

**THE HIGH COURT**

[2021] IEHC 663  
**2020/1959SS**

**IN THE MATTER OF THE VALUATION ACT 2001**

**BETWEEN**

**BREANAGH CATERING LIMITED**

**RESPONDENT**

**(APPELLANT BEFORE THE VALUATION TRIBUNAL)  
AND**

**COMMISSIONER OF VALUATION**

**APPELLANT**

**(RESPONDENT BEFORE THE VALUATION TRIBUNAL)**

**JUDGMENT of Mr. Justice Heslin delivered on the 1st day of October, 2021**

**Introduction**

1. This is an appeal by way of case stated by the Valuation Tribunal (hereinafter "the Tribunal") pursuant to s. 39 of the Valuation Act, 2001 (hereinafter "the Act") at the request of the Commissioner of Valuation (hereinafter "the Commissioner"). The Commissioner was the Respondent before the Tribunal when it made a decision on 18 January 2016 (hereinafter "the Decision") which has given rise to the case stated. The issue which was before the Tribunal concerned the rateable valuation determined by the Commissioner in respect of the Jackson Court Hotel on Harcourt Street in Dublin (hereinafter "the Property"). A nightclub known as "Copper Face Jack's" is in the basement of the Property and is accessible from the ground floor bar and from the street. The Respondent in respect of the case stated is the occupier and ratepayer of the property (and was the Appellant before the Tribunal).
2. It is not in dispute that there was a revaluation of all commercial properties within the Rating Authority area of Dublin City Council, pursuant to s. 19 of the Act. A proposed Valuation Certificate was issued by the Commissioner pursuant to s. 24 of the Act, indicating a valuation of €1,750,000.00. That valuation remained unchanged following a consideration of representations made on behalf of the Respondent in the present proceedings. The final Valuation Certificate issued on 16 December 2013 and the Respondent appealed to the Commissioner pursuant to s. 30 of the Act. This appeal was disallowed by the Commissioner's appeal manager. In September 2014, the Respondent appealed the Commissioner's determination, on the grounds that the valuation applied was excessive and an oral hearing was held in the offices of the Tribunal on 09 November 2015. The Respondent was represented by Mr. Desmond Byrne FRICS FSCSI Dip Arb. Law. of Bannon Chartered Surveyors (hereinafter "the Respondent's Valuer"). The Commissioner was represented by Mr. Alan Sweeney, B.Sc (Property & Mgmt) NSCSI MRICS (hereinafter "the Commissioner's Valuer"). Neither party was legally represented.
3. In advance of the hearing of the said appeal, each Valuer prepared a précis of evidence. These were exchanged between the parties and submitted to the Tribunal prior to the commencement of the oral hearing. It is the Decision of the Tribunal which gave rise to the case stated, dated 15 December 2020. Before looking at either, it is necessary to understand the methods employed to determine valuation having regard to the provisions of the Act, section 48 being of fundamental significance.

## **S. 48 of the Valuation Act, 2001**

4. Given its relevance, it is useful to set out s. 48 of the Act in full:

*"48.—(1) The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.*

*(2) Subsection (1) is without prejudice to section 49.*

*(3) Subject to section 50, for the purposes of this Act, "net annual value" means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant."*

## **Estimate**

5. It is clear from s. 48 that the net annual value (hereinafter "NAV") is an *estimate*. The section makes clear that the relevant exercise is based on a hypothetical tenancy to a hypothetical tenant. Plainly the estimate must be within a reasonable range, but the Commissioner's statutory function is to identify a NAV which the property might reasonably be expected to let for.

## **Appeals scheme under the Valuation Act 2001- Sections 34 and 35**

6. The appeal in question is governed by s. 34 of the Act (as it existed prior to amendment in 2015) and permits a person to appeal to the Tribunal against a decision of the Commissioner to allow or disallow an appeal in relation to a property. There is no dispute in relation to the foregoing, nor is there any dispute that s. 35 of the Act provides that the appeal must specify the grounds on which the appellant considers that the NAV determined by the Commissioner is incorrect and the value the Appellant considers the Commissioner should have determined as the NAV. The foregoing is clear from s. 35(a)(i) and (ii) of the Act. For present purposes, Sections 34 and 35 of the Act state the following as follows in respect of appeals to the Tribunal and the grounds of an appeal:

*"34.— (1) a person referred to in subsection (1) of section 30 (whether or not he or she was the appellant or an appellant in the appeal concerned) may appeal in writing to the Tribunal against a decision of the Commissioner to allow or disallow an appeal under that section in relation to a property (whether or not the property falls within the same paragraph of that subsection (1) as the property falls within).*

*(2) Such an appeal shall be made within 28 days from the date on which the Commissioner issued the valuation certificate concerned or made the notification concerned under s. 33(2).*

*35 – an appeal made under s. 34 shall, as appropriate –*

*(a) Specify–*

- (i) *the grounds on which the appellant considers that the value of the property, the subject of the appeal (in this section referred to as 'the property concerned', being the value as determined or confirmed by the Commissioner under s. 33, is incorrect...."*

7. It was pursuant to the foregoing sections that the relevant appeal came before the Tribunal. It is not in dispute that when a Tribunal hears such an appeal, as in the present case, it involves a hearing *de novo* (see *Commissioner of Valuation v Carlton Hotel Dublin Airport* [2016] 2 I.R. 385). The parties also agree that, in the appeal before the Tribunal, the onus rested on the ratepayer (who is the Respondent in the present case) to establish that the NAV determined by the Commissioner was 'incorrect' (s. 35(a)(i) of the Act).

#### **Valuation Act 2001 (Appeals) Rules 2008**

8. It is not in dispute the provisions of s. 35 of the Act are repeated and reflected in the Valuation Act, 2001 (Appeals) Rules 2008 which govern appeals, and which provide as follows:

*"The procedure of the Tribunal shall, subject to the provisions of this Act, be such as shall be determined by the Tribunal by rules made by it with the consent of the Minister and the rules shall, without prejudice to the generality of the foregoing, make provision for ..."*

9. Rule 9 restates the requirements of s. 35 of the Act in the following terms:

*"The Grounds of Appeal as stated in the Notice of Appeal shall, as appropriate and as required by s. 35 of the Act, (a) specify – (i) the grounds on which the appellant considers that the value of the property, the subject of the appeal (in this section referred to as 'the property concerned') being the value as determined or confirmed by the Commissioner under s. 33, is incorrect ..."*

#### **The onus of proof**

10. The parties agree that, in an appeal to the Tribunal, the onus lies on that appellant to show that the NAV is incorrect and this reflects section 35(a)(i) of the Act which I previously referred to. Furthermore, in the judgment of the Tribunal which issued on 07 January 2020 in Appeal No.: VA14/5/935-Declan Coleman, the Tribunal stated as follows at para. 10.2:

*"10.2 In an Appeal, the onus is on the Appellant to put forward a rationale as to why the valuation should be altered. The subject is to be valued on the assumption that it is vacant and let on 7th April, 2011. The hypothetical landlord and tenant are assumed to be willing to negotiate the rent on terms as set out in s. 48 of the 2001 Act."* (emphasis added)

#### **What an appellant must prove**

11. It is uncontroversial to say that what is required in an appeal to the Tribunal is that the relevant appellant *prove* that the NAV is actually *incorrect* and the appellant must do so on specified grounds, by reference to what is envisaged by s. 48(1) and (3). Thus, unless it is shown that the Commissioner's estimate is actually incorrect, the appellant before the

Tribunal has not discharged the relevant burden of proof and has not met the statutory test for an appeal under s. 35.

### **Revaluation**

12. The Act provides for both the revision of entries on a valuation list (hereinafter "revisions") and for the creation of new valuation lists (hereinafter "revaluation"). It is not in dispute that the purpose of a revaluation of a rating authority area is to re-assess the rateable valuation of all rateable properties within the area by reference to a common date.

13. It is also accepted between the parties that, in a revaluation, a valuer has three primary methods to provide support for a stated opinion of value. The three methods are as follows –

(a) *Rental/Comparative method;*

(b) *Receipts and Expenditure method (hereinafter "R&E");*

*and*

(c) *Contractor's method (not of relevance in the present case).*

14. In circumstances where s. 48 of the Act very clearly identifies what is the objective, namely, to arrive at the NAV under the hypothetical tenancy, I do not understand there to be any dispute between the parties in relation to the principle that the Tribunal is entitled to take into account all relevant evidence and that no data which is relevant to the NAV calculation should be excluded. As regards the foregoing, the Appellant refers to the English decision in *Lamb v GoOutdoors Ltd.* [2015] UKUT 366 (LC) wherein, at para. 39, the following was stated:

*"These propositions provide guidance on the usefulness of different types of evidence but they should not be regarded as rules to be followed slavishly. It will be necessary to have regard to relevant evidence of all types, if available, but always with a clear focus on the statutory valuation hypothesis." (emphasis added)*

15. Although a case from the neighbouring jurisdiction, it is plain that the statutory valuation hypothesis referred to concerned a similar approach to that detailed in s. 48 of the Act, i.e. involving an estimation of rent for which the property might reasonably be expected to let from year to year on the basis of assumptions, including that referred to in s. 48(3).

### **R&E**

16. It is not in dispute that R&E is typically used where there is little or no available rental evidence and the value of the property is reflected in the volume and nature of the trade conducted there. R&E seeks to calculate the likely rental bid of a hypothetical tenant by analysing accounts and other evidence to identify the projected gross receipts and then deducting expenditure, with a number of adjustments in order to conform with the statutory hypothesis, leaving a "divisible balance" which can be divided between the tenant and the landlord (as rent) under s. 48.

### **R&E "Guidance Note"**

17. It is not in dispute that the application of R&E is illustrated in a UK publication entitled *"The Receipts and Expenditure Method of Valuation for Non-Domestic Rating: A Guidance Note"* by the Joint Professional Institutions' Rating Valuation Forum and published by the Royal Institution of Chartered Surveyors, London (hereinafter "the Guidance Note"). Section 7 of the Guidance Note refers to what is described as "The '*shortened*' method". Para. 7.3 of the Guidance Note states that: *"The method is based upon the determination of fair maintainable annual receipts which are able to be derived by occupying the property and conducting the undertaking with the skill and expertise which should reasonably be expected from a hypothetical tenant of those premises."* Having emphasised, at para. 7.4, that in determining the amount of such receipts, care must be taken in the examination of past accounts to discount any special failings or successes and also emphasising the care required to ensure that like is compared with like if guidance is sought from the receipts of other similar properties, para 7.5 of the Guidance Notes states that:

*"Having determined the fair maintainable receipts, the relevant percentage is applied to the receipts to determine the rental value. The amount of this return is generally based upon the rental evidence available, either directly where the evidence relates to properties similar in all respects to the property under consideration, or by interpolating that evidence to allow for any differences."*

### **FMT**

18. It is not in dispute that what is discussed in s. 7 of the Guidance note is a method which can be described as the "*fair maintainable trade*" method (hereinafter "FMT"). It is common case that this was deployed in the appeal which the Tribunal dealt with. As stated at para. 7.2 of the Guidance Note, this method is frequently deployed by valuers with regard to "*licenced*" properties.
19. It is not in dispute that FMT applies an estimate of the percentages of each individual revenue stream (e.g. hotel rooms, food, beverages, door/cloakroom) which a hypothetical tenant would be prepared to pay by way of rent. The balance is to be applied to discharge the operating expenditure and other tenant costs necessary to generate the revenue stream, and some compensation to the tenant for its effort and risk. Thus, the percentages relate to the profitability of the item(s) – the more profitable, the greater percentage that is available for rent. Similarly, the less profitable, the less available by way of rent. In this manner, the FMT uses profitability to assess what a hypothetical tenant would be prepared to pay in rent.
20. Although the authors of the Guidance Note offer the view, at para. 7.1, that FMT "*is not a profits R&E method of valuation*" there is a connection between the two methods, both of which are concerned with receipts, expenditure and profitability and the connection between these two different methods was put as follows by the authors of the Guidance Note wherein, at para. 7.1, they said the following in relation to the FMT method: *"It is a comparative method of valuation utilising either market transactions or comparable*

*assessments (which may themselves have been derived from a 'full' R&E method valuation), interpreted or analysed to represent a proportion of gross receipts."*

### **Door/Cloakroom Receipts**

21. The sole issue in dispute in the appeal dealt with by the Tribunal was the percentage to be applied to the door/cloakroom receipts (hereinafter "the Receipts") associated with the nightclub in the property, in respect of revenue exceeding €1M. For the purposes of the appeal, the total door/cloakroom revenue was in the sum of €3,200,000.00.

### **Reasons**

22. This court is not engaging in a merits-based analysis or a hearing, *de novo*, with a view to determining valuation. At the heart of the present case is the Appellant's contention, vigorously resisted by the Respondent, that inadequate reasons were given for the Decision. To understand the context in which the Decision was given, it is appropriate to refer to the contents of the case stated.

### **The case stated, dated 15 December 2020**

23. Section 1 of the case stated summarises the arguments advanced by the Respondent in these proceedings (being the Appellant before the Tribunal) against the determination of the Commissioner on the grounds that the valuation applied was excessive. Section 2 sets out details in relation to the Property. Section 3 identifies appendices, including the précis of evidence of each of the two professional valuers, which were before the Tribunal when it heard the appeal and issued the Decision. Section 4 refers to statutory provisions, in particular, s. 48 of the Act. Section 5 refers to the hearing itself and states inter alia that: *"At the hearing, each Valuer adopted his Précis as his evidence-in-chief and gave additional oral evidence directly and under cross-examination. Without objection, Mr. Sweeney amended the revenue figure in paragraph 4.7 of his Précis to €12,590,000 from €9,665,000 and the annual net profit figure stated in paragraph 5.1 thereof to €5,000,000 from €6,000,000."* Nothing turns on the foregoing which appear to be corrections of mathematical errors. Issues and evidence before the Tribunal
24. The issues, as before the Tribunal and the evidence provided to the Tribunal are referred to in the following terms at s. 6 of the case stated, and it is appropriate to quote this *verbatim*. Section 6 of the case states the following: -

"6. *The disputed issue.*

- 6.1. *Both Valuers valued the Property by the shortened 'FMT' method, rather than by using the full R&E method of valuation with an end allowance to reflect the skills of an exceptional operator. By the shortened method, the net annual value of a property is determined by applying a given percentage to the Property's estimated fair maintainable trade. The 'FMT' is an estimate of the gross annual receipts from each individual revenue stream generated in the Property which a competent operator could be expected to achieve at the property at the valuation date...*

- 6.3. *The percentages to be applied to certain revenue streams were agreed by the valuers as follows: 13% to be applied to hotel rooms, 7% to food and 11% to beverages.*
- 6.4 *The main issue between the party's valuers concerned the treatment of the door/cloakroom receipts associated with Copper Face Jacks in respect of revenue in excess of €1,000,000. The door/cloakroom revenue was agreed in the sum of €3,200,000.*
- 6.5 *Mr. Byrne pointed out that the appeal Property was valued at €687/m<sup>2</sup> which he said was considerably above other comparable hotels. He said the appeal Property was smaller than the Russell Court Hotel and the Harcourt Hotel in terms of bedrooms and floor area, yet the NAVs of the Russell Court Hotel and the Harcourt Hotel were significantly lower than the appeal Property. He provided in his Précis a résumé of the sizes, NAVs and NAVs per m<sup>2</sup> of the comparable hotels. In his opinion the disparity in the NAVs per m<sup>2</sup> was unfair and contrary to justice in that the NAVs did not sit fairly, one property with another. He contended that it was the management skills of the actual occupier that was exceptional not the Property or its location and that s.48 of the 2001 Act required the NAV to be assessed on the turnover that a reasonably competent operator would expect to achieve.*
- 6.6 *It was common case that the Appellant has an exceptional acumen for the business which was reflected in the application by both valuers of an end allowance, Mr. Sweeney applying 12.5% and Mr. Byrne 15%, before arriving at the NAV.*
- 6.7 *in the alternative valuation approach B (based on the occupier's actual turnover) Mr. Byrne contended for an FMT figure of €51,000 by the application of the following percentages to the agreed door-cloakroom revenue: -*

<i>First €600,000</i>	<i>@</i>	<i>0%</i>
<i>Next €400,000</i>	<i>@</i>	<i>10%</i>
<i>Balance of €2,200,000</i>	<i>@</i>	<i>5%</i>

*Mr. Byrne explained that the rationale for the application of a nil percentage to the first €600,000 was to cover operating costs. He pointed to the fact that the door and cloakroom revenues of the Russell Court Hotel and of the Harcourt Hotel were assessed at only 1.06% and 2.8% respectively of the level applied to the Property. He pointed out that different accountancy firms can incorporate door and cloakroom receipts with the drink receipts because door and cloakroom is looked upon as a generator of drink sales, which would then be assessed under the respondent's valuation scheme at 11%.*

- 6.6 *[sic] Mr. Sweeney assessed door and cloakroom receipts of €990,000 by applying the following percentages to the agreed door and cloakroom revenue: -*

First €1,000,000 @ 11%

Balance of €2,200,000 @ 40%

*Mr. Sweeney accepted that the appellant is an exceptional operator. He said that the application of 40% to door and cloakroom receipts in excess of €1,000,000 is necessary to arrive at a fair estimate of the NAV of the property. In reply to a question from the Tribunal he confirmed that he believed 40% to be sustainable if the financial information provided by the Appellant is analysed and he referred the Tribunal to the full R&E valuations he had carried out which were included in Appendix G of his Précis for the financial years 2012, 2011, 2010 and 2009. He stated that a split of the divisible balance equally between the landlord and tenant supported a NAV of €2.5m in 2012 and that, in his opinion, the full R&E valuation would probably support the application of 70% to door and cloakroom receipts in excess of €1,000,000. On that basis he contended that 40% was justified. He pointed out that there was no other property in the rating authority area generating door and cloakroom receipts of €3,200,000 and confirmed that the appeal Property is the only property where the respondent applied 40% to door and cloakroom receipts in excess of €1,000,000. In reply to a question from the Tribunal as to why he considered it necessary to apply 40% to the door and cloakroom receipts he confirmed that it was necessary in light of the R&E valuations he had carried out."*

25. Having regard to the foregoing, it is clear that evidence was given to the Tribunal by the appellant's valuer with reference to the R&E valuations he had carried out. That this was relevant evidence cannot be doubted in circumstances where it was proffered in reply to questions posed by the Tribunal (specifically the question as to why the appellant's valuer considered it necessary to apply 40% to the balance, above €1,000,000, of the agreed door and cloakroom revenue). Indeed, evidence was given by the appellant's valuer that the application of 70% to such receipts was supportable having regard to the full R&E valuation which had, in fact, been carried out by Mr. Sweeney. Thus, even though it is common case that both valuers had regard to FMT, it cannot be doubted that evidence concerning the R&E valuations which had been carried out by the appellant's valuer was relevant and was proffered to the Tribunal both orally and in writing. As to the latter, it is appropriate to note that in the précis of evidence prepared by the appellant's valuer, reference is made (at s.4.5) to the fact that, during the course of carrying out the revaluation exercise, the Valuation Office requested market and financial information from each occupier of a hotel property including (a) copies of audited accounts to include detailed profit and loss accounts for the most recent 3 years for which figures were available; (b) management accounts to cover the same 3 year period, including breakdown of turnover between the various trading activities and details of occupancy levels and room rates; and (c) financial projections to cover the next twelve-month period. Internal p.12 of the précis submitted by the appellant's valuer to the Tribunal stated *inter alia*, the following (at s.4.5): -



*"The Commissioner of Valuations relies upon approximately 22 items of market information on a total of 107 hotel properties to inform his valuation scheme in Dublin City. The Commissioner also has access to approximately 100 items of market information relating to other licensed premises i.e. bars and nightclubs.*

*Each of these transactions were investigated and analysed in accordance with Valuation Office Policy. The result of these investigations combined with the analysis of financial information **(including the carrying out of full receipts and expenditure valuations)** lead the Commissioner to believe the shortened method of valuation was the most appropriate. This method entails applying percentages to various income streams to arrive at the net value". (emphasis added).*

26. It was clearly against the backdrop of having carried out the aforementioned R&E valuations that the appellant's valuer was in a position to give his evidence to the Tribunal, in response to their questions, and with reference to the R&E valuations he had carried out, in support of the 40% which the appellant regarded as appropriate.
27. It is also relevant to note that in s.5 of the précis of evidence furnished by the appellant's valuer to the Tribunal, reliance was placed on the full R&E valuation as supporting the reasonableness of the NAV as arrived at by the FMT. In other words, documentary evidence comprising a full R&E was tendered as evidence that what the appellant contended for was not excessive, in the context of a NAV arrived at by the FMT method. It is also a matter of fact that the R&E valuation comprised Appendix G to the appellant's précis of evidence.

#### **Appendix G**

28. Appendix G comprises a full R&E carried out in respect of four years (*i.e.* 2012, 2011, 2010 and 2009). The "divisible balance" recorded in respect of those years is €5,023,816 (2012); €5,365,187 (2011); €5,604,834 (2010); and €5,952,779 (2009). Thus, the divisible balance ranges between some €5m to €5.9m, depending on the year. Applying a tenant's share of 50:50 results in an average NAV of €2.5m to €2.9m. It is uncontroversial to say that this is well in excess of the €1.75m NAV provided for in the final valuation certificate which issued on 16 December 2013, in respect of which the appeal to the respondent, pursuant to s.30 of the Act, was disallowed by the relevant Appeal Manager on 01 August 2019. Even if an 'end allowance' of 15% (representing the exceptional skills of the relevant operator) were to be applied, it would produce figures in the range of €2,125,000 (€2.5m less 15% *i.e.* less €375,000) to €2,465,000 (€2.9m less 15% *i.e.* less €435,000). This is not to say that the appellant determined the NAV with reference to the R&E. It is to say, however, that evidence was undoubtedly given by the appellant's valuer, written and oral, with specific reference to the R&E, to support the view that the €1.75m NAV, arrived at via the FMT was reasonable and was not, in fact, excessive. Although the R&E valuation was not relied upon as the method for producing the NAV, it was plainly part of the evidence relied on by the appellant in opposing an appeal which was based on the contention that the valuation applied was excessive. The foregoing is clear from s.5 of the précis of evidence furnished by the appellant's valuer which states: -

### **"5.1 Conclusion.**

*I request that the Tribunal affirms the valuation of the subject property determined by the Commissioner of Valuation as representing its Net Annual Value in accordance with s.45 of the Valuation Act 2001.*

*The FMT (Fair Maintainable Trade) estimated by the Commissioner on this property is €12,590,000. Turnover has exceeded this level in all years provided 2009-2012. The Agent was requested at both representation and first appeal stage to supply up-to-date trading information in order to establish if new competition in the area had made any impact on the trading performance of subject property. To date only projections have been supplied.*

*The valuation scheme, which was developed in relation to all hotels in DCC indicates that the subject should be valued in line with **Type 4 - high food & beverage** properties. The percentages applied to accommodation, food and beverage are in line with other hotels, pubs and nightclubs in the Harcourt/Camden Street area. These percentages have been widely accepted with the subject property being the only licensed premises in the area subject of an appeal to the Valuation Tribunal.*

*The most contentious point of the valuation would appear to be the application of 40% on Door/Cloakroom Receipts in excess of €1,000,000. In developing the valuation scheme for hotels the Commissioner has attempted to cater for all properties. The Jackson Court Hotel is an exceptional property and the application of 40% on Door/Cloakroom Receipts in excess of €1,000,000 is necessary in order to arrive at a fair estimate of net annual values. **See Appendix G for supporting full receipts and expenditure valuation.** The Jackson Court Hotel is generating in excess of €6,000,000 net profit annually. I consider an NAV of €1,750,000 reasonable." (emphasis added).*

29. In the foregoing manner, R&E evidence was undoubtedly given to the Tribunal. Written evidence, including a full R&E was provided. In addition, oral evidence was given with reference to the R&E to support the view that the NAV of €1.75m was not excessive. It is important to note that this R&E evidence, in particular the expert opinion evidence given by the appellant's valuer relying on the full R&E carried out by him, was uncontested evidence.

### **A 'tiered' approach**

30. Before turning to the Decision of the Tribunal, it is also appropriate to observe that there was agreement between both valuers in relation to what might be called a 'tiered' approach to the application of percentages to tranches of revenue in the context of the FMT. In other words, both valuers agreed that operating costs are paid out of the revenue first earned and that, as revenue increases, there are increasing funds available for rent. As para. 6.7 of the case stated records: "*Mr. Byrne explained that the rationale for the application of nil percentage to the first €600,000 was to cover operating costs.*"

The logic of the foregoing is that the hypothetical tenant is deemed to require the first €600,000 to pay all fixed costs and certain other costs (such as insurance, wages etc ) and, therefore, will deem the first €600,000 as not giving rise to any profit from which rent can be paid. However, once revenues exceed €600,000, a profit arises from which rent can be paid. As is clear from para. 6.7 of the case stated, the tiered approach contended for by Mr. Byrne would see the next €400,000, subject to a percentage of 10%. Basic mathematics confirms that, if the first €600,000 (at nil percent) and the next €400,000 (at 10%) are combined, it produces a percentage of 4% for the first million Euro.

31. On behalf of the respondent, Mr. Byrne contended for the balance over €1m (namely the €2.2m balance out of the agreed total of €3.2) to attract a percentage of 5%. By contrast, and in the manner detailed in the case stated, Mr. Sweeney for the appellant applied 11% to the first €1m and 40% to the balance of €2.2m in respect of the agreed door and cloakroom revenue and gave evidence that 40% was necessary to arrive at a fair NAV, the fairness of which he defended with reference to the full R&E which he had carried out. It is a matter of fact that the respondent's valuer, Mr. Byrne, did not carry out a full R&E. It is uncontroversial to say that the evidence tendered on behalf of the appellant to the Tribunal was that the 40% is justifiable because the Receipts in excess of €1m are largely profit, with the majority of costs discharged in generating the first €1m of revenue.

**12.5% / 15 % 'end allowance'**

32. It was common case in the appeal before the Tribunal that the respondent in the present proceedings has exceptional acumen for the business and this was reflected in the application by both valuers of an "end allowance" i.e. the appellant's valuer applied an allowance, or deduction, of 12.5% whereas the respondent's valuer applied a 15% allowance, before arriving at the NAV (and I will presently refer to that 15% figure when discussing Appendix G).

**The Decision**

33. I now turn to the Decision which gave rise to the case stated. As will immediately be clear from the Decision, which is set out, *verbatim*, below, the Tribunal decided to apply 11% to the total door/cloakroom receipts. By so doing, the Tribunal was in effect stating that the landlord will agree to receive 11% of the revenue and the tenant will retain 89% of the revenue. It is the adequacy of reasons for the foregoing, against the backdrop of the evidence tendered, which is at the heart of the case before this Court. At this juncture it is appropriate to set out the decision in full. The Decision of the Tribunal dated 18th January, 2016 states as follows:

***"In relation to the issue of Quantum of Valuation in respect of:***

*Property No. 814473, Hotel, Night Club / Discotheque, The Jackson Court Hotel, 29-31 Harcourt Street, County Borough of Dublin.*

*JUDGMENT OF THE VALUATION TRIBUNAL*

*ISSUED ON THE 18TH DAY OF JANUARY 2016*

BEFORE:

**Barry Smyth – FRICS, FSCSI, MCI, Arb** Deputy Chairperson

**Michael Lyng – Valuer** Member

**Brian Larkin – BL** Member

*By Notice of Appeal received on the 4th September 2014 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a net annual value of €1,750,000 on the above described relevant property on the grounds as set out in the Notice of Appeal, a copy of which is attached to this judgment at Appendix 1.*

*The Appellant proposed a NAV of €840,000 based on two approaches, namely 1) a hypothetical tenant estimate of Fair Maintainable Trade and 2) the actual trade with an end allowance to reflect the skills of the exceptional operator. The Respondent based his opinion of NAV on the actual turnover with an end allowance to reflect the skills of the exceptional operator.*

*The Tribunal having examined the property details; having confirmed the valuation history; having heard and examined both the Appellant's and the Respondent's evidence; having considered the evidence adduced and submissions made at a hearing at the Tribunal offices at Holbrook House, Holles Street, Dublin 2 on the 9th day of November 2015, by Mr Desmond Byrne of Bannon Chartered Surveyors for the Appellant and by Mr Alan Sweeney of the Valuation Office for the Respondent,*

**DETERMINES**

*That the net annual value of the subject property be as set out below:*

**€1,155,000**

*This is arrived at as follows:-*

<b>Estimated FMT</b>	<b>Revenue</b>	<b>NAV %</b>	<b>NAV</b>
<i>Hotel Rooms</i>	<i>€ 390,000</i>	<i>@ 13%</i>	<i>€ 50,700</i>
<i>Food</i>	<i>€ 850,000</i>	<i>@ 7%</i>	<i>€ 59,500</i>
<i>Beverage</i>	<i>€ 8,150,000</i>	<i>@ 11%</i>	<i>€ 896,500</i>
<i>Door &amp; Cloakroom</i>	<i>€ 3,200,000</i>	<i>@ 11%</i>	<i>€ 352,000</i>
<b>TOTAL:</b>	<b>€12,590,000</b>		<b>€1,358,700</b>

**Less:**

*15% End Allowance to reflect exceptional*

*expertise of the occupier*

*€ 203,805*

*€1,154,895*

*=====*

*Say: €1,155.000*

***The reasons being as follows:***

- 1. The floor areas and turnover associated with the subject property, The Jackson Court Hotel, are not in dispute.*
- 2. It is agreed that the shortened Method of Valuation as used by both the Appellant and the Respondent is appropriate in this instance.*
- 3. The Tribunal prefers to consider this appeal on the basis of the actual turnover levels as reflected in the statutory accounts rather than attempt an assessment on what a hypothetical tenant might achieve. This data is more tangible.*
- 4. It is clear that the operator of the premises has an exceptional acumen for the trade. Indeed, this was not disputed at the Hearing and was furthermore reflected in the application of a 12.5% end allowance by the Valuation Office before arriving at the NAV. Its performance is in sharp contrast to the neighbouring Russell Court and Harcourt Hotels which are larger properties and have a greater number of bedrooms.*
- 5. The percentages applied to the individual categories viz rooms; food and beverage at 13%, 7% and 11% are not in dispute between the parties.*
- 6. A significant gulf exists however between the parties and this is down to the totality and treatment of door/cloakroom receipts associated with Copper Face Jack's night club located in the basement of the Hotel premises and operated in conjunction with the ground floor bar. The Respondent suggested that a NAV of €990,000 arises from that activity, while the Appellant contended for alternative NAVs of €18,000 based on purported receipts of €90,000 at 20% based on turnover that a reasonably competent hypothetical tenant might hope to achieve or €51,000 on the basis of the actual turnover with the first €600,000 at 0%, the next €400,000 at 10% and the balance of €2,200,000 at 5%.*
- 7. The Tribunal in particular noted that the Respondent applied a factor of 11% to the first €1,000,000 of door/cloakroom receipts and 40% to the balance above €1,000,000 for NAV purposes. However, no evidence was adduced to support this methodology or as to how the 40% was arrived at. By the same token the Tribunal also noted that the Appellant, in arriving at a NAV based on the door/cloakroom*

*receipts effectively had applied a factor of just 1.6% on receipts of €3.2 million. This element of the total NAV was unsupported by documentation and seems very low.*

8. *However, it was common case between the parties that there were many operators in the trade who either included door and cloakroom receipts in their turnover figures or waived such charges and charged more for the beverages. So there was greater transparency at least in this case to identify the door/cloakroom receipts.*
9. *Taking all the above into consideration the Tribunal is of the view that the application of an overall average of 11% to total door/cloakroom receipts is a more equitable basis than the tiered arrangement of 11% and 40% contended for by the Respondent and the approach proffered by the Appellant.*
10. *The Tribunal considers that the application by the Appellant of a lower 9% factor to the beverage turnover in the subject premises, while at the same time applying a 15% end allowance was in the nature of double accounting or double discount to reflect the skills of the exceptional operator in arriving at a NAV.*
11. *The Tribunal deems that an end allowance pitched at 15% is reasonable to reflect the business acumen of the present operator which a third party might not be able to replicate, but it should be in the context of an 11% factor being applied to beverages rather than the lower 9%.*
12. *In conclusion the Tribunal, in presiding over appeals within the licensed trade, must constantly bear in mind that it is the property and not the business conducted in the premises that is the subject of valuation. This principle is particularly relevant in the context of the treatment of door/cloakroom receipts, as in the subject appeal, if equity is to be achieved.*

*And the Tribunal so determines.”*

34. It is fair to say that nothing stated by the Tribunal in paras. 1 to 5, inclusive, is in dispute and these paragraphs comprise a recitation of uncontroversial matters, as opposed to setting-out any reasons to underpin the central issue which was in dispute. Similarly, paras. 8 and 9 deal with issues not in dispute, whereas para. 10 comprises a statement of principle. Thus, the operative part of the Decision comprises paras. 6 and 7.

#### **Analysis of the Decision**

35. Before turning to an examination of legal authorities concerning the duty to give reasons and the extent of that duty, the following can be said with regard to the Decision as a matter of fact:
  - (1) It is clear *that* the Tribunal has decided to apply 11% to total door/cloakroom receipts, but it is not at all clear *how* this decision was arrived at;

- (2) It is not possible to discern from the Decision why 11% (as opposed to the percentages contended for by each of the parties or, for that matter 10%, 12%, or any other percentage) was arrived at;
- (3) The Decision does not identify the facts relied upon as a basis for determining that 11%, and no other percentage, was appropriate;
- (4) The Decision does not identify the facts or evidence to support an obvious inference that 11% was appropriate;
- (5) There is no reference in the Decision to evidence which was given with regard to comparators or to what is called the 'tone of the list';
- (6) The Decision does not refer to or engage with the evidence given to the Tribunal by the appellant's valuer, concerning the R&E valuations he had carried out, which evidence was tendered in response to specific questions by the Tribunal and in support of the contention that 40% was justified in circumstances where the full R & E valuation would, according to the Commissioner's expert, probably support the application of 70% to door and cloakroom receipts;
- (7) As is clear from the final paragraph in section 6 of the case stated and from the contents of Mr. Sweeney's precis of evidence which was before the Tribunal, evidence was undoubtedly tendered, both written and oral, in support of the application of 40% to door and cloakroom receipts in excess of €1M, including R&E evidence, as follows: (i) Mr. Sweeney's expert view was that 40% over Revenues of €1M was *"necessary to arrive at a fair estimate of the NAV of the property"*; (ii) his testimony was that 40% was *"sustainable if the financial information provided by the appellant is analysed and he referred the Tribunal to the full R&E valuations which he had carried out which were included in Appendix G of his Precis for the years 2012, 2011, 2010 and 2009"*; (iii) his testimony was that *"the full R&E valuation would probably support the application of 70% to door and cloakroom receipts in excess €1,000,000"*; (iv) on the basis of the foregoing R&E valuation, Mr. Sweeney *"contended that 40% was justified"*; (v) he also gave evidence that there was no other property in the rating authority generating door and cloakroom receipts of €3.2M; and (vi) Mr. Sweeney's evidence, in reply to a question from the Tribunal was that he considered it necessary to apply 40% to the door and cloakroom receipts *"in light of the R&E valuations he had carried out"*. The fact and content of the aforesaid oral and written evidence is impossible to reconcile with the statement, at para. 7 of the Decision, that *"no evidence was adduced to support this methodology or as to how the 40% was arrived at"*.
- (8) There is no suggestion that the aforesaid evidence, including the R&E evidence, which was in fact given by Mr. Sweeney: (a) was not relevant; (b) was not admissible; (c) was not probative of the central issue in dispute; and/or (d) that it was challenged in any way. Despite the foregoing, this evidence is not engaged

with in the Decision which records a very different conclusion than contended for by Mr. Sweeney but does not explain how that conclusion was reached;

- (9) No reason is given in the Decision for rejecting the uncontested evidence with regard to the actual R&E carried out by the appellant's valuer in respect of the reasonableness of the 40% for Revenue over €1 million;
- (10) In circumstances where the Decision states *inter alia* that "*no evidence*" was adduced to support the 40% on receipts above €1 million, it is entirely unknown whether the Tribunal did not consider this evidence at all, or whether they considered the evidence but rejected it. In particular, it is unclear to this Court whether the Tribunal took the view that Mr. Sweeney's evidence which was in fact given with regard to the 40% - in particular Mr. Sweeney's reliance on the R&E valuations he had carried out as a basis to justify the 40% as not being excessive - was evidence which the Tribunal: (a) considered not to be relevant; or (b) considered not to be admissible; or (c) deemed relevant and admissible but erroneously omitted to consider; or (d) considered on its merits but rejected; and (e) if properly considered but rejected, the basis for rejecting same is not at all clear from the Decision.
- (11) If it be the case that the Tribunal took the view that the same percentage should be applied to Revenue up to, as well as in excess of, €1 million, as the 11% applied by the appellant commissioner to Revenue up to €1 million (and, in the absence of stated reasons, this is an assumption as to the view formed by the Tribunal) nowhere does the Decision explain how such a view was reconciled with the evidence that the costs would have been included in the first €1 million of receipts and Revenue in excess of €1 million would attract a substantially increased percentage of profit;
- (12) For the Tribunal to say that there was no evidence as to how 40% was arrived at, does not provide any explanation or reasons as to the basis upon which the Tribunal preferred 11%;
- (13) In circumstances where uncontested evidence was given that the full R & E valuation would probably support an application of 70% to door and cloakroom receipts (in respect of Revenue over €1 million) and that 40% was reasonable and not excessive in the foregoing context, it is impossible to understand from the Decision the basis upon which the Tribunal substituted 11% over the entire Revenue;
- (14) There is no identification in the Decision as to why 40% is incorrect and, coupled with the statement that "*no evidence*" was proffered to support the 40%, to the extent that the foregoing, as it appears to be, is employed by the Tribunal as a basis for the 11% decided upon, it indicates that the Tribunal regarded the onus of proof as being on the appellant commissioner, as opposed to being on the respondent to prove that the NAV was incorrect;



- (15) Because the evidence relied on and reasoning employed is not clear from the Decision, it is impossible to assess same for the purposes of any possible challenge;
- (16) Fairly considered, the Decision confirms *what* was arrived at but not *how* or *why* or *what* the Decision was based on.
- (17) Bearing in mind the onus which was on the respondent (i.e. the appellant before the Tribunal) to prove that the NAV of €1.75m was *incorrect*, the Decision makes no express finding that the pre-appeal NAV was incorrect. The Tribunal certainly expressed the view that the application of 11% to the total of all door/cloakroom revenue was "*more equitable*" (and such an application alters the NAV) but the Tribunal neither state that the pre-appeal NAV *was* incorrect, nor records *why* it was incorrect. Thus, the relationship between the Tribunal's Decision and the relevant statutory test is unclear.
- (18) The Decision is capable of being read as the Tribunal having regarded itself as 'at large' to insert a percentage it deemed appropriate, as opposed to carrying out the statutory appeal in respect of the correctness of the Valuation Commissioner's decision which was the subject of the appeal.
- (19) It is not in dispute that the object under s. 48 of the Act is to assess what the hypothetical tenant might achieve. The foregoing is very difficult to reconcile with the statement at para. 3 of the Decision that "*The Tribunal prefers to consider this appeal on the basis of the actual turnover levels as reflected in the statutory accounts rather than to attempt an assessment on what a hypothetical tenant might achieve*".

#### **'Splitting the difference'?**

- 36. It is uncontroversial to say that the central issue in dispute before the Tribunal was the percentage to be applied to door and cloakroom receipts. It is very clear from the Decision that the Tribunal concluded that 11% was appropriate. It is not at all clear *why*. It is fair for this court to ask whether the 11% represented the outcome of a "splitting of the difference" exercise on the part of the Tribunal? It may have been, but it is not clear from the Decision whether this is so, nor is it the only possible explanation for the 11%.

#### **Rejection of the 'tiered' approach?**

- 37. For example, did the 11% result from a rejection of the 'tiered' approach which both valuers had contended for, albeit using different ranges and percentages? Nor is it clear from the Decision why the Tribunal rejected the tiered approach which both valuers contended for and the evidence relied upon by the Tribunal as a basis for departing from the tiered approach urged on it by both sides is not at all clear. Although a case not directly on point, the following principle identified by the Supreme Court in *Donegal Investment Group plc. v. Danbywiske* [2016] IECA 193 appears to me to be relevant. At para. 82 of the judgment delivered by Clarke J. (as he then was) the learned judge stated as follows: -

*"[82] For the reasons set out in this judgment I am satisfied that it is open to a trial judge to adopt a methodology or approach which differs from each of the approaches advocated in the expert testimony tendered by the parties. However, where a trial judge is persuaded to adopt a different approach, it is necessary for the judge to structure the judgment in such a way that either expressly explains why the approach adopted is considered to be appropriate notwithstanding the expert evidence tendered or that, at a minimum, the reasoning of the trial judge in that regard can be inferred with some reasonable level of confidence".*

38. Expert evidence on both sides provided for a 'tiered' application of (albeit different) percentages based on the FMT approach. The proposition that there should not be different tranches of income to which the relevant percentage would be applied, is not something which was raised in the notice of appeal to the Tribunal. Furthermore, the Tribunal did not raise at the hearing the proposition that the same percentage ought to apply across the entirety of the revenue. Thus, the application of a blanket percentage to the entire revenue was not a point which the appellant in this case, or, for that matter, either party to the appeal before the tribunal, had an opportunity to address. It is not clear from the Decision why the Tribunal rejected the 'tiered' approach which both valuers plainly considered to be appropriate.

**Waiving of door/cloakroom charges?**

39. This court could also ask whether the 11% which they decided upon, reflects a decision by the Tribunal that door/cloakroom receipts are often waived, with operators charging more for beverages and, in the foregoing context, an application by the Tribunal of a similar percentage to door/cloakroom receipts as to beverages.
40. The fact that the Decision requires this court to pose such questions, being entirely unclear as to the answers, highlights what are, as a matter of fact, deficient reasons, even before one looks at the relevant authorities concerning where the 'bar' has been set as regards the adequacy of reasons for a decision by an administrative body.

**Beverages and 11%?**

41. If the explanation for the 11% is that the Tribunal took the view that it was unnecessary to categorise door/cloakroom receipts as a separate income stream and that revenue from door/cloakroom receipts could have been included under a heading of "beverages" and that the hypothetical tenant could be assumed to simply charge more for beverages and waive the entire door/cloakroom receipts, this is not at all clear from the terms of the Decision. Moreover, if the foregoing is the explanation, it is underpinned by a premise that the hypothetical tenant, in 2011, would waive €3.2M of revenue in respect of door/cloakroom receipts. Furthermore, the comparators relied on by the Respondent in the present case, during the appeal before the Tribunal did not, in fact, waive door/cloakroom receipts (as is clear from the précis of evidence provided by the Respondent's valuer Mr. Byrne – see internal p. 13 of same).
42. Remaining with the issue of beverages, para. 7 of the Decision states *inter alia* that: "*it was common case between the parties that there were many operators in the trade who*

*either included door and cloakroom receipts in their turnover figures or waived such charges and charged more for the beverages. So there was greater transparency at least in this case to identify the door/cloakroom receipts.*" It is very difficult to reconcile the first of those sentences, which appears in the Decision, with the evidence which was before the Tribunal, in the appeal and which is referred to at para. 6.7 of the case stated. In the paragraph 6.7 of the case stated, it is recorded that the Respondent's valuer, Mr. Byrne: *"pointed out that different accountancy firms can incorporate door and cloakroom receipts with the drink receipts because door and cloakroom is looked upon as a generator of drink sales, which would then be assessed under the respondent's valuation scheme at 11%."* It is not at all clear how the foregoing evidence given by Mr. Byrne feeds into the Tribunal's Decision. Mr. Byrne's evidence as to the accountancy treatment which different firms can employ makes no reference whatsoever to door/cloakroom receipts being *"waived"*, yet the latter is referred to at para. 8 of the Decision. Furthermore, the sentence used in the Decision which immediately follows the reference which the Tribunal made to charging *"more for the beverages"* is as follows: *"So there was greater transparency at least in this case to identify the door/cloakroom receipts."* That seems to be confirmation on the part of the Tribunal that there was greater transparency in the appeal before it, in that it was possible to identify the door/cloakroom receipts by reason of the fact that they had not been waived and they had been included as a separate income stream in the instant case (and in the two comparators relied on by Mr. Byrne). Thus, it is not clear what significance, if any, the Tribunal attached to the previous sentence in which the reference was made to *"many operators in the trade"* who either included door/cloakroom receipts in their turnover figures or waived same and charged more for beverages.

#### **Error regarding the figure of €51,000**

43. Furthermore, it emerged during the hearing before this court that the figure of €51,000 which is referred to in para. 6.7 of the Tribunal's Decision was an error. The source of the error was internal page 19 of the précis of evidence furnished by the Respondent's valuer. On that page, figures were given in respect of what was described as "Valuation Approach (B)". There, the Respondent's valuer applied the "tiered" approach and, having ascribed 0% to the first €600,000 representing door/cloakroom receipts, he noted the figure of €0. He then applied an NAV percentage of 10% to the next €400,000, producing a figure of €40,000 which he recorded. Regarding the balance of the €2.2M in door/cloakroom receipts, he ascribed 5% but erroneously recorded that as €11,000 whereas, in fact, it should have been a figure of €110,000. The error stemmed from adding €40,000 to €11,000 and getting €51,000, whereas €40,000 should have been added to €110,000, producing the sum of €150,000. Thus, the reference at para. 6.7 of the Tribunal's decision to €51,000 should have been to €150,000.

#### **Effect of mathematical error**

44. The "downstream" effect of this entirely understandable error for which no blame could possibly attach to anyone, is that the percentage which is recorded in para. 7 of the Tribunal's Decision as being 1.6%, is mistaken. It is clear that the Tribunal did not understand the figure of €51,000 or the percentage of 1.6% to be errors. Rather, the

Tribunal plainly understood those figures to be correct and to be relied upon by the Respondent in the case before this court when arriving at a NAV. This is clear from the passage in para. 7 where, having referred to the 40% contended for by the Appellant (before this Court, i.e. the Commissioner), the Tribunal went on to note that the Respondent: "... *in arriving at a NAV based on the door/cloakroom receipts effectively had applied a factor of just 1.6% on receipts of €3.2M. This element of the total NAV was unsupported by documentation and seems very low.*

#### **Significance of the error?**

45. If it is the case that the Tribunal's decision involved a "splitting of the difference" between 1.6% and 40%, such an exercise was based on an entirely innocent but very material mistake. It is also fair to say that, because reasons are not adequate to explain how and why the Tribunal settled on 11%, this Court cannot know whether the foregoing error, made in para. 6.7 and repeated in para. 7.3, played a material role in para. 7.4 of the Tribunal's Decision that *"the application of an overall average of 11% to the door and cloakroom receipts is a more equitable basis than the tiered arrangement of 11% and 40% contended for by the Respondent or the approach proffered by the Appellant"*.

#### **'more equitable'**

46. I take the view that to say something is "*more equitable*" represents a conclusion, not a reason. How or why the Tribunal came to the view that 11% was more equitable is unknown. In other words, the destination is clear but the route by which it was reached is a matter for guesswork, in my view.

#### **Submissions**

47. In very detailed and comprehensive written submissions, and in oral submissions made with great skill, counsel for the Respondent submits that there are "*7, 8, 9 or 10 reasons*" given for the decision and the gravamen of the submission is that each are perfectly clear, cogent and sufficient. The Decision is characterised by the Respondent's Counsel as being "*as straightforward as it gets*". Among the submissions made are that R&E evidence had no place in the appeal and that it was not considered by the Tribunal and should not have been considered. With respect, the evidence before this court forces me to a different conclusion. I am simply unable to know whether or not R&E evidence which was undoubtedly given, was or was not considered by the Tribunal in forming its decision. If it was considered, I am unable to know how the Tribunal dealt with it.
48. It is uncontroversial to say that there is a very clear tension between, on the one hand, the written and oral evidence proffered by Mr. Sweeney as referred to at para. 6.6 of the case stated and, on the other hand, the outcome in terms of the Decision. What is entirely unclear is how this tension was resolved by the Tribunal if, that is, the Tribunal considered the evidence to be relevant, admissible, probative and uncontested which it certainly appears to have been, in light of the contents of the case stated.
49. On behalf of the Respondent, the decision is characterised as being "*an impeccable judgment doing all it needs to do*". For the reasons set out in this judgment, I cannot agree. It does not seem to me that the Tribunal has provided sufficient information to explain why the conclusion was reached. It seems to me that it is not possible, therefore,

to consider whether there is a legitimate basis to challenge the conclusion, specifically, the 11%. To put it another way, if this court has to guess at how the 11% was arrived at (and it certainly does) it highlights the deficiencies in the judgment insofar as reasons are concerned.

50. With the exception of para. 6, counsel for the respondent submits that virtually every other paragraph in the Decision comprises a distinct, straightforward and clear reason underpinning the Decision. This, I cannot agree with. Looked at individually, or taken collectively, I am at a loss to understand the connection between the information given in the Decision under the heading which refers to "*reasons*" and the conclusion of 11% arrived at.
51. In saying the foregoing, I am not for a moment doubting the skill, expertise or bona fides of the Tribunal members. Furthermore, it may well be the case that there are clear and compelling reasons for the conclusion reached. What I am satisfied of, however, is that those reasons are not set out in the Decision with sufficiency. Despite the skill and subtlety with which counsel for the Respondent contends that "*there is no lack of clarity and everybody knows what they are doing and why they are doing it*" insofar as the Decision is concerned, I am forced, on the evidence before this court, to take a different view. I am not at all clear why the Tribunal came to the view it came to.

#### **Inadequacy of reasons**

52. It is fair to say that the central issue in the case before this court concerns the adequacy of reasons and I am satisfied that, as a matter of fact, the reasons given in the Decision are not adequate, having regard to what might be called a 'first principles' analysis which I have conducted in the foregoing manner. It is, however, appropriate to look at certain authorities which counsel for both sides very helpfully drew the court's attention to. These authorities focus on the duty to give reasons and the nature of same which is, of course, fundamentally important to the decision this court has to make. A second theme in the authorities concerns curial deference and this was something counsel for the Respondent urged this court to show with regard to the Tribunal's Decision, contending also that the reasons were entirely adequate, having regard to the relevant legal principles, and therefore, this court should adopt a "hands off" approach and should refuse the relief sought in the case stated. I want to state clearly at this juncture that I very carefully considered the detailed written submissions furnished by both sides as well as all oral submissions made during the hearing. It is unnecessary to set out in a longhand fashion the respective submissions made in circumstances where the central issue for this court to decide hinges on the adequacy, or otherwise, of the reasons in the decision. Furthermore, there is no real dispute between the parties as to the applicable legal principles or, for that matter, to their application. In other words, it is accepted that the Tribunal had a duty to give reasons and that discharging such a duty requires compliance with the principles emerging from the authorities, certain of which are presently referred to. It could hardly be otherwise given that the Respondent is subject to a statutory obligation to give reasons.

#### **Statutory duty to give reasons**

53. The statutory duty to give reasons is found in s. 4(3) of the Act (Schedule 2) which states that: *"The Tribunal shall issue a written judgment setting forth the reasons for its determination in each appeal."*

**The duty to give reasons – certain authorities**

54. Among the authorities referred to in the written and oral submissions made by the respective parties, I find the following to be of particular assistance insofar as the decision which this Court is required to make. In the Supreme Court's decision in *Connelly v. An Bord Pleanála* [2018] IESC 31, the Chief Justice examined the duty to give reasons and this judgment provides a clear explanation regarding the rationale for the requirement to give reasons, as well as clear guidance on the extent of the reasons which must be given. It is useful to quote from the judgment, beginning at para 5.4 as follows: -

*"5.4. In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons".*

55. It is fair to say that even the most careful consideration of the Tribunal's Decision does not enlighten an interested party as to why 11% was decided upon. The facts relied on to underpin that outcome are not set out. The evidence which contended for a different percentage is not engaged-with sufficient for an interested party to understand the reasons why that evidence was rejected in favour of the conclusion reached by the Tribunal (if it was, in fact, engaged with and rejected). Although, in the manner explained earlier in this judgment, it is possible to guess at a variety of routes by which the Tribunal possibly might have come to the conclusion that 11% was appropriate, the Decision is not one where the 11% outcome constitutes the only reasonable inference. Indeed, the basis for such an inference is not at all clear but, as I say, has to be guessed at.
56. Later in *Connelly*, the Chief Justice conducted an analysis of a range of relevant authorities and extracted principles concerning the purpose which is served by the provision of reasons by a decision-maker. Having done so, the Chief Justice stated the following at para. 6.15: -

"6.15. Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review".

57. No issue is taken with the applicability of the foregoing principles to the present case and, for the reasons set out in this judgment, I am satisfied that the reasons in the Decision are less than adequate, and, therefore, do not meet the twin-objectives identified by the Chief Justice at para. 6.5 in *Connelly*.
58. Insofar as the principle, articulated by the Chief Justice at para. 10.14 in *Connelly* that "the law on reasons does not require that one agrees with the reasons given. In a challenge based on allegedly inadequate reasoning, the law only entitles an interested party to know what the reasons were", no issue is taken with the foregoing principle. The point is, however, that the reasons in the Tribunal's decision are plainly deficient, in my view. The interested reader could not reasonably be able to come away from the Decision adequately informed as to why the Tribunal reached the conclusion it reached and did not reach a different conclusion.

### **Main reasons**

59. In my view, reliance by the respondent on *M.E.O. (Nigeria) v. the International Protection Appeals Tribunal* [2018] IEHC 782 cannot avail the respondent. In that decision, Humphreys J. stated (at para. 23) that: ". . . the duty to give reasons is only a duty to give the main reasons, so a decision-maker is perfectly entitled to identify only the main reasons for that decision. As it is put in Fordham, *Judicial Review Handbook*, 6th ed. (Oxford, 2012) p. 667, reasons must relate to the 'principal important controversial issues' or the main issues in dispute: see caselaw cited there . . .". Counsel for the respondent submits that the main issue was what percentage, using the FMT method, was appropriate to apply to door/cloakroom receipts. The submission is made that the percentage and the reasons are clear from the Decision. What, this Court asks rhetorically, are the main reasons for the 11%? Are they readily available to the interested reader of the decision and are they readily available to the Court? In my view they are not.
60. In the *Commissioner of Valuation v. Valuation Tribunal & E – NASC Eireann Teo Plannet 21 Communications Ltd* [2019] IEHC 23, Simons J. stated *inter alia* as follows with regard to the duty to give reasons: -

"86 . . . . *The Valuation Tribunal is under a statutory obligation to provide reasons. See paragraph 4(3) of the Second Schedule of the Valuation Act 2001, as follows.*

*'(3) The Tribunal shall issue a written judgment setting forth the reasons for its determination in each appeal.'*

*87. This statutory obligation has recently been considered by the High Court in Boland v. Valuation Tribunal [2017] IEHC 660. Murphy J. stated as follows.*

*'[...] the Court is satisfied that the judgment of a statutory tribunal such as this, which is required by law to give reasons for its determination, must be a judgment which stands on its own two feet. Reliance cannot be placed on a transcript of the evidence as interpreted by the notice party to give it sense and meaning. This is particularly so where the notice party, as in this case, is the beneficiary of the tribunal's determination. The notice party has an interest in having the decision of the tribunal upheld and as such cannot truly be described as a legitimus contradictor. The notice party is not competent to tell the Court how the tribunal arrived at its decision, only the tribunal can do that in a properly written judgment. . . .'*

*88. I respectfully adopt this statement of Murphy J. as a correct statement of the law".*

**'Stand on its own two feet'**

61. The principle articulated by Murphy J. that the Tribunal's decision must "*stand on its own two feet*" is an important one. In the present case, counsel for the respondent has, with great skill, attempted to hand a range of 'crutches' to the Decision in an effort to stand it up. This is not permissible and the Decision does not stand on its own two feet. In the manner examined earlier in this judgment, it is possible to conceive of a range of very different routes by which the Tribunal may possibly have reached their destination. That highlights the lack of clarity in the Decision and the failure to meet the principles which the authorities highlight.
62. Counsel for the respondent took serious issue with the submission made on behalf of the appellant to the effect that the infirmities identified by Murphy J. in *Boland* echoed the position as regards the Tribunal's decision in the present case. It was submitted that it was 'grossly unfair' and 'misleading' to suggest that the Tribunal's Decision was in any way comparable to the Decision which was found wanting by Murphy J. in *Boland*. I am entirely satisfied however that, to borrow a phrase from para. 24 of *Boland*: "*Even if one takes all of the material before the tribunal into account, the process by which the tribunal reached its determination and the reasons for that determination are not at all clear*". Just as was the position in *Boland*, the outcome is clear but the reasons for that outcome are not. That is not to say that there were no reasons whatsoever, but it is to say that such reasons as the Tribunal gave are insufficient for interested parties, and for this Court, to understand how the outcome was reached.



63. It was submitted on behalf of the respondent that the decision at issue in the present case was comparable to the Valuation Tribunal's decision in *McGuirk v. Valuation Commissioner* [VAL 11/5/041] which had been cited as an exemplar of a decision given by the Tribunal which met the relevant standards insofar as the duty to give reasons is concerned. With respect, I cannot agree with that submission. The Tribunal's 21 December 2011 judgment in *McGuirk* set out, in some detail, relevant matters under headings comprising the following: 'At issue'; 'The Property'; 'Basis of Valuation'; 'Valuation History'; 'Appellant's Case'; 'Appellant's Comparators'; 'Respondent's Case'; 'Respondent's Comparators'; 'Law and Findings'; and 'Determination'. For the reasons explained in this judgment, I cannot agree that the Tribunal's Decision at issue in the present case provides anything like the same clarity as the decision in *McGuirk* and, not being in a position to understand with sufficient clarity *why* the Tribunal decided on 11%, I am satisfied that inadequate reasons are given in the Decision which, unlike those in *McGuirk*, are insufficiently clear and is defective insofar as reasons are concerned.

#### **Curial deference**

64. Among the submissions made on behalf of the respondent is that this Court should be extremely slow to interfere with the Tribunal's Decision and considerable reliance was placed on the decision of Kelly J. (as he then was) in *Premier Periclase Ltd. v. Commissioner of Valuations* [1999] IEHC 8 wherein (at p. 25) the following was stated with regard to the principles upon which the court must operate on a case stated: -

*"In O'Keeffe v. An Bord Pleanála [1993] 1 IR 39, the Supreme Court expounded what is now called the principle of curial deference to decisions of an expert administrative tribunal such as the one in suit in these proceedings. That principle was further explained in the decision of the Supreme Court in Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare [1998] 1IR 34. The case concerned an appeal on a point of law pursuant to Section 271 of the Social Welfare (Consolidation) Act, 1993. In the course of his judgment, Hamilton C. J. set forth the approach which the Courts should take when asked to interfere with the decision of an expert administrative tribunal. He said: -*

*"They should be slow to interfere with the decisions of expert administrative tribunals. When conclusions are based on an identifiable error of law or an unsustainable finding of fact by a Tribunal, such conclusions must be corrected. Otherwise, it should be recognised that Tribunals which have been given a statutory task to perform and exercise their functions as is now usually the case with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them, it should not be necessary for the Courts to review their decisions by way of appeal or judicial review".*

*Whilst I am not here dealing with judicial review, I am of course dealing with an appeal by way of Case Stated with all of the limitations involved in that which I have already pointed out.*

*In the course of his judgment in that case Keane J. said that the findings of fact made by the Appeals Officers could not be disturbed "unless they were incapable of being supported by the facts or were based on an erroneous view of the law".*

*There is no doubt but that the Valuation Tribunal is the type of body which Hamilton C.J. had in mind when expressing the views which I have just quoted from his judgment in the Denny case. In the instant appeal, the Tribunal consisted of its Chairman, who is a Senior Counsel, and two deputy chairmen. One is a Barrister and the other is a Fellow of the Royal Institute of Chartered Surveyors. This Court should be slow to interfere with its decisions. It should only do so on the basis of an identifiable error of law or an unsustainable finding of fact".*

65. As regards the foregoing passage, to which the respondent draws this Court's particular attention, I am satisfied, on the evidence before this Court, that there has been a failure on the part of the Tribunal to give adequate reasons for its decision. The Tribunal may well have deployed its undoubted and considerable expertise with regard to the task before it. Unfortunately, however, the result of those efforts is impossible to discern with sufficient clarity to meet the requirements as to the sufficiency of reasons identified in the authorities and in the context of a statutory duty placed upon the Tribunal to set forth the reasons for its determination. At issue is not any second-guessing by this Court of decisions within the particular competence of the Tribunal. Rather, the question is trying to understand *how* and the reasons *why* the Tribunal came to the conclusion it did.
66. Similarly, counsel for the respondent emphasises the statement by MacMenamin J. in *Nagle Nurseries v. Commissioners of Valuation* [2008] IEHC 73 wherein, at para. 25, the learned judge stated that: -

*"A court should be slow to interfere with the decisions of an expert tribunal, such as the Valuation Tribunal, to which the principle of curial deference applies. It may only do so on the basis of an identifiable error of law or unsustainable finding of fact, that is to say a finding a fact for which there is no evidential basis. (See Mara v. Hummingbird Limited [1982] I.L.R.M. 421; Henry Denny & Sons (Ireland) Limited v. The Minister for Social Welfare [1998] 1 I.R. 34; Premier Periclase Limited v. Commissioner of Valuation, The High Court, Unreported, 24th June, 1999, Kelly J".*

67. This Court is not giving other than due respect to the Tribunal with regard to its expertise as regards the determination of matters which such a specialist body is charged with deciding. What this Court in the present case is concerned with is something entirely different and, at its root, is whether the decision of an undoubtedly specialist body can be sufficiently understood. For the reasons set out in this judgment, I am satisfied that it cannot. That being so, there has been a failure to comply with the duty to give reasons which is both an element of fair procedures in the context of being a requirement of natural and constitutional justice and, in the case of the Tribunal, is also a statutory obligation.

68. The fact that the very important principle of curial deference cannot, in the present case, save a decision which cannot be understood due to an inadequacy of reasons is clear from a consideration of the recent decision by the Court of Appeal in *Stanberry Investments Ltd. v. Commissioner of Valuation* [2020] IECA 33. In that decision, Murray J. carefully examined the interplay between the principle of curial deference and the Tribunal's obligation to provide reasons for its decisions. At para. 49 in *Stanberry*, Murray J. put matters as follows: -

*"49. The Commissioner says in this case, as parties in a similar position frequently do, that the Court should be "slow to interfere with the decisions of expert administrative Tribunals". Without significant qualification, this statement is apt to mislead. Administrative tribunals, expert or otherwise, obtain no deference on pure issues of law (see Millar v. Financial Services Ombudsman [2015] IECA 126 [2015] 2 IR 156 at - in particular - para. 62). The remarks of Kelly J. in Premier Periclase Limited v. Commissioner of Valuation [1999] IEHC 8, makes it clear that errors of fact simpliciter do not present any issue of curial deference either; "[w]hen conclusions are based on an identifiable error of law or an unsustainable finding of fact by a Tribunal, such conclusions must be corrected" (at para 25). A similar statement of principle appears in Nangles Nursery v. Commissioner of Valuation [2008] IEHC 73 at para. 25. It follows that in both judicial review proceedings, and appeals on a point of law, the scope for 'deference' is limited".*

69. At para. 50, Murray J. referred inter alia to the Supreme Court's decision in *Attorney General v. Davis* [2018] IESC 27, wherein the court (McKechnie J.) made clear that a statutory right of appeal on a point of law will, if its wording does not otherwise prescribe, include errors of law as generally understood; errors such as would give rise to judicial review including illegality, irrationality, defective or no reasoning, procedural errors of some significance; and errors in the exercise of discretion which are plainly wrong as well as errors of fact. Murray J. went on to cite the Supreme Court's decision in *EMI Records (Ireland) Ltd. v. Data Protection Commissioners* [2013] IESC 34 [2013] 2 IR 699, wherein (at para. 20) Charleton J. stated that: -

*"Curial deference does not aid such a specialist tribunal beyond according due respect for its expert factual assessment or decision on the balance of competing interests. Curial deference cannot extend to sanctioning breaches of the rules as to jurisdiction or the bypassing of the tribunal of the obligation to incorporate fair procedures"*

70. It cannot be disputed that a crucial aspect of fair procedures constitutes the giving of adequate reasons. Later in the judgment, Murray J. stated the following at para. 52 which, in my view, is of particular relevance in the case before this Court: -

*"52. However, the arguments advanced by the Commissioner in this appeal extend the doctrine beyond these parameters, effectively seeking to extract from 'curial deference' a supercharged presumption of validity. It was claimed at one point, for example, that the Court failed to observe due deference to a specialist body by*

*failing to adopt one interpretation of the last paragraph of the conclusions section of the Tribunal's decision: the Commissioner has sought to contend that 'curial deference' means that if there were two possible interpretations of the decision of the Tribunal available, the Court is required to adopt the interpretation that upholds it. That is not a correct statement of the principle. Deference means that in those areas touching on the Tribunal's expertise, the Court should be slow to interfere with the Tribunal's reasoning. It does not mean that where the Tribunal's reasoning is unclear so that there are differing possible interpretations of its decision the Court must simply assume that it was correct in the conclusion it reached. As Charlton J. said in EMI Records v. Data Protection Commissioner at para. 22, "curial deference cannot possibly arise where by statute reasons for a decision are required but none are given." 'Curial deference' is thus properly understood as depending on the Tribunal having provided a properly reasoned decision, not as affording a mechanism for compensating where the decision is not so reasoned".*

71. In the manner explained in this judgment, I am satisfied that there are differing possible interpretations as to how the Tribunal in the present case came to the conclusion that 11% was appropriate, but there is no clarity as to the reasoning the Tribunal employed. Not being a properly reasoned decision, the principle of curial deference cannot aid the respondent in the present proceedings. This is for the simple reason that the principle of curial deference does not transform the opaque into the clear. Clarity is not achieved by guesswork, nor by arguments deploying reasons not found in the Decision in an attempt to explain what the respondent contends to have been the path or pathways taken by the Tribunal to arrive at the destination in question. Clarity cannot be retrofitted, regardless of how skilful and valiant an attempt is made in submissions on behalf of the respondent.
72. Because there is such a lack of clarity, much of the submissions made on behalf of the respondent seem to me to be an attempt to "fill in the blanks" i.e. by submitting to this Court what reasoning the respondent says that the Tribunal employed. A prime example of this is the submission made that R&E evidence was not a feature of the case, was not relevant, was not admissible and that this Court can and should take it that the Tribunal wholly disregarded same in the manner, the respondent submits the Tribunal was entitled to do. In this submission, the respondent calls in aid, extracts from the aforementioned 'Guidance Note' wherein the authors offer their view that the "shortened" method is not an R&E method of valuation. Reliance was also placed on an extract from the UK publication "Ryde on Rating and the Council Tax" (Issue 87, May 2021) wherein under the heading "Use of the receipts and expenditure methods" the authors state the following (at 664): -

*"In the light of the Court of Appeal decision in Garton v. Hunter (Valuation Officer), a profits based valuation will always be admissible, but the weight to be attributed to it will depend upon the circumstances. It is sometimes useful as a check even where other method of valuation is preferred".*

73. The submission is made on behalf of the respondent that, insofar as R&E was used by the appellant's valuer, it was simply used as a "check", but it was strenuously urged on this Court that it should regard the Tribunal as having decided that no R&E evidence was relevant, or admissible, or probative, or relied on. To my mind, the foregoing submission ignores two fundamentally important matters. Firstly, it is a matter of fact that R&E evidence was given, both in writing and orally, by the appellant's expert valuer (including in response to specific questions put to him by the Tribunal). Secondly, the Tribunal may, or it may not, have taken the view that Mr. Sweeney's evidence - wherein he deployed the full R&E valuation carried out by him in support of the reasonableness of the 40% - constituted irrelevant or inadmissible evidence. Alternatively, the Tribunal may have considered this evidence, weighed it up but discounted it. The fundamentally important point is, of course, that all of this is guesswork, absent any reference in the Tribunal's decision as to how they engaged with this aspect of Mr. Sweeney's evidence.
74. What I cannot accept, having regard to the contents of the case stated, and the contents of the précis of evidence tendered by the appellant's valuer, is that there was no evidence touching on the R&E valuations which he conducted, proffered by Mr. Sweeney in contending that the Commissioner's valuation was not excessive. How the Tribunal reached the conclusion it came to, having regard to this aspect of Mr. Sweeney's evidence, is unclear but it is entirely impermissible for this Court to take the view that all is answered by the court assuming (as the respondent's Counsel urges it to do) that R&E evidence was never part of the case, or that it was impermissible for such evidence to have been given, or that it was 'obvious' that it could not have been considered by the Tribunal. I say this particularly in light of the uncontested fact that the Tribunal itself posed questions which elicited the very evidence which the respondent's counsel submits was not a feature of the case, was not relevant and was not admissible. For R&E evidence to have been given, as it undoubtedly was, including in response to a question by the Tribunal, is impossible to reconcile with the submission by the respondent's counsel that it was not relevant and admissible. Nor does the submission made on behalf of the respondent sit easily with the principle articulated in *Lamb v GoOutdoors Ltd.* that "It will be necessary to have regard to relevant evidence of all types, if available, but always with a clear focus on the statutory valuation hypothesis." (emphasis added).
75. The fundamental difficulty facing the respondent is, in truth, not one of principle. It is one of fact. For the reasons explained in this judgment, the Tribunal's Decision is incapable of 'standing on its own two feet' and is deficient as to reasons. Even if, as the respondent's counsel submits, all R&E evidence was regarded by the Tribunal as utterly irrelevant, inadmissible and of no probative value, it behoved the Tribunal to explain. It is a fact that evidence, including R&E evidence, was given in support of what the Commissioner contended for, yet the Tribunal stated that "*no evidence had been adduced*". The Decision did not, for example, state that the evidence was deemed by the Tribunal to be inadmissible.
76. Furthermore, it does not appear to be in dispute that the Tribunal is not constrained as regards the evidence it can consider. Notwithstanding the relative antiquity of the case

and the different underlying facts, the following principle articulated by Lord Denning in *Garton v. Hunter (VO)* [1969] 2 QB 37 (at 44) would appear to hold true as regards evidence in the context of the assessment of rateable valuation: - “*Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness and badness of it goes only to weight, and not to admissibility*”.

77. Nor is there any dispute in relation to the following principle from the decision of Kingsmill Moore J. in *Roadstone Ltd v. Commissioner of Valuation* [1961] IR 239 (at p. 260): -

*"It has been repeatedly decided that in arriving at his estimate of the hypothetical rent a judge is not bound to use any particular method but may arrive at his determination in whatever way is most suitable to produce the required result: Dundalk Gas. Co. v. Commissioner of Valuation (2), per FitzGibbon J., at pp. 167, 168; Commissioner of Valuation v. Dundalk Urban District Council (3), per Murnaghan J., at p. 289. The ascertainment of the net annual value as directed by the section is a question of fact and not a question of law (Mersey Docks and Harbour Board v. Birkenhead, Assessment Committee (1), per Lord Halsbury at p. 180) and common sense and economic considerations must be the guides".*

78. Nothing in the foregoing principles indicates that the Tribunal in this case was in any way constrained as to what evidence they could consider, regardless of what method it related to. A crucial point in the present case is that it is not clear how, having regard to the evidence which was given, the Tribunal came to the conclusion it reached. The principle that the tribunal's 'hands' are not 'tied' as regards the evidence it can consider seems to me to be entirely consistent with another agreed principle, namely that (as made clear in *Commissioner of Valuation v. Carlton Hotel Dublin Airport* [2016] 2 IR 385), an appeal to the Valuation Tribunal from a decision of the Commissioner of Valuation takes the form of a *de novo* hearing.

#### **Burden of proof**

79. The fact that the appeal in question involved a *de novo* hearing takes nothing away from the burden of proof which, as the parties agree, rested on the respondent in the present case to discharge. In other words, the respondent in the present case (being the appellant before the Valuation Tribunal) faced the burden of proving that the NAV of €1.75m was *incorrect*. Quite apart from the undoubted inadequacy of reasons, it also seem to me that certain statements in the Decision are suggestive of a shifting of a burden on to the appellant in the present case (i.e. on to the Commissioner who was the respondent in the appeal before the Tribunal) as if they faced the burden of proving the NAV which had been determined. They did not face any such burden.
80. In other words, for the Tribunal to say that there was “*no evidence*” adduced as to how 40% was arrived at, is neither a finding that 40% is *incorrect*, nor does it provide any reasons as to why 40% is incorrect. The effect of the foregoing, however, appears to me to suggest a shifting of the onus of proof onto the Commissioner to prove to the satisfaction of the Tribunal that the NAV determined by the Commissioner is correct, failing which the Tribunal will substitute its own percentage. If that what was occurred, it

conflicts with ss. 34 and 35 of the Act. I deliberately say 'if' because, as it stands, the Decision is not sufficiently clear to understand the reasoning employed by the Tribunal and whether the Tribunal regarded it as for the Commissioner to prove that 40% was *correct* (as opposed to the burden being on the rate-payer to establish that the NAV determined by the Commissioner was '*incorrect*' (per s. 35(a)(i) of the Act).

81. It is uncontroversial that, in the appeal to the Tribunal, the relevant onus of proof rested on the respondent (in the present case). Although the basis upon which the Tribunal rejected the evidence tendered by the respondent's valuer is unclear, it is clear that it was rejected. In other words, what was urged on the Tribunal by the rate-payer as being the appropriate percentage was not what the Tribunal decided. Leaving aside questions which arise as to whether the Tribunal regarded it as for the Commissioner to prove the *correctness* of the pre-appeal NAV, the fact that what the Respondent (in the present case) urged on the Tribunal was not reflected in its Decision suggests that the Respondent (i.e. the appellant before the tribunal) did not discharge the burden of proof, which undoubtedly rested on it, of demonstrating that the pre-appeal NAV was *incorrect*.

### **Conclusion**

82. As per s. 8 of the case stated, the following are the questions of law arising: -

"Was the Valuation Tribunal correct in law

- (a) In applying an overall 11% to the door and cloakroom receipts on the grounds that no evidence was adduced to support the respondent's methodology or as to how the 40% was arrived at, having regard to the onus of proof and the appeal scheme established under Part 7 of the Valuation Act 2001, and the provisions of s. 63 of the said Act?
- (b) In focusing on the percentages to be applied to door and cloakroom receipts instead of considering of the estimate of NAV was excessive?
- (c) In failing to consider if the NAV was excessive in light of the R&E evidence?
- (d) In the reasons provided to the parties, in particular as regards the conclusion that 11% should be applied to all door and cloakroom receipts?
- (e) In finding that 11% should be applied to door and cloakroom receipts in excess of €1m where the respondent now contends that there was an absence of evidence to support that percentage?
- (f) In failing to have regard to the R&E evidence, when inferring or concluding that 11% should be applied to the door and cloakroom receipts?
- (g) In concluding that 11% should be applied to the entirety of the door and cloakroom receipts, when the costs of operating the nightclub were discharged by the first €600,000 of revenue?

(h) In reducing the applicable percent to 11% on the grounds that no evidence was adduced to support the methodology or as to how the 40% was arrived at, in circumstances where the R&E evidence indicated that the NAV was not excessive and that the application of 70% to the door and cloakroom receipts would be justified?"

83. For the reasons set out in this judgment I am satisfied that each of the questions stated should be answered in the negative and the matter should be remitted back to the Tribunal for hearing.
84. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."* Having regard to the foregoing, the parties should correspond with each other with regard to the appropriate form of the final order, including as to costs. 7 days should be sufficient in that regard. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within a further 7 days, i.e. within 14 days from the date of this judgment.