finding of fact could be made with or without considering Mr. McCarthy's evidence. He stated in paragraph 43:

> [43] In any event, with or without Mr. McCarthy's evidence, I am satisfied that it is more likely than not that it was at least five or six years after the seine was moved to Burin that it was known to have been missing. That is my finding of fact on this issue, and I will apply it to the discussion which follows.

(Emphasis added.)

[128] The judge's factual determination was that the net was not known to have been missing until at least 2003 (five or six years after it was moved to Burin in 1998). His statement in paragraph 43, above, suggests he would have reached this conclusion "with or without Mr. McCarthy's evidence".

[129] This key finding of fact, then, is not dependent on the judge making an adverse finding on the basis that FPI did not call Mr. McCarthy to testify at trial. Indeed, it is not even clear that an adverse inference was actually made at all.

[130] In my view, the issue of Mr. McCarthy's testimony (or lack thereof) is irrelevant to the trial judge's factual finding about when the net was known to have been missing. I would conclude that the judge made no error in his assessment of Mr. McCarthy's failure to testify in these circumstances.

(ii) Standard of proof

[131] FPI alleges that the trial judge erred by applying the wrong standard of proof in this case. The allegation is that the judge required FPI to provide "definitive" and "categorical" evidence as to when the Roses were advised that the seine was missing and could not be returned.

[132] This, FPI submits, is an error in law, as the judge has not applied the appropriate standard of proof in civil matters, which is proof on a balance of probabilities. Requiring "definitive" and "categorical" evidence, FPI argues, is an error, as it is more akin to the criminal standard of proof beyond a reasonable doubt.

[133] In *F.H. v. McDougall*, the Supreme Court of Canada confirmed at paragraph 49 that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities". Therefore, it is argued, that the application of a different standard of proof by the judge constitutes an error of law.

[134] However, a review of the trial judge's reasons does not support this submission that the wrong standard of proof was applied.

[135] As discussed above, the key finding made by the judge related to when the net was known to be missing. The judge clearly adopted the appropriate civil standard in making this determination, stating at paragraph 43:

> [43] … I am satisfied that it is <u>more likely than not</u> that it was at least five or six years after the seine was moved to Burin that it was known to have been missing.

(Emphasis added.)

[136] Further, at paragraph 71, near the end of the judgment, the judge again referenced the appropriate civil standard in stating his conclusion. He writes:

> [71] While the Defendant says that the cause of action arose before 2001 when Gabe Gregory was still with the company, I have found that it was more probable than not that the cause of action arose when the company failed to respond to a demand to deliver the seine. …
>
> (Emphasis added.)

[137] The trial judge's references to "definitive" and "categorical" were made when considering Mr. Gregory's evidence in the context of the evidence of other witnesses. The judge concluded that Mr. Gregory could not provide "definitive" evidence on the timing or substance of the meeting with Mr. Tom Rose. This was considered by the judge in determining the issue and, ultimately, preferring the evidence of others.

[138] For example, the judge stated at paragraph 38: "I am satisfied that, in the absence of definitive evidence on this issue, the Plaintiffs' position is more credible."

[139] This, in my view, reflects the trial judge's weighing of the evidence, and is not illustrative of the judge misapprehending the civil burden of proof.

[140] Similarly when the trial judge states, at paragraph 38, that Mr. Gregory "was not able to say categorically that the seine could not be returned…", he was merely commenting on the fact that Mr. Gregory's evidence was not unconditional, precise or unqualified and needed to be considered in the context of the entire evidential record.

[141] This is very different than suggesting that there is a higher burden on FPI than the established civil standard. The use of the words "definitive" and "categorical" by the judge in this context does not demonstrate that he was somehow applying a standard at or approaching the criminal standard of proof beyond a reasonable doubt. In my view, the record simply does not support this contention.

[142] I would conclude that the trial judge did not err in this respect, and that he applied the correct standard of proof, consistent with the Supreme Court of Canada's statement in *F.H. v. McDougall*.

(iii) Providing sufficient reasons

[143] FPI argues that the trial judge erred in failing to provide sufficient reasons for accepting testimony of certain witnesses, whose evidence FPI considered to be unreliable, over the testimony of Mr. Gregory.

[144] In the notice of appeal, this error is alleged with respect to the judge's failure to provide sufficient reasons for accepting Mr. Clayton Adams' evidence.

[145] In the factum, FPI contends the trial judge erred in "failing to provide adequate reasons for the acceptance of the evidence of two witnesses in the face of clear evidence of unreliability of their testimony" (emphasis added). Presumably one of those witnesses was Mr. Adams. The other is likely a reference to Mr. Tom Rose.

[146] Two distinct points arise from this issue. The first involves whether the trial judge properly considered the evidence in totality, weighed conflicting evidence, considered the reliability of the evidence, and made factual findings and inferences which were supported by the evidence. This point has been discussed at length above, in Issue 1, where it was concluded that the trial judge made no palpable and overriding error in assessing the evidence in this regard.

[147] The second point arising from this issue is whether the trial judge provided sufficient reasons for preferring the evidence of certain witnesses over others.

[148] Implicit in this ground of appeal is FPI's contention that Mr. Gregory's evidence was wholly reliable and determinative of the limitations issue, that his evidence should have been accepted unreservedly by the judge, and that the evidence of other witnesses was unreliable and should have been rejected.

[149] The issue is presently framed in this ground of appeal in terms of whether the reasons provided by the trial judge to support his findings and inferences were sufficient in the circumstances. In my view, they were.

[150] The Supreme Court of Canada has identified the requirement for the sufficiency of reasons in numerous cases, including in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, and later in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3.

[151] In *R.E.M.* the Supreme Court outlined, at paragraph 11, the three functions of reasons for judgment in a criminal context; namely that they "tell

the parties affected by the decision why the decision was made", they "provide public accountability of the judicial decision", and they "permit effective appellate review".

[152] The Supreme Court in *R.E.M.* reviewed various authorities on the sufficiency of reasons and made the following observations:

> [35] In summary, the cases confirm:
>
> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, …
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. …
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> …

[153] The Supreme Court's rationale for requiring sufficient reasons, outlined in cases such as *Sheppard* and *R.E.M.*, applies not only in the criminal context, but also in civil cases.

[154] In *Brake-Patten v. Gallant*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77, leave to appeal to SCC refused, [2012] S.C.C.A. No. 257, this Court stated that these principles apply in the civil context. As Justice Hoegg noted at paragraph 112 in *Brake-Patten*:

> [112] The Supreme Court of Canada has applied these principles, which were developed in the context of criminal law, to civil cases. In this regard, there is no principled reason to differentiate between civil and criminal cases given the effort and resources, both private and public, expended on civil cases and their importance to the parties involved. (See *Hill v. Hamilton Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; and *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.)

[155] Applying the principles relating to sufficiency of reasons to the trial judge's decision in this case, I would conclude that the judge's reasons are "intelligible" and responsive to the "live" issues in dispute. The reasons indicate the judge considered all the evidence, specifically addressed the issue of

reliability in respect of several witnesses, including Mr. Adams, Mr. Tom Rose and Mr. Gregory, assessed whether evidence was corroborated or not, and weighed conflicting evidence.

[156] Numerous excerpts from the trial judge's reasons in this regard are included in the analysis above, in Issue 1, and need not be reproduced.

[157] In my view it cannot reasonably be said that the reasons are inadequate or that they do not provide sufficient information to enable the parties to understand what was decided, and why the judge decided as he did, which is central to the requirement to provide sufficient reasons.

[158] As a result, I would conclude that the judge's reasons meet the test of sufficiency of reasons as set out by the Supreme Court of Canada, and that there is no error in this regard.

(iv) Commencement of the limitation period

[159] FPI submits that the trial judge erred in finding that the six-year limitation period applicable in this circumstance did not commence until a demand for the return of the seine was made by the Roses.

[160] FPI and the Roses had conflicting views on this point.

[161] FPI submits that no demand was necessary to begin the limitation period. The trial judge noted FPI's position as follows:

> [55] The Defendant argues that a demand is not necessary. Counsel speaks of bailment as a cause of action separate from detinue. In the Defendant's view, once bailment is established, the duty of safekeeping is established, and a cause of action arises only for breach of that duty. It is suggested that for breach of a contract of bailment a demand for delivery is not necessary, only knowledge of a breach. But no authority is provided for this distinction.

[162] The Roses argued that there must first be a demand for return of the goods (the seine) and a failure to comply before the cause of action arises. The judge reviewed the case law provided in support of this position and agreed with the Roses regarding the requirement for a demand, stating:

> [58] … It is only when the Plaintiff demands return of the goods, and the consequent failure of the Defendant to deliver them, that the cause of action arises.

[163] The judge made a finding of fact that the demand for the return of the seine was made by the Roses in 2003. This is the same year that he found, as a fact, that the seine would have first been known to have been missing. The judge stated at paragraph 44: "…I find that [the Roses] did not demand or seek its return until 2003, when conditions in the fishery caused them to consider changing of their mode of fishing".

[164] Similarly, the judge indicated at paragraph 59 that the Roses' evidence "that they did not demand its return until they decided to use it in the fishery after 2003 is uncontradicted".

[165] Further, he stated at paragraph 60: "I am satisfied that there was no explicit and unequivocal demand for its return until sometime in 2003".

[166] There was significant debate, in the written and oral submissions on appeal, about this issue of whether a demand for the return of the seine was required before the six-year limitation period began, or whether the limitation period could begin without a demand.

[167] Counsel, in their written and oral submissions, provided the Court with their informed and thoughtful positions on the origin and development of the ancient causes of action in conversion and detinue, and specifically on whether a demand was required in the present circumstances.

[168] However, despite Counsels' learned and erudite submissions on these points, I would nonetheless conclude that, due to the judge's factual determinations, it is not necessary for the disposition of this appeal to determine this issue of whether a demand is required to start the limitation period.

[169] That is because, as noted above, the trial judge made a separate factual determination that "it was at least five or six years after the seine was moved to Burin [in 1998] that it was known to have been missing."

[170] Consequently, the judge found that the net would not have been known to be missing until at least 2003 (five or six years after 1998). As noted in the discussion in Issue 1, I would conclude that the judge made no palpable and overriding error in this respect.

[171] The year 2003 is also when the trial judge found, as a fact, that a demand was made for the seine's return (paragraph 44).

[172] The Roses' legal action was commenced in 2008. As the trial judge found that the seine was known to have been missing in 2003, and also that its return was demanded in 2003, in either case the Roses would have complied with the six-year limitation period.

[173] Whether the limitation period started when the net was known to be missing (as FPI contends) or when the demand for its return was made (as the Roses contend) is not critical in light of the judge's factual findings. Both events were found by the judge to have occurred in 2003. Therefore, the Roses' claim would have been commenced within the required six-year period in either scenario. In either case, there would be no limitations defence available to FPI.

[174] It is unnecessary, therefore, for the disposition of this appeal, to determine whether the applicable limitation period commenced when the demand was made, or at some other time.

[175] As a result, I would dismiss this ground of appeal.

DISPOSITION

[176] For the reasons provided above, I would dismiss the appeal and award costs to the Respondents on Column 3 of the Scale of Costs in the *Court of Appeal Rules*.

_____

F. P. O'Brien J.A.

I Concur: _____

J.D. Green J.A.

I Concur: _____

C.W. White J.A.