THE COURT OF APPEAL

APPROVED

NO REDACTION NEEDED

Record Number: 2021/278

High Court Record Number: 2020/1959SS

Neutral Citation Number: [2024] IECA 53

Haughton J.

Pilkington J.

Butler J.

IN THE MATTER OF THE VALUATION ACT, 2001

BETWEEN/

BREANAGH CATERING LIMITED

APPELLANT

-AND-

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Robert Haughton delivered electronically on the 8th day of March, 2024

Introduction

1. This is an appeal from the decision of the High Court (Heslin J.) delivered on 1 October 2021 and the perfected order dated 14 October 2021, on an appeal by way of Case Stated from a decision dated 18 January 2016 of the Valuation Tribunal (*"the Tribunal Decision"*) to the High Court pursuant to s. 39 of the Valuation Act, 2001 (*"the 2001 Act"*) at the request of the Commissioner of Valuation.

2. In an effort to provide clarity due to the changing positions of the parties before the Tribunal, the High Court and before this court, the appellant Breanagh Catering Limited will be referred to as *"Breanagh"* and the Commissioner of Valuation as *"the Commissioner".*

3. The Case Stated raises questions concerning the approach that should be taken to establishing the nett annual value (*"NAV"*) for rating purposes of the Jackson Court Hotel, with particular reference to the *"door and cloakroom"* receipts of the hotel's successful nightclub, Copper Face Jacks. However the focus of argument in the High Court and this court was whether the Tribunal had provided adequate reasons for its decision.

4. Section 48 of the 2001 Act sets out the basis upon which the NAV of a relevant property is to be determined:-

> *"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."*

Section 49 and s. 50 are not germane to this appeal.

The Tribunal Decision

5. The Tribunal Decision concerned the rateable valuation determined by the Commissioner in respect of property known as the Jackson Court Hotel, a hotel in the centre of Dublin situated on the west side of Harcourt Street and comprising two inter-linked four story over basement mid terrace Georgian buildings, with an agreed gross floor area of 2,547 square metres (*"the Property")*. More especially, as this is where the contention lay, it concerned the correct approach to the valuation of the door and cloakroom receipts of a constituent part of the Property comprising the well-known night club Copper Face Jacks. This valuation was conducted during a revaluation of all commercial properties within the Rating Authority area of Dublin City Council, pursuant to s. 19 of the 2001 Act, with a statutory revaluation date of 7 April 2011.

6. A proposed Valuation Certificate was issued by the Commissioner pursuant to s. 24 of the 2001 Act, indicating a valuation of €1,750,000.00. This valuation was upheld following representations made on behalf of Breanagh. The final Valuation Certificate was issued on 16 December 2013 and Breanagh pursued a first appeal to the Commissioner pursuant to s. 30 of the 2001 Act. That first appeal was disallowed by the Commissioner's appeal manager.

7. By Notice of Appeal to the Tribunal received on 4 September 2014, Breanagh appealed the Commissioner's determination, on the grounds that NAV applied was excessive, and proposed a NAV of €620,000. The appeal proceeded to an oral hearing which was held at the offices of the Tribunal on 9 November 2015. Breanagh was represented by Mr. Desmond Byrne of Bannon Chartered Surveyors (*"Mr. Byrne"/"Breanagh's Valuer")* who at the hearing proposed a revised NAV of €840,000. The Commissioner was represented by Mr. Alan Sweeney, (*"Mr.Sweeney"/"the Commissioner's Valuer").* Neither party was legally represented.

Pursuant to the Rules of the Tribunal, the parties duly exchanged their précis of evidence and submitted same to the Tribunal prior to the hearing.

8. Schedule 2 of the 2001 Act governs the composition and functions of the Tribunal, and importantly article 4(3) provides:-

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

9. The Tribunal Decision, in which Breanagh was appellant and the Commissioner respondent, issued on 18 January 2016 and is set out below, *verbatim*:-

> *"**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[1] *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:-

Estimated FMT	***Revenue***	***NAV %***	***NAV***
Hotel Rooms	*€ 390,000*	*@ 13%*	*€ 50,700*
Food	*€ 850,000*	*@ 7%*	*€ 59,500*
Beverage	*€ 8,150,000*	*@ 11%*	*€ 896,500*

[1] I shall refer to this as the *"FMT"* method.

Door & Cloakroom	*€ 3,200,000*	*@ 11%*	*€ 352,000*
TOTAL:	*€12,590,000*		*€ 1,358,700*

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[2] 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%[3] on receipts of €3.2 million. This element of the total NAV was unsupported by documentation and seems very low.*

   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

[2] The parties were agreed that €51,000 was an error and should have read €150,000, which is the figure that results from (€600,000 x 0%) + (€400,000 x 10%) + (€2,200,200 x 5%) – based on total receipts of €3,200,000, and Mr. Byrne's evidence as to appropriate percentages. The source of this error seems to be the typographical omission of a nought in a table of calculation in Mr. Byrne's Précis of Evidence at paragraph 10.0 where he misstates €2,200,000 x 5% as being €11,000, when in fact it should be €110,000 – although he goes on to give correct totals. Unfortunately this error was carried forward in the Commissioner's written submissions to the High Court, and in due course, as can be seen *supra,* features in the Tribunal Decision.

[3] This figure of 1.6% is a further error, consequent on the error noted in footnote 2. In fact the €150,000 contended for by Mr. Byrne represents approximately 4.7% of €3,200,000.

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.

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.

8. *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.*

9. *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%.*

10. *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."

10. Section 39 of the 2001 Act provides for appeals by way of case stated from the Tribunal to the High Court and onward to the Supreme Court, now this court, and the procedure is set out in the first three subsections:-

*"**39.**—(1) After the determination of an appeal under **section 37** by the Tribunal, any party to the appeal, if dissatisfied with the determination as being erroneous in point of law, may declare in writing to the Tribunal his or her dissatisfaction and such a declaration shall be made within 21 days from the date of the Tribunal's having made its determination.*

(2) The party, having declared his or her dissatisfaction, may, within 28 days from the date of the said determination, by notice in writing addressed to the chairperson of the Tribunal, require the Tribunal to state and sign a case for the opinion of the High Court thereon within 3 months from the date of receipt of such notice.

(3) The case shall set forth the facts and the determination of the Tribunal and the party requiring it shall transmit the case, when stated and signed by the chairperson of the Tribunal, to the High Court within 7 days from the date of receiving it."

The Case Stated

11. The Case Stated by the Tribunal pursuant to s. 39 of the 2001 Act covers much of the same ground as the Tribunal Decision in its introductory sections and in identifying *"The Disputed Issue"*, but of some significance to this appeal it sets out additional information not included in the Tribunal Decision itself. It notes that there was agreement between the parties' valuers as to the revenue from the several income streams shown in the above table, totalling €12,590,000, and that the percentages to be applied to certain other revenue streams were agreed at 13% for hotel rooms, 7% for food and 11% for beverages. It states that both valuers used the *'FMT'* (Fair Maintainable Trade) method, stating:-

"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 valuer. 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."

12. It proceeds to elaborate on the competing positions taken by the valuers before the Tribunal, and the evidence which each of them emphasised:-

"6.4 The main issue between the parties' 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 total 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 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 areas, yet the NAVs of the Russell Court Hotel and the Harcourt Hotel were significantly lower that the appeal Property. He provided in his Précis a resumé of the sizes, NAVs per m^2 of the comparable hotels. In his opinion the disparity in the NAVs per m^2 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 section 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 the end

allowance, Mr. Sweeney applying 12.5% and Mr. Byrne 15%, before arriving at the NAV.

6.7 In his valuation approach A (based on what the hypothetical tenant might be expected to achieve), Mr. Byrne assessed door and cloakroom receipts of €18,000 by applying 20% to a turnover of €90,000. In the alternative valuation approach B (based on the occupier's actual turnover) Mr. Byrne contended for an FMT figure of [€150,000][4] by the application of the following percentages to the agreed door-cloakroom revenue: -

First €600,000	*@ 0%*
Next €400,000	*@ 10%*
Balance of €2,200,000	*@ 5%*

Mr. Byrne's 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 1.6% and 2.81% 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 1%.

6.6 [sic] Mr. Sweeney assessed door and cloakroom receipts of €999,000 by applying the following percentages to the agreed door and cloakroom revenue: -

First €1,000,000	*@ 11%*
Balance of €2,200,000	*@ 40%*

[4] In error the Case Stated refers to €51,000 thus replicating the error in paragraph 6 of the Tribunal Decision. See footnote 2. It was agreed that the correct figure is €150,000.

Mr. Sweeney accepted that the Appellant is an exceptional operator. He said that the application of 40% to door and cloak room 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 the 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 by a NAV of €2.5 million in 2012 and that, in his opinion, the full R & E valuation would probably support the application of 70% to door and cloak room 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 the 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****."* [Emphasis added]

Emphasis is added to the last part because this is material that did not form part of the Tribunal Decision.

13. The Tribunal then sets out a largely accurate[5] summary of the *"Determination of the Tribunal"*, and poses the following questions for the opinion of the High Court:-

[5] The errors noted in earlier footnotes led the Tribunal at paragraph 7.3 of the Case Stated to replicate the numerical error in paragraph 7 of the Tribunal Decision:-

"Was the 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 [Commissioner'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 provision of s. 63 of the said Act?

b. In focusing on the percentages to be applied to door and cloakroom receipts instead of considering if 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 one million euros 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 per cent to 11% on the grounds that no evidence was adduced to support the methodology or as to how the 40% was arrived at, in

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"7.3. As regards the Appellant's valuation methodology, the Tribunal found that the application of 1.6% to door and cloakroom receipts of €3,300,000 was unsupported by documentation and seemed very low."

This subparagraph also misstates the total agreed door and cloakroom receipts. which was in fact €3,200,000. 1.6% of that figure is €51,200. In fact on Mr. Byrne's figures, as correctly laid out in paragraph 6.7 of the Case Stated, his FMT figure for door and cloakroom receipts was €150,000, which is approximately 4.7% of the total door and cloakroom receipts.

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?"

The High Court

14. The powers of High Court on foot of an appeal by way of case stated are set out in s. 39(5) and (6) of the 2001 Act:-

> *"(5). The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit.*
>
> *(6) The High Court may cause the case to be sent back for amendment, and thereupon the case shall be amended accordingly, and judgement shall be delivered after it has been amended."*

The High Court did not cause the Case Stated to be sent back for amendment. Under s. 39(7) an appeal from the decision of the High Court which originally lay to the Supreme Court now lies to this court, which has like powers to those conferred on the High Court.

15. Although the parties' submissions in the High Court addressed other issues, such as the onus of proof, central to the argument was the duty to give reasons, and whether the Tribunal gave adequate reasons for its decision in relation to the percentages to be applied to the door and cloakroom receipts and the rejection of a tiered approach.

16. In his judgment Heslin J. correctly identified that the Court was not engaging in a *de novo* hearing of valuation, and he recognised that the essence of the appeal was the Commissioner's contention that inadequate reasons were given for the Tribunal Decision. The particular focus in that court, and in this court, was therefore question (d):-

"Was the Valuation Tribunal correct in law …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?"

17. The trial judge refers to relevant parts of the 2001 Act, and the different methods of revaluation under s. 48 with particular reference to the U.K. publication *"The Receipts and Expenditure Method of Valuation for Non-Domestic Rating: A Guidance Note"* (*"the Guidance Note"*), which describes the R&E Method and, in section 7, the FMT method.[6]

18. Having set out paragraph 6 of the Case Stated in full the trial observes that:-

"…it is clear that evidence was given to the Tribunal by the [Commissioner'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 [Commissioner'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 Commissioner'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 [Commissioner's] valuer was relevant and was proffered to the Tribunal both orally and in writing." (paragraph 25)

The trial judge then refers to Mr. Sweeney's Précis of Evidence, which records that the Valuation Office requested market and financial information from hotels, including audited accounts for three years, management accounts and financial projections, and that the Commissioner obtained 22 items of market information on 107 hotels to inform a *'valuation*

[6] Regard is routinely had in this jurisdiction by rateable valuation experts, the Commissioner, the Tribunal and the courts to the Guidance Note and its explanations and advice on the different methods of valuation.

scheme' for Dublin Hotels, and 100 items of market information relating to other licensed bars or nightclubs, and that this led to the carrying out of full R&E valuations which in turn *"…lead the Commissioner to believe the shortened method of valuation [FMT] was the most appropriate…applying percentages to various income streams to arrive at the net value."* The trial judges observes that against that backdrop Mr. Sweeney *"… was in a position to give his evidence to the Tribunal in response to their questions, with reference to the R&E Valuations he had carried out, in support of the 40% which the [Commissioner] regarded as appropriate."* (paragraph 26).

19. The trial judge then refers in paragraph 28 to the accounts for years 2009-2012 in respect of the Property set out in Appendix G in Mr. Sweeney's Précis which would, on the R&E Method, *"result in an average NAV of €2.5m to €2.9m",* or in the range of €2,125,000 - €2.465,000 after applying an *'end allowance'* of 15% for exceptional skills – figures well in excess of the €1.75m NAV set by the Commissioner. The trial judge also noted Mr. Sweeney's conclusion at paragraph 5.1 of his Précis, the last paragraph of which reads:-

> *"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 value.*
>
> *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."*

The trial judge notes that the R&E evidence given in the Appendix was uncontested (paragraph 29), although he does note in paragraph 31 that *"It is a matter of fact that … Mr. Byrne did not carry out a full R&E"*.

20. The trial judge then notes that at the Tribunal hearing there was agreement between the two valuers as to a *'tiered'* approach, although they disagreed on tiers and percentages – Mr. Byrne advocating for 0% on the first €600,000 (to cover operating costs), 10% (he had originally used 9%) for the next €4,000,000, and 5% on the balance; and Mr. Sweeney advocating for 11% on the first €1,000,000 and 40% on the balance. He also notes that on *"end allowance"* Mr. Byrne contended for 15% and Mr. Sweeney for 12.5% (paragraph 32).

21. Having set out the Tribunal Decision in full the trial judge noted that nothing in the reasons set out at paragraphs 1-5 and 8-10 was controversial – the dispute lay in paragraphs 6 and 7 (paragraph 34).

22. At paragraph 35 of his judgment Heslin J makes key findings:-

> *"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 précis 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 [Breanagh] *to prove the NAV of €1.75m was* ***incorrect,*** *the Decision makes no express findings 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, no 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"."

23. The trial judge then makes the following observations, posed as questions as to how the Tribunal reached particular conclusions:-

1) That *"[I]t is not at all clear why"* the Tribunal concluded that 11% was appropriate – was it *"splitting of the difference"…?; "[N]or is that the only possible explanation for the 11%"* (paragraph 36);

2) Did 11% result from rejection of the *'tiered approach'*? If so it is not clear why the Tribunal rejected the tiered approach. The trial judge refers to *Donegal Investment Group plc. v. Danbywiske* [2016] IECA 193 at paragraph 82 for the proposition that while a judge may adopt an approach that differs from that advocated by either parties' experts if doing so this should be expressly explained in the reasoning. In a similar vein it was not clear what evidence was relied upon by the Tribunal for so doing given that both valuers contended for a tiered approach. It was not raised in the notice of appeal to the Tribunal, and the Tribunal did not raise at hearing the proposition that the same percentage should apply across all the revenue (paragraphs 37-38);

3) Did the 11% reflect the evidence that door/cloakroom receipts are *"often waived"*, with operators charging more for beverages (for which the agreed FMT percentage is 13%)? (paragraphs 39-40); or a view that such receipts should be treated under the heading *"beverages"*?

4) The trial judge found it difficult to reconcile the statement in paragraph 7 of the Tribunal Decision 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"* (my emphasis) with Mr. Byrne's evidence, recorded in paragraph 6.7 of the Case Stated, that different accountants *"can incorporate door and cloakroom receipts with the drink receipts"* under the valuation scheme at 11%, but which makes no reference to door and cloakroom receipts being *"waived"* (paragraph 42);

5) In paragraphs 43-45 the trial judge noted the mathematical error in paragraph 6.7 of the Tribunal Decision, where €51,000 should be €150,000, with the downstream error in paragraph 7 that Breanagh *"…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."* He notes that if the decision involved *"splitting of the difference"* between 1.6% and 40% based on this error, it was a *"very material mistake"*, but the court cannot know whether the error played a material role in the Tribunal Decision to apply 11% as *"a more equitable basis than the tiered arrangement of 11% and 40% contended for by the [Commissioner] or the approach proffered by [Breanagh]"* (paragraph 45);

6) The trial judge took the view that *"more equitable"* represented a conclusion, rather than a reason for 11%;

7) *"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"* (paragraph 47). The trial judge found a tension between the evidence given by Mr. Sweeney and the Tribunal Decision, and states: *"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."* (paragraph 48).

24. The trial judge then addresses relevant authorities on the duty to give reasons, and it is convenient to set this out here because it was not really disputed before the High court or on this appeal – the only real point of difference in both courts lay in the application of the principle of curial deference to the Tribunal Decision. Starting with *Connelly v. An Bord Pleanála* [2018]

IESC 31, the trial judge quoted the following statements of Clarke C.J. in relation to the need for administrative bodies to give adequate reasons:-

> *"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.*
>
> *…*
>
> *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."

25. The trial judge rejected a contention made on behalf of Breanagh based on a dictum of Humphreys J. in an asylum judicial review of *M.E.O. v. International Protection Tribunal* [2018] IEHC 782 that the Tribunal only had to give its main reasons, asking rhetorically *"What .... are the main reasons for the 11%"*.

26. The trial judge then relied on *Commissioner of Valuation v. Valuation Tribunal and E-NASC Éireann Teoranta and Plannet 21 Communications Ltd* [2019] IEHC 23 where Simons J., having referred to the statutory obligation in paragraph 4(3) of the Second Schedule to the 2001 Act to give a written judgment with reasons, stated:-

"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".

27. In paragraph 61 the trial judge makes it clear that he regards as important the principle that the Tribunal Decision must *"stand on its own two feet"*, adopting the following from Murphy J. at paragraph 24 in *Boland* as being applicable to the Case Stated:-

> *"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."*

28. The trial judge then addressed Breanagh's contention that the court should be slow to interfere with the Tribunal Decision as an expert administrative body, in reliance on *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, and the judgment of Kelly J. (as he then was) in *Premier Periclase Ltd. v. Commissioner of Valuation* [1999] IEHC 8 which extended the principle of curial deference to the Valuation Tribunal, stating:-

> *"…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."*

He considered that this principle did not apply where there has been a failure to give reasons, and referred to the following passages from the judgment of this court (Murray J., Haughton and Power JJ. concurring) in *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33. Because these were opened more fully before this court I will set out the relevant passages:-

"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.*

50. Furthermore, in judicial review proceedings (and insofar as it arises in an appeal on a point of law) the notion of 'deference' to the decisions of an expert body is already built in to the procedure by virtue of the combined effect of the presumption of validity, and the stringent test for review on the grounds of unreasonableness reflected in O'Keefe v. An Bord Pleanala *[1993] 1 IR 39. Indeed, I note that in* Attorney General v. Davis *[2018] IESC 27 the Court (at para. 58) suggests some scepticism as to whether deference has any role in the appeal on a point of law provided for in that case (and see as to the need for the body claiming such deference to be operating within a specialised sphere, the judgment of McKechnie J. in* FitzGibbon v. Law Society *[2014] IESC 48 [2015] 1 IR 516 at paras. 76 to 85). This reflects the analysis proposed by*

Charleton J. in EMI Records (Ireland) Ltd. v. Data Protection Commissioner *[2013] IESC 34 [2013] 2 IR 699 at para. 20:*

> *"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."*

51. *None of this is to deny any role for the sentiment underlying 'curial deference' in an appeal of a decision of the Tribunal. Unlike the position under consideration in* Attorney General v. Davis*, when the Oireachtas prescribed an appeal on a point of law from a decision of the Valuation Tribunal, it must be assumed that that process would operate cognisant of the fact that issues will arise in the course of a valuation appeal which are peculiarly suited to the expert determination of the specialist body. These include considerations such as the reliability of comparators, the appropriate method of valuation, and the correct approach to application of particular valuation concepts such as the tenant's share or divisible balance. In those cases, where an appeal on a point of law presents an issue of underlying fact or inference in relation to matters within those zones of expertise, the Courts should certainly afford very significant weight to the decision of the expert body.*

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 Charleton 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. This is evident from the judgment of Hamilton CJ in Henry Denny itself:*

> *"... it should be recognised that tribunals which have been given statutory tasks 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" (at para. 38 (emphasis added)).*

29. The trial judge was not satisfied that the deficit in reasoning could be overcome by curial deference, or that Breanagh's submissions could *"fill in the blanks"* (paragraph 72). Thus, Breanagh could not overcome the deficit based on the statement in the Guidance Note that the

FMT method is not a R&E method of valuation. Nor would it rely on the following extract from *Ryde on Rating and Council Tax* (Issue 87, Butterworths Law, May 2021) at 664 where the authors state:-

> *"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."*

This did not support Breanagh's suggestion that the Tribunal decided that no R&E evidence was relevant or admissible or probative, and the court could not assume that it was never part of the Commissioner's case (paragraph 74). The trial judge stated in paragraph 76 that it was not in dispute *"that the Tribunal is not constrained as regards the evidence it can consider"*, nor the method that it might adopt, quoting Kingsmill Moore J. in *Roadstone Ltd v. Commissioner of Valuation* [1961] I.R. 239, 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".*

30. In the course of his judgment in applying these principles the trial judge was not satisfied that the Tribunal Decision standing on its own two feet gave adequate reasons to show why the decision was made, or sufficient reasons for the parties to consider whether to avail of further appeal, and in particular as to:-

- how and why 11% was decided upon;
- what engagement there was with evidence for other percentages and why that evidence was rejected;
- why a *"tiered approach"* to percentages was rejected;
- whether the Tribunal regarded the R&E evidence of Mr. Sweeney – undoubtedly given in his Précis and referred to in his oral evidence – as relevant or admissible, and if so why the Tribunal discounted it;
- how it could be said that there was *"no evidence"* for Mr. Sweeney's percentage of 40% or how that figure is incorrect;
- why in paragraph 7 of the Tribunal Decision there is reference to operators who *"waived"* door and cloakroom receipts;
- whether the error of 1.6% played a material role in the decision that 11% *"is more equitable".*

31. The trial judge went on to address the onus of proof, expressing the view that certain statements in the Tribunal Decision *"are suggestive of a shifting of the burden on to"* the Commissioner (paragraphs 79-81).

32. Accordingly the trial judge was satisfied that each question should be answered in the negative and the matter remitted to the Tribunal for hearing.

Appeal

33. There were 46 Grounds of Appeal, but at the hearing of the appeal counsel for Breanagh indicated at the outset that the first question that this court needed to answer was question (d) in the Case Stated:-

"Whether the Tribunal was correct in law –

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?"

Counsel readily accepted that if this court agreed with the High Court that the reasons given by the Tribunal were inadequate then this court should not address the merits or answer the other questions in the Case Stated – but conversely if it considered the reasons given were adequate then the other questions should be answered. Accordingly the oral submissions were directed at the adequacy of reasons given in the Tribunal Decision.

Breanagh's Arguments

34. Mr. Hickey S.C. for Breanagh did not dispute the legal principles in relation to reasons or curial deference set out in the judgment. However he did rely on a statement of Humphreys J. in *Balscadden v. An Bord Pleanála* [2020] IEHC 586, in relation to the giving of reasons by An Bord Pleanála. Humphreys J. accepted that the "*main guidance regarding reasons, especially in the planning context, is* Connelly v. An Bord Pleanála" (paragraph 37) but he went on to enunciate general principles having regard to a range of caselaw, as follows (paragraph 39):-

"Considering a range of caselaw in relation to the question of reasons, including RPS Consulting Engineers Ltd. v. Kildare County Council *[2016] IEHC 113, [2017] 3 I.R. 61;* Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála *[2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019);* Friends of the Irish Environment CLG v. Government of Ireland *[2020] IEHC 225 (Unreported, High Court, Barr J., 24th April, 2020);* O'Neill v. An Bord Pleanála *[2020] IEHC 356 (Unreported, High Court, McDonald J., 22nd July, 2020);* Crekav Trading G.P. Ltd. v. An Bord Pleanála *[2020] IEHC 400 (Unreported, High Court,*

Barniville J., 31st July, 2020); and Leefield Limited v. An Bord Pleanála *[2012] IEHC 539 (Unreported, High Court, Birmingham J., 4th December, 2012), one can draw a number of conclusions as follows:*

(i). the extent of reasons depends on the context;

(ii). what is required is the giving of broad reasons regarding the main issues;

(iii). there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;

(iv). it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;

(v). there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;

(vi). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and

(vii). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved, and should not be read in isolation."

35. Counsel then argued that:-

- The Tribunal gave adequate reasons;
- That the High Court did not properly apply curial deference to the Tribunal Decision, the reasons for which would be understood from the standpoint of an intelligent person who has

participated in the proceedings and is appraised of the broad issues involved (the test, *per* Humphreys J. in *Balscadden*);

- That the Tribunal was at large to choose the method or combination of methods of valuation, and chose the FMT method, *"a practical approach"* that was agreed by both valuers, and did not choose the R&E method;
- That it can be inferred that the Tribunal adopted 11% for door/cloakroom receipts as that was the percentage used for Beverages, and was used for comparable properties across the City;
- That there was no authority or precedent that justified tiered percentages, and it can be inferred that the Tribunal rejected tiering because it was not used with any other hotels, where only a flat rate of 11% was used;
- In none of the comparables was the R&E method used to qualify the FMT valuation;
- The *"hybrid"* FMT and R&E method used by Mr. Sweeney distorted the FMT (which looks only at the income streams) by taking into account one variable, namely income over €1 million;
- The 40% advocated by Mr. Sweeney was peculiar – the R&E method justified 70%, not 40%, and also 40% was not applied to any other hotel with door/cloakroom over €1 million;
- In any event the Case Stated shows that the Tribunal did *"engage"* with Mr. Sweeney in relation to his R&E evidence;
- That cogent reason for a flat 11% is given in the Tribunal Decision at paragraph 7 where it is stated:-

> *"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."*

36. In further oral submissions on behalf of Breanagh at the reply stage Mr. Ó Maolchalain B.L. added that it was clear that the Tribunal was not *"splitting the difference"* in coming to 11% – rather it was rejecting both valuers tiered percentages and coming to a *"more equitable"* 11%; this was supported by comparables such as the Russell Court Hotel, and treating door/cloakroom receipts the same as beverages tied in with the *"emerging tone of the list"* and this could not have come as any surprise. He referred the court to *Commissioner of Valuation v. Carlton Hotel Dublin Airport Ltd* [2016] 2 I.R. 385 where O'Malley J. stated, at paragraph [61]:-

> *"The Commissioner is certainly correct in saying that uniformity and equity are essential to the administration of the rating system, as they are in relation to any tax. Like must be treated alike. However, there is a logically prior issue and that is whether liability to the tax in question has been properly assessed in the first place. There is no merit in the uniform application of a mistake."*

Counsel submitted that in referring to *"more equitable"* the Tribunal was in effect applying the *"tone of the list".*

37. Mr. Ó Maolchalain also argued that the court can take into account the evidence cited in the Case Stated, in circumstances where the parties engaged over its terms, and where it is required by s. 39(3) of the Act to be signed by the Chairperson of the Valuation Tribunal (although it should be noted that the Chairperson of the Valuation Tribunal was not on panel that heard this appeal). In this regard the appeal to the Tribunal was a *de novo* hearing, as confirmed by O'Malley J. in *Carlton* at paragraph [69], and Breanagh was at large to show by Mr. Byrne's evidence that the Commissioner's valuation was *"excessive"*. Accordingly there was no obligation on Breanagh to show that the Commissioner erred in principle. Here the Tribunal

had the evidence from experts on both sides, and it was entitled to find that the valuation was excessive and to come to its own valuation.

38. Lastly counsel argued that the error of 1.6% was not canvassed as such in the Case Stated, or the subject of any question, and was therefore not properly before the High Court; but in any event the error was not material because it is mentioned in the Tribunal Decision only as a figure below which the Tribunal would not, and did not, go.

The Commissioner's Response

39. Mr. Ó hOisín S.C. for the Commissioner argued that the High Court in a carefully considered judgment demonstrated how the Tribunal Decision was deficient in failing to indicate how it decided on a flat 11% valuation of door/cloakroom income, and he adopted as correct the 19 points made by the trial judge in his analysis of the Tribunal Decision in paragraph 35 of his judgment. It left the Commissioner speculating on the Tribunal's reasoning as to why it considered 11% was *"more equitable"* than 40%, or why 1.6% (which should have been 4.7%) was considered too low. Objectively it was not possible to ascertain logical reasoning from the decision.

40. It was submitted that it was not permissible for the court to find reasons *"to fill the gap"* in the materials in the Case Stated where these were not part of the reasoning in the Tribunal Decision. Insofar as the Case Stated referred to the R&E evidence it was contradicted in the Tribunal Decision which found in paragraph 7 that there *"no evidence was adduced to support this methodology or as to how the 40% was arrived at"*. The Tribunal Decision did not say why 40% was rejected.

41. In support of the proposition that the Tribunal failed to give adequate reasons counsel relied on the valuation authorities cited by the trial judge in paragraph 60 and in particular the statement of Murphy J. in *Boland* that its decision must *"stand on its own two feet"*, which was approved

and followed by Simons J. in *NASC*. It was submitted that the curial deference was subject to the limitations identified by Murray J. in *Stanberry*, and did not aid Breanagh.

42. It was submitted that the three main methods of valuation under s. 48(3) are the rental/comparative method, the R&E method and the Contractors method, but that it is not an exact science and the Tribunal must have regard to all relevant evidence. Counsel relied (as had the trial judge at paragraph 14) on the authority of *Lamb (VO) v. GoOutdoors Ltd*. [2015] UKUT 0366 (LC) where it was stated at paragraph 39:-

> *"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."*

This was reflected in the UK Guidance Note on the R&E Method which at paragraphs 5.59 and 5.60 advises that having completed a valuation using the R&E Method the valuer should *"Stand back and look"* and consider it against valuations of any similar properties.

43. Counsel submitted that the 1.6% error alone was sufficient to justify remittal of the matter to the Tribunal for a fresh hearing.

Discussion

44. It is not disputed that the Tribunal has an obligation to give adequate reasons for its decision in accordance with the requirement of constitutional fairness and the principles enunciated recently by the Supreme Court in *Connelly*. The reasons must communicate sufficient information to enable the parties to understand the reasons for the decision, and to consider whether they have a reasonable chance of succeeding in an appeal.

45. The first issue is to what extent it is permissible for the court to have regard to the content of the Case Stated to ascertain the reasons, or adequacy of the reasons for the Tribunal decision.

46. There is nothing *per se* wrong with a Case Stated setting forth background to the decision. Indeed s. 39(3) of the 2001 Act mandates that it *"shall set forth the facts and the determination of the Tribunal"*. It is desirable that a Case Stated have introductory sections providing details of the appeal, setting out the core evidence concerning the property, and annexing relevant materials – in this instance, the Notice of Appeal to the Tribunal, the Tribunal Decision, and the Précis's of evidence of Mr. Byrne and Mr. Sweeney. Further it is helpful for the Case Stated, as does this one, to set out the disputed issue. Indeed in cases where there is a full transcript of the Tribunal hearing I would see no difficulty in principle with the transcript also being appended to the Case Stated. All of this sets the evidential context, and records the arguments pursued before the Tribunal, and indicates what caused a party to request and the Tribunal to pose questions of law for the opinion of the High Court.

47. The problem arises only where it is claimed, as here, that the reasons given by the Tribunal are inadequate. As a general principle I agree with the proposition that the reasoning for the decision must be found within the decision, and in the case of Valuation Tribunal decisions this follows in particular from the statutory requirement in Schedule 2 paragraph 4(3) of the 2001 Act that *"the Tribunal shall issue a written judgment setting forth the reasons for its determination"*.

48. There is authority for this at High Court level, with which I agree. In *Boland v. Valuation Tribunal* [2017] IEHC 660 the applicant sought judicial review of the Tribunal decision precisely because of an absence of reasons. The applicant had maintained that her property, which had been vacant for six years and was in need or significant repairs, should have been valued rebus sic stantibus *i.e.* as it stood at the date of revaluation under s. 48(3), but her case was not addressed in the Tribunal decision. Murphy J. had no difficulty finding that the decision

"manifestly deficient" because there was mere recitation of her grounds of appeal and – *"[T]here is no reference to the case made by her, nor is there any reference to the response of the notice party. There are no findings of fact, nor is there reference to the applicable law."* (paragraph 23).

Murphy J. proceeded to state:-

> *"25…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."*

Significantly the Valuation Tribunal did not seek to stand over its decision in that appeal, but the Commissioner as notice party did, and sought, as does Breanagh in the present appeal, to rely on documentation that was before the Tribunal, and the transcript. Murphy J. stated:-

> *"34. … The notice party sought to plug the manifest gaps in the tribunal's decision by exhibiting the documentation which was before the tribunal and a transcript of the hearing. The Court, as already stated, has not been able to discern the tribunal's reasoning even with sight of the additional documentation and transcript. … The legislature has imposed a clear obligation on the valuation tribunal to give a written judgment setting forth its reason for its determination. It cannot avoid that obligation by pointing to extraneous materials from which the reasons for its decision may or may not be inferred."*

49. As we have seen in *NASC*[7] Simons J. adopted as correct the statement of the law by Murphy J. in *Boland*, and it was also followed by the trial judge in the judgment under appeal. I too would

[7] [2019] IEHC 23.

adopt as correct the simple proposition that the Tribunal's decisions must generally be able to *"stand on [their] own two feet"*. To the extent that Humphreys J. may appear to go beyond this in *Balscadden* in giving his conclusions, and in particular the conclusion *"(vi) there is no obligation to set out the reasons in a single document if they can be found in some other identified document"*, his *dicta* should be read in the context of decision making by a planning authority or An Bord Pleanála where decision makers may rely on a multitude of documents, submissions and reports, or opinions expressed in such reports, to convey reasons for decisions – see for example my decision in *Ratheniska v. An Bord Pleanála* [2018] IEHC 18. Clarke C.J. addressed this is *Connelly*, itself a planning judicial review, by repeating at paragraph 7.3 comments that he made in *Christian v. Dublin City Council* [2012] IEHC 163:-

> *"The second leg of the requirement to give reasons is that the reasons be capable of being determined with some degree of precision. It seems to me in that context that any document recording the reasons must be such that it is possible to say that the document concerned actually represents the reasons for the decision in question in a way which ought not be capable of real debate. It does not seem to me that it necessarily follows from the above analysis that the reasons have to be included in the development plan itself. It is, for example, possible that there may be documents referred to in the development plan which can provide the rationale for aspects of the measures incorporated into the development plan. In addition, documents prepared in the context of the adoption process may, depending on the context, also be capable of being relied on as an authoritative statement of the rationale. However, the requirement of reasonable certainty as to the reasons seems to me to necessitate that any documentation said to represent the reasons must be either expressly referred to in the development plan or be, by necessary implication, from the terms of the*

development plan, clearly adopted by those voting in favour of the development plan as part of the reasoning concerned."

50. Accordingly evidence given before the Tribunal, and referenced in the Case Stated – whether directly, or by incorporation – can only be regarded as part of the reasoning of the Tribunal if and to the extent that it is carried into or clearly incorporated into the Tribunal Decision and can be said, with *"reasonable certainty"* to represent the reasons for the decision.

51. In my view the references in (the second) paragraph 6.6. of the Case Stated recording the Tribunal's questioning of Mr. Sweeney in relation to the 40% figure that he proposed for door/cloakroom receipts over €1 million, and his responses – in so far as they might be said to support or undermine his figure, or support any other figure such as 11% – cannot be treated as part of the reasoning of the Tribunal. That *"engagement"* cannot be deployed by Breanagh to attempt to explain, clarify or elucidate any element of the Tribunal Decision, and in particular cannot be deployed to draw any inference as to how the Tribunal fixed on a flat 11%. Apart from anything else, the contents of a document created after a decision has issued clearly cannot be retrospectively incorporated into the decision so as to provide a rationale for it.

52. This conclusion does not mean that the trial judge could not have regard to the evidence that was given to the Tribunal in assessing whether and to what extent the Tribunal had regard to relevant evidence in reaching its determination. That is a different issue. The (second) paragraph 6.6 in the Case Stated does make it clear that Mr. Sweeney did, in both his Précis and in his oral evidence, tender his valuation opinion of 40% based on the full R&E evidence and analysis that he had carried out. The trial judge so finds at paragraph 35(7), where he quotes much of the relevant part of this engagement. He cannot be faulted for making that finding. It is highly relevant to his to consequential finding in relation to the Tribunal Decision that:-

"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"."

53. The next issue is that of curial deference. There is no doubt that the Tribunal is a type of body that may enjoy some curial deference from the courts. I have earlier quoted fully from the judgment of Murray J. in this court in *Stanberry*, at paragraphs 49-52, where he identifies the limits of this curial deference as being where there is an error of fact *simpliciter*, or the appeal is on a point of law. He rejected the attempt of the Commissioner to rely on curial deference to obtain a *"supercharged presumption of validity"*. Counsel for Breanagh sought to make a more nuanced submission, arguing that there should be deference to the Valuation Tribunal, and that the reasons for the decision *"were perfectly clear to anyone involved in the trade"*. He sought to rely on the formulation of Humphreys J. in *Balscadden*, arguing that *"the reasons must be judged from the standpoint an intelligent person who has participated in the proceedings and is appraised of the broad issues involved, and should not be read in isolation."*

54. In my view this misses the point. What Murray J. said in *Stanberry* bears repeating:-

"52. ... 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 Charleton 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."*

55. Moreover, in asking the court to approach the Tribunal Decision as a *"person in the trade"* Counsel seemed to be asking the court to go beyond the test of the reasonably intelligent

participant to that of an expert, either a valuer or a lawyer expert in rating matters. This puts the test for understanding the Tribunal's reasoning too high, and beyond the concept of the reasoning in the decision *"standing on its own two feet"*, because it requires some additional external expertise. But whether that higher test, or the *intelligent participant* test, is applied it seems to me that it is not possible to discern the reasoning of the Tribunal for opting for the 11% percentage. The outcome is clear, but the reasoning is not.

56. Turning to what the court might reasonably discern to be the reasons for the key determinations in the Tribunal Decision, I agree with the trial judge that there are differing possible interpretations as to why the Tribunal rejected a tiered approach, how the Tribunal came to fix on a flat 11%, and why 40% was rejected.

57. Both valuers contended for (different) tiered approaches, and nothing in reasoning of the Tribunal suggests that tiering, in principle, was not possible, or that it was necessarily an incorrect approach or methodology. Indeed counsel for Breanagh made it clear to this court that he was not asserting that there was necessarily any bar to a tiered approach. Instead counsel sought to fill this gap by arguing that the Commissioner's valuer was using a hybrid of the FMT method by adopting an R&E adjustment based on one variable (*viz.* income stream over €1 million), which distorted the FMT and *"had never been seen before"*, and was not part of a valuation *"scheme"* applied by the Commissioner to similar properties. That, however, was not what the Tribunal said, and the reader is left wondering why a tiered approach was rejected. (To this I should add that whether tiering or an approach that combines FMT and the R&E method is logical or valid as method of valuation under s. 48(3), or recognised or supported by the Guidance Note, is not something on which this court can or should express any view given the narrow focus of this appeal on question *(d)*.)

58. Further there is a lack of clarity from the Tribunal Decision as to whether Mr. Sweeney's Précis and oral evidence based on the R&E accounts was *considered*, regarded as admissible, regarded as relevant or otherwise, or indeed rejected as not properly forming part of the FMT method.

59. The bare reference in the Tribunal Decision to *"an overall average of 11%"* does not explain what figures led the Tribunal to this *"average"*. All that can be said with any certainty is that it is not an average of any competing figures (which included Mr. Byrne's 0%, 9% or 10%, 5%; and Mr. Sweeney's 11%, 40%, and 70%) mentioned by the valuers.

60. Counsel suggested it was clear where the 11% came from – it was the figure used for Beverages. But with respect to counsel this is not clear from the Tribunal Decision – it is only one possibility – and if the Tribunal considered that door/cloakroom receipts should be treated the same way as beverages it should have said so. If that was the Tribunal's reasoning on such a pivotal point then it should have been expressly stated and the Tribunal should have explained with greater clarity why it was choosing that figure and rejecting all others.

61. Even if a reading of the Tribunal Decision as a whole indicates that the Tribunal intended to refer to a *"flat rate 11%"* rather than *"an overall average"*, its reasoning that it *"is a more equitable basis than the tiered arrangement of 11% and 40% contended for by the [Commissioner] and approach offered by [Breanagh]"* is opaque, and in truth does little to explain why a flat rate of 11% is chosen.

62. Counsel sought to fill this gap by explaining that the reference to *"more equitable"* should be understood as a reference by the Tribunal to the principles of equity and uniformity which are now enshrined in s. 19(5)(b) of the 2001 Act, as substituted and inserted by s. 7(b) of the Valuation (Amendment) Act, 2015, which reads, so far as relevant:-

> *"(5) The valuation list…shall achieve both (insofar as is reasonably practicable)–*
>
> *(a) …*

(b) equity and uniformity of value between properties on that valuation list, and so that (as regards the matters referred to in paragraph (b)) the value of each property on that valuation list is relative to the value of other properties comparable to that property on that valuation list in the rating authority area concerned or, if no such comparable properties exist, is relative to the value of other properties on that valuation list in that rating authority area."[8]

63. Counsel argued that in referring to *"more equitable"* it was referring to the comparable properties such as the Russell Court Hotel and the Harcourt Hotel, where 11% was applied to the beverage income stream, but the door/cloakroom receipts did not exceed €1 million, and the Tribunal was therefore reflecting the *tone of the list*. It was submitted that this was consistent with the Tribunal adopting the FMT method, and applying it to actual turnover figures.

64. This, in my view, is asking the court as the *intelligent participant* to read far more into the Tribunal Decision than is actually there. If the Tribunal by this shorthand was applying the principles of *"equity and uniformity"* it should have said so, and gone on to identify the comparable properties whose income streams, percentages or valuations informed its decision and explained how this led to the 11% figure. The only reference to comparables in the Tribunal Decision itself is to the Russell Court Hotel in paragraph 4 in a different context – the *End Allowance* deduction for an operator with exceptional acumen for the trade. Moreover, as the trial judge points out, there is no reference in the Tribunal Decision to the *tone of the list*.

65. I also agree with the trial judge that the Tribunal fails to identify why, if Mr. Sweeney's evidence based on the R&E account was admissible and relevant, it rejects the 40% figure

[8] Although the amendment in 2015 postdated the valuation date of 7 April 2011, it was not in dispute that the principles of equity and uniformity would have applied to the 2011 revaluation once the *tone of the list* became apparent. See *Commissioner of Valuation v. Carlton Hotel* [2016] 2 I.R. 385, quoted earlier in this judgment, where O'Malley J. held that these principles applied to a 2007 revaluation.

propounded by him. It was incumbent of the Tribunal to present clear reasoning given the significant difference in outcome depending on whether it accepted that 40% figure or for cogent reasons decided on a lower figure.

66. I have referred earlier to that part of his judgment in which the trial judge highlights inconsistency between the Tribunal's reference in paragraph 7 of its decision to *"many operators in the trade … either included door and cloakroom receipts in their turnover or waived such charges and charged more for beverages"* and paragraph 6.7 of the Case Stated recording Mr. Byrne's evidence that different accountancy firms incorporate door and cloakroom receipts with drink receipts because they are looked upon as a generator of income. The underlined phrase does not appear to have been part of Mr. Byrne's evidence, yet it is referenced in the Tribunal Decision. I agree with the trial judge's criticism of this in paragraphs 41 and 42.

67. I also have concerns about the possible impact on the Tribunal's thinking of the errors in the figures which I have outline earlier which originated in Mr. Byrne's Précis, and which were unfortunately carried forward in the Tribunal Decision and caused it to note in paragraph 7:-

> *"… the Appellant, in arriving at a NAV based on the door/cloakroom receipts effectively had applied a factor of just 1.6%*[9] *on receipts of €3.2 million. This element of the total NAV was unsupported by documentation and seems very low."*

This creates in the mind of the reader with knowledge of the error uncertainty as to the extent to which this error may have influenced the Tribunal in its conclusions. To paraphrase Clarke C.J. in *Connelly* the decision must show that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration, and it should *"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."*. In its

[9] This figure of 1.6% is a further error, consequent on the error noted in footnote 2. In fact the €150,000 contended for by Mr. Byrne represents approximately 4.7% of €3,200,000.

reference to the clearly incorrect and therefore irrelevant figure of 1.6%, upon which some reliance is placed (how much is unclear) this standard is not met by the Tribunal Decision.

68. I am therefore satisfied that Breanagh has failed to establish any error on the part of the trial judge in concluding that the Tribunal Decision failed to give adequate reasons. He correctly determined that the question:-

> *"Was the Valuation Tribunal correct in law*
>
> *(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?"*

– should be answered *"No"*.

69. In light of this answer, and the acceptance by counsel on both sides that if question *(d)* were to be answered in the negative the court would not need to address the other questions, it is not necessary for this court to answer any of the other questions posed in the Case Stated.

70. The court understands that it is not possible to reconvene the same Tribunal. Accordingly the appropriate order is for the matter to be remitted to the Tribunal for a fresh *de novo* hearing of Breanagh's appeal from the Commissioner by a different panel. Whilst it is entirely a matter for the Valuation Tribunal to consider, it may be that having regard to the two different methods of valuation that have featured in the judgments of the High Court and this court, and the hybrid method deployed by Mr. Sweeney in his evidence, and the numerical error in Mr. Byrne's Précis, it would be desirable to give the parties an opportunity to submit fresh précis of evidence and, if they wished, written legal submissions.

71. It is appropriate to indicate the costs order that I propose should be made. As the Commissioner was *"entirely successful"*, within the meaning of that term in s. 169(1) of the Legal Services Regulation Act, 2015, Breanagh should pay to the Commissioner the costs of the appeal, such

costs to be adjudicated by a legal costs adjudicator in default of agreement. If Breanagh seeks a different costs order it should so inform the Office of the Court of Appeal within seven days from the electronic delivery of this judgment, and a short hearing will be arranged.

Pilkington and Butler JJ. have indicated that they agree with this judgment and the orders proposed to be made.