THE COURT OF APPEAL

APPROVED
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Record Number: 2022 313
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Neutral Citation Number [2024] IECA 68

Haughton J.

Pilkington J.

Butler J.

BETWEEN/

COILLTE TEORANTA

TRADING AS SLIABH BAWN WINDFARM

RESPONDENT

-AND-

COMMISSIONER OF VALUATION

APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 2nd day of April, 2024

Introduction

1. This is an appeal from a decision of the High Court (Simons J.) delivered on 2 November 2022 (reported at [2022] IEHC 588) on a Case Stated from the Valuation Tribunal

("*the Tribunal*") arising from its determination on 20 February 2020. I will refer for convenience to the appellant as "*the Commissioner*" and the respondent as "*Coillte*".

2. The questions raised in the Case Stated are set out in Appendix 1 to this judgment, and they concern the valuation for rating purposes of Coillte's Sliabh Bawn wind farm ("*the wind farm*"). Questions (3) and (4) were reframed by Simons J., and as reframed are set out in Appendix 2. Not all of the questions need to be answered in this appeal – this applies to questions (1), (7) and (8); but those that remain in dispute – questions (2) to (6) – arise from the circumstance that the wind farm only came into being after the valuation date designated in the Valuation Order that directed the revaluation of properties in the Roscommon County Council Rating Authority area.

3. Simons J. held with Coillte in answering reframed questions (3) and (4) by finding that the Tribunal erred in law in excluding empirical data in respect of the energy output of the wind farm in estimating the net annual value ("*NAV*") of the windfarm, and he ordered that the matter be remitted to the Tribunal.

4. In essence the questions in dispute raise two discrete issues that fall to be decided on this appeal, but there is also a preliminary issue that exercised the trial judge, and upon which he expressed an opinion, which I will also address.

5. The first issue that arises relates to the evidence that is admissible and should be considered when considering the "*actual state*" of the wind farm when using the Receipts and Expenditure method ("*R&E method*") to establish the NAV. In particular a question arises as to whether the Tribunal erred in determining the energy output of the wind farm on the basis of estimates of output from 2015 predating the construction of the wind farm, and in excluding from its consideration such empirical data in respect of energy output as had become available at the date of issuance of the Valuation Certificate on 7 September 2017.

The trial judge considered that the Tribunal erred in excluding the empirical data, and this was the essential basis upon which he set aside the Tribunal determination and remitted the matter to the Tribunal to reconsider the valuation.

6. The second issue concerns whether the Tribunal erred in law in determining that the hypothetical tenant would make his rental bid for the wind farm on the basis of P90 (i.e. the estimated annual energy output that would probably be exceeded 90% of the time) rather than P75 or P50. The trial judge did not consider it necessary to decide this, given his findings on the first issue, but in my view it does still arise: it is the subject of question (2), and is not necessarily answered by the trial judge's findings on question (1), and both parties made submissions on the issue.

7. Of his own motion in the High Court Simons J. raised a further question – which I will call *the preliminary issue* – as to whether the lands upon which the wind farm was subsequently constructed constituted "*relevant property*" for the purposes of a valuation under Part 5 of the Valuation Act, 2001 (as amended) ("*the 2001 Act*") – a *revaluation* – (and, if so, by reference to what date or dates the property fell to be valued), or whether the wind farm should more properly have been the subject of the *revision* under the procedure. The resolution of this question required interpretation of a number of provisions of the 2001 Act, including s. 20 under which a valuation date is designated in a Valuation Order (when, in this instance, the wind farm did not exist) and s. 48(3) which requires the assessment of the net annual value (NAV) of the property to be made in its "*actual state*". It required a broader consideration of the legislative scheme of *revaluation* under the 2001 Act, and an understanding of the distinction between a *revaluation* and a *revision* of rateable values.

8. At the invitation of Simons J. the parties made further written and oral submissions on the preliminary issue, and he addresses it at some length in his judgment, and expresses as his opinion that:-

> *"It is at least arguable that [rateable properties which only come into existence subsequent to the valuation date] fall to be dealt with by way of the revision procedure under Part 6 of the Valuation Act 2001, rather than by reading the concept of a second valuation date into the legislation."*

9. As I say, the preliminary issue was raised by the trial judge of his own motion. It was not the subject of any question raised in the Case Stated, and in fact both sides submitted that it did not arise, and that the Commissioner was entitled to add the windfarm to the Valuation List during the revaluation process, and to estimate its NAV. However, the issue has far-reaching consequences as it goes to the jurisdiction of the Commissioner to add any property constructed or used for the first time after the Valuation Date, such as the wind farm, to the Valuation List as a *relevant property*; it follows that it affects the jurisdiction of the Commissioner to value such a property in the course of a revaluation, the right of Coillte to bring an appeal before the Tribunal, and the jurisdiction of that Tribunal to state a case for the opinion of the High Court. As the trial judge himself suggests, the issue may be said to transcend the circumstances of the particular proceedings. In so far as the trial judge's opinion creates uncertainty on this issue, it is appropriate that this court address it and give its opinion, albeit entirely *obiter*, with a view to bringing some clarity, at least until a case is brought forward that raises the issue directly for a binding determination, or amending legislation brings greater certainty. I also do so in deference to the comprehensive legal submissions on this point made particularly by counsel for the Commissioner, but also supported by counsel for Coillte.

On the interpretation of the 2001 Act reached on the preliminary issue in this judgment I and the other members of the court who concur with this judgment respectfully disagree with the opinion expressed by the trial judge.

10. I will in this judgment (a) set out the legislative framework and key provisions of the 2001 Act; (b) set out relevant background; (c) set out relevant Tribunal findings of fact and determinations (d) consider and discuss the preliminary issue; (e) address the first substantive issue; (f) address the second substantive issue in turn; (f) set out this court's answers to the questions in the Case Stated.

The Legislative Framework

11. The legislative framework is set out in the Valuation Act, 2001 as amended by Valuation (Amendment) Act, 2015.

12. Under s. 3 "*Relevant Property*" falls to be construed in accordance with Schedule 3 of the 2001 Act, and paragraph 1(m) in that Schedule includes "*electricity generating stations, including where appropriate - ... (vii) wind generators, turbines and generators, together with ancillary plant and electrical equipment, including transformers*".

There is no dispute here that the wind farm as constructed is "*relevant property*" and hence rateable. However, before it was constructed it was not rateable property, because Schedule 4 in the 2001 Act contains "*Relevant Property Not Rateable*", and includes at paragraph 1 "*agricultural land*".

13. Also within the definition of s. 3 of the 2001 Act there is the following:-

> *"'Material change of circumstances' means a change of circumstances that consists of -*

(a) the coming into being of a newly erected or newly constructed relevant property or of a relevant property".

14. Part 5 of the 2001 Act governs valuation of relevant property pursuant to Valuation Order made by the Commissioner specifying the valuation of all relevant properties within a rating authority area. As this must occur in each rating area every 5 to 10 years, it is convenient to refer to this process as a *revaluation.* Section 19 is the section most relevant to this appeal, and establishes the statutory basis for the Commissioner making a Valuation Order and the manner in which the new Valuation List is to be drawn up:-

"19–(1) The Commissioner, after consultation with the Minister for the Environment, Community and Local Government and the rating authority concerned, may make an order (in this Act referred to as a 'valuation order') specifying a rating authority area as being an area in relation to which the Commissioner proposes to appoint a person under subsection (2) to organise and secure the carrying out of a valuation of relevant property situate in that area (other than any property specified in paragraph (a) or (b) of that subsection).

(1A) A valuation order may specify that the valuation of a rating authority area, or a portion thereof, shall be carried out in accordance with regulations made under section 26B.

(2) As soon as may be after the making of a valuation order, the Commissioner shall appoint a person to organise and secure the carrying out of a valuation of every relevant property on the Valuation List situate in the rating authority area specified in the order and any relevant property entered on that list between the making of the valuation order and the publication of the list, other than—

(a) any relevant property the subject of an order under section 53, or

(b) any relevant property specified in Schedule 4.

(3) The person so appointed is referred to in this Act as a "valuation manager".

(4) For the purposes of subsection (2) a valuation manager shall, in accordance with subsection (5), arrange for -

(a) the carrying out of a valuation of each property concerned by one or more officers of the Commissioner (who may include that valuation manager), and

(b) the drawing up and compilation of a Valuation List for the rating authority area concerned.

(5) <u>The Valuation List as referred to in this section shall be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue of the valuation certificates concerned, and shall achieve both (insofar as is reasonably practicable</u>) –

(a) correctness of value; and

(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.

(6) ...[not relevant].

(7)…[not relevant].”

[Emphasis added]

15. I have emphasised wording in s. 19(2) because this clearly contemplates the addition of “*relevant property*” to the “*valuation list*” between the date of making of the Valuation Order and the publication of the list, which is governed by s. 21 and may occur some years after the making of the Valuation Order.

16. Secondly, I have emphasised wording in s. 19(5) as this is critical to the first issue on this appeal. The first limb of this requires the Valuation List to be drawn up and compiled by reference to relevant market data; the second limb adds to this data “*and other relevant data available on or before the date of issue of the Valuation certificates concerned*”. The trial judge found this second limb required the Valuation Tribunal to consider empirical data as to energy output of the wind farm that was available for a six month period prior to the date of issue of the valuation certificate concerned, and for reasons given later in this judgment I agree with his conclusions.

17. Section 20 reads:-

“20.—(1) A valuation order shall specify one date by reference to which the value of every relevant property, the subject of the valuation mentioned in the order, shall be determined.

(2) The date so specified shall not be later than the date of the making of the valuation order.”

This designation of one date for valuation presented the dilemma that exercised the trial judge, and raised the question of how the wind farm could be valued under a *revaluation* based on a date when it had not been constructed.

18. Section 21 provides for a publication date for a valuation list, and so far as relevant states:-

> *"21.— (1) A valuation order shall specify—*
>
> > *(a) a date (in this Act referred to as the 'publication date') on which the Commissioner proposes to cause to be published under section 23 a list comprising every relevant property that has been the subject of the valuation mentioned in the order, and the value of that property as determined by that valuation, and*
> >
> > *(b) a date (in this Act referred to as the 'effective date') on which that list becomes effective for rates purposes.*
>
> *(2) Such a list shall be known, and is in this Act referred to, as a "valuation list".*
>
> *(3) The publication date so specified shall not be later than 3 years after the date of the making of the valuation order."*

Subsections (4) and (5) allow for amendment of the publication date and revocation of a Valuation Order, but are not relevant to this appeal.

19. Under s. 23 on the relevant publication date the Commissioner publishes the new Valuation List, consequent upon the revaluation, whereupon it replaces the existing Valuation List and has full force for the purposes of that rating authority making rates on

properties situate in its area. Section 24 then provides for the issue of Valuation certificates consequent on the valuation having been carried out, and states, so far as relevant:-

> *"24.—(1) On a date that is no later than 7 days before the date the Commissioner causes to be published under section 23 a Valuation list, the valuation manager who secured the carrying out of the valuation concerned under section 19 shall cause to be issued to each occupier of every relevant property to which that valuation relates a certificate stating the value of that property as determined in accordance with that valuation.*
>
> *(2) Such a certificate is referred to in this Act as a 'valuation certificate'."*

20. Section 25 imposes a duty on the Commissioner to make Valuation Orders under s. 19 in respect of each rating authority area so that "*a period of not less than 5 years and not more than 10 years elapses between the date on which any Valuation List … is … published*". It was clearly the intent of the legislature that there should be regular revaluations in each rating area in order to ensure that all relevant properties were rated, and the NAVs were updated periodically, presumably to take into account any changes in the relevant properties and also economic circumstances including inflation.

21. Part 6, headed "*Revision of Valuations*", relates to the revision of valuations of one or more properties, as opposed to a revaluation of all properties within a rating area under a Part 5 Valuation Order. Section 27(1) provides:-

> *"27.—(1) An occupier of a property may apply in writing to the Commissioner for the appointment by the Commissioner of a person under section 28(3) to exercise the powers under that section in relation to that property."*

Section 27(2) allows a rating authority to make a similar application to the Commissioner in relation to one or more properties in that rating area. Subsection (3) allows a similar application to be made by a person "*as respects a property in relation to which he or she is an interest holder*". And under subsection (4) "*an occupier of a property that appears on a Valuation List ...*" may make a similar application.

22. Subsection 28(3) and (4) are then relevant:-

> *"(3) If an application under section 27 is made to the Commissioner, the Commissioner shall appoint an officer of the Commissioner to exercise, in relation to the property or properties to which the application relates, the powers expressed by this section to be exercisable by a revision manager, and such manager who is so appointed is also referred to in this Act as a 'revision manager'.*
>
> *(4) A revision manager, if he or she considers that <u>a material change of circumstances which has occurred since a valuation under section 19 was last carried out in relation to the rating authority area in which the property concerned is situate or</u>, as the case may be, since the last previous exercise (if any) of the powers under this subsection, or of comparable powers under the repealed enactments, in relation to the property warrants the doing of such, may, in respect of that property—*
>
> *(a) if that property appears on the Valuation List relating to that area, do whichever of the following is or are appropriate—*
>
> *(i) amend the valuation of that property as it appears on the list,*
>
> *(ii) exclude that property from the list on the ground that the property is no longer relevant property, that the property no longer exists or that the property falls within Schedule 4,*

(iii) amend any other material particular in relation to that property as it appears on the list,

(b) if that property does not appear on the said Valuation List and it is relevant property (other than relevant property falling within Schedule 4 or to which an order under section 53 relates), do both of the following—

(i) carry out a valuation of that property, and

(ii) include that property on the list together with its value as determined on foot of that valuation."

[Emphasis added]

In section (3) of the 2001 Act "*material change of circumstances*" has a particular definition, and in so far as relevant this is set out below:-

"'Material change of circumstances' means a change of circumstances that consists of –

(a) the coming into being of a newly erected or newly constructed relevant property or of a relevant property, or

(b) ...

(c) the happening of any event whereby any property or part of any property begins, or ceases, to be treated as a relevant property, or

(d) the happening of any event whereby any relevant property begins, or ceases, to be treated as property falling within Schedule 4, or ..."

23. Part 10 of the 2001 Act sets out certain powers of officers of the Commissioner, and places certain obligations on occupiers of property. Section 46 puts an obligation on the occupier to supply certain information – "*specified particulars*" – to the Commissioner following the making of a Valuation Order, and subsections (2) and (3) are relevant:-

> *"(2) Within 28 days from the date on which a valuation order is made in relation to a rating authority area, the occupier of each relevant property … which is situated in that area on that date shall provide in writing to the Commissioner the specified particulars with respect to that property.*
>
> *(3) The occupier of—*
>
> > *(a) a relevant property which comes into existence after the date on which a valuation order is made in relation to the rating authority area in which the property is situated,*
> >
> > *(b) a relevant property which was not relevant property on the date on which such an order is made in relation to the rating authority area in which the property is situated, or*
> >
> > *(c) a relevant property, on the coming into occupation of that property for the first time or on the entering into a new tenancy agreement in respect of that property,*
>
> *… shall, within 28 days from the date on which the property has come into existence, become relevant property, or come into occupation or a new tenancy agreement has been entered in respect of it, as the case may be, provide in writing to the Commissioner the specified particulars with respect to that property."*

Emphasis is added to wording which I find supports my reasons for opining that the wind farm was properly added to the Valuation List rather than being valued under a *revision.*

24. Part 11 of the 2001 Act is headed *"Basis of Valuation"*, and s. 48 restates the former "*rating construct*":-

> *"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 relates to *revisions* under Part 6, and s. 49(1) provides:-

> *"49.—(1) If the value of a relevant property (in subsection (2) referred to as the "first-mentioned property") falls to be determined for the purpose of section 28(4), (or of an appeal from a decision under that section) that determination shall be made by reference to the values, as appearing on the Valuation List relating to the same rating authority area as that property is situate in, of other properties comparable to that property."*

<u>Relevant Background</u>

25. The Valuation Order for the purposes of s. 19 of the 2001 Act for the revaluation of the Roscommon County Council Rating Authority area was signed on 26 January 2016. The Valuation Date specified in that Order was 30 October 2015. The wind farm had not been constructed on either of these dates. The wind farm was constructed thereafter and was commissioned and commenced operation in March 2017, some 16 months after the Valuation Date.

26. Other relevant dates:-

- The wind farm was added to the Valuation List in June 2017.
- The date of issuance of the Certificate of Valuation pursuant to s. 24 of the 2001 Act was 7 September 2017.
- The Publication Date in respect of the Valuation List pursuant to s. 21 of the 2001 Act was 15 September 2017.
- The effective date for the new valuation of the wind farm was 31 October 2017.
- Empirical energy output data for the wind farm became available for the period March 2017 to September 2017.

27. A proposed Valuation Certificate was issued indicating a valuation of €4,875,000. Representations were made on behalf of Coillte to the Commissioner seeking a reduction in the valuation, but the valuation manager did not consider it appropriate to change the proposed NAV. The final Valuation Certificate issued on 7 September 2017 stating a valuation of €4,875,000.

28. By Notice of Appeal dated 12 October 2017 Coillte appealed to the Tribunal pursuant to s. 34 of the 2001 Act against the said determination on the grounds that it was excessive and not in accordance with s. 48 of the 2001 Act. Whilst both Coillte and the Commissioner agreed that the R&E method should be applied to establishing the NAV, Coillte in its Notice of Appeal and through its valuer, Donal O Buachalla ("*Coillte's valuer*"), contended that due consideration had not been given to certain issues including the following (as recited in the Case Stated):-

- *"The variability of future revenue streams anticipated by the hypothetical tenant*
- *The limited pool of hypothetical tenants with the expertise required to operate the property*
- *The volatility of wind as a source of generation*
- *The wasting nature of the underlying property and anticipated future physical, functional and technological obsolescence*
- *The obligation of the tenant to ensure the property is maintained in such state as to command the rent for the hypothetical term, and*
- *The risk factors affecting the wind industry including but not exclusively changes the TUoS charges, compliance costs, community funds costs, REFIT Scheme and issues of curtailment."*

The appellant contended that the NAV should be reduced to €3,300,000.

29. It should be noted that at no point did Coillte's valuer, or its legal representatives (and it was represented by senior counsel at the Tribunal hearing) contend that the wind farm was

not "*relevant property*", or that the Commissioner was not entitled to add it to the Valuation List, notwithstanding that it had not been constructed or commissioned either at the Valuation Date, or the date of the Valuation Order. Moreover the Tribunal itself did not raise any issue as to its jurisdiction to entertain the appeal.

30. As the parties' valuers agreed on several matters, and in particular the use of the R&E method of valuation as being the appropriate means to establish the NAV, only three issues fell for determination by the Tribunal. The first issue was whether the Commissioner had overstated the estimated wind capacity factor at the Valuation Date, and that issue is core to this appeal.

31. The second issue concerned the period of the sinking fund for depreciation of the wind farm assets. Coillte argued for a 15 year period being the duration of the Renewable Energy Feed-In Tariff (hereafter "*REFIT*") Scheme, whereas the Commissioner contended for a 5 year period beyond that 15 years, on the basis that the design life of the wind turbines was 20 years but the REFIT period should be ignored. Although question (8) in the Case Stated concerns this it was agreed by the parties that the High Court could defer deciding this pending the outcome of an appeal to this court in *Commissioner of Valuation v. Hibernian Wind Power Ltd* [2021] IEHC 49 where the same issue was raised. This court's decision in that appeal was delivered on 22 May 2023 (reported at [2023] IECA 121; judgment of Collins J., Whelan and Haughton JJ. concurring) and on the facts of that case this court approved the Tribunal finding that "*the annual sinking fund payments would be established over a period of 15 years whilst revenue is guaranteed under the Refit Scheme…rather than the life of the asset (20 years) in light of the Valuation Act 2001 as amended and in particular s.48 and the hypothetical tenancy envisaged thereby.*"

32. The third issue concerned the tenant's share of the *divisible balance* under the rating construct. The Tribunal determined that this should be apportioned as to the tenant's share 35% and landlord's 65%, and in this regard was not persuaded by Coillte to depart from precedents in two wind farm appeals that it had determined. No question on this is raised in the Case Stated.

Tribunal Relevant Findings of Fact

33. Before referring to certain findings of fact made by the Tribunal it is necessary to give an explanation of the terms "*P90, P75 & P50*". This is given at paragraph 10.7 of the Valuation Tribunal decision, and was not in dispute:-

> *"A developer or an investor in a wind farm project will never be sure exactly how much energy output will be produced at a particular location which is presumably the reason why experts are retained and methods and tools such as the DNV-GL WindFarmer software are devised to calculate potential energy production. In the planning and financing stage of a wind farm project a risk assessment is normally undertaken to quantify the risks related to a project's financial viability. A risk assessment includes the quantification of specific uncertainties and provides a range of exceedance probabilities of the wind farm's annual energy production. A value of P90 or P75 or P50 describe an annual value of energy production from the intermittent resource with a probability of 90% or 75% or 50%, respectively. P90 is the annual energy production which is reached with a probability of 90%. The risk that an annual energy production of P90 is not reached is 10%. For P50, there is a 50% chance that the annual energy production will be reached (or not reached) at any given time. Evidence was given that banks usually require a P90 value of the wind resource at a location when assessing the risk associated with a project's ability*

to service its debt obligations and other operating costs. The use of a P50 value to assess the performance and return of the project carries greater risk as the results will have 50% chance to be above or below the average. Investors need greater certainty."

34. Relevant Tribunal findings of fact are conveniently set out in the Case Stated at paragraph19:-

"The following facts were found by the Tribunal:

(A) Sliabh Bawn Wind Farm is a large-scale wind farm comprising a substation and 20 Siemens turbines each having a capacity of 3.2 MW and a 79.5 metre hub height. The total installed generating capacity of the property is 64 MW but it has a MEC of 58 MW. It was commissioned in March 2017, some 16 months after the valuation date.

(B) The Property is situated in County Roscommon in Doughill Forest on Sliabh Bawn Mountain. The nearest town is Strokestown which lies 5 km north west of the property and Roscommon town lies 12 km to the northeast. The Property is located within complex terrain in an area of commercial forestry of approximately 833 hectares the elevations of which range from approximately 70 metres to 250 metres above sea level.

(C) In February 2010 Coillte instructed Garrad Hassan Ireland Limited ("DNV-GL") to carry out an analysis of the wind climate at the Sliabh Bawn location for the purpose of predicting the long-term energy output of a proposed wind farm. Coillte supplied DNV-GL with data recorded from a single 82.8 metres high meteorological mast at the Sliabh Bawn Site between February 2010 and 2014.

…

(F) In 2015, the REFIT 2 reference price for a large-scale wind was €69.72 and the fixed balancing payment was €9.90, giving a total guaranteed REFIT 2 price of €79.62. If the property had been commissioned in 2015, its PPA price on the 30th of October 2015 would have been €74.90.

(G) The 2015 Report prepared by DNV-GL predicts a 10-year average capacity figure of 38.78% (TIGC 64MW) on a P50 basis and a 10-year average capacity figure of 34.1% (TIGC 64MW) on a P90 basis.

(H) On the 27th of April 2017, the Valuation Office served a Notice pursuant to section 45(1) (as amended by section 24 of the Valuation (Amendment) Act 2015) of the Valuation Act 2001 which requested Coillte to furnish, inter alia, "accounts and trading information for the most recent 3 years for which figures are available" by the 25th of May 2017. The Appellant did not have any cost or trading information at that time as the property had been commissioned in March 2017. The Tribunal was satisfied that all of the information requested by that section 45 Notice insofar as it was available was furnished by Coillte. Coillte could not provide accounts and trading information that it did not yet have.

(I) Coillte's Asset Manager contacted the Valuation Office by email dated the 10th of May 2017 by way of an initial response to the section 45 Notice providing details of the number and type of turbines at the property as well as the TIGC and MEC of the property. In that email the Asset Manager stated "Predicted annual capacity factor (P50 basis) 38.92%". He also informed the Valuation Office that audited accounts and management accounts were unavailable. Coillte's accounts

and trading information for 2017 and 2018 were furnished by Coillte's Valuer to the Commissioner's Valuer in advance of the appeal hearing."

35. Accordingly, before the Tribunal Coillte's valuer adopted annual energy generation /output figures based on the actual output of the wind farm for the period March 2017 to 31 December 2018, which informed Coillte's accounts for the wind farm, and showed actual monthly income consistently less than that budgeted and anticipated based on the 2015 DNV-GL Report. These accounts also show that energy output for the months March to September 2017 i.e., up to the date of issue of the Valuation Certificate on 7 September 2017, the actual energy output was consistently less than that projected (or "*budgeted*"*)*, as the following table demonstrates:-

Generation From Sliabh Bán Wind Farm in Mega watts **March - September 2017**		
Month	**Actual**	**Budgeted**
March	16,969	--
April	10,049	15,653
May	11,575	16,370
June	12,039	13,313
July	10,907	12,773
August	11,506	14,079

September	13,122	17,136

36. In relying on the actual energy output Coillte's valuer relied upon paragraph 5.11 of "*The R & E Method of Valuation for Non-Domestic Rating - A Guidance Note of the Institute of Revenue's Rating and Valuation*" to support the use of "*hindsight*" because the wind farm was a new venture and the output achieved by the property in its first 22 months of production was known. He contended that it would be unfair to value the property by disregarding known and verifiable facts. Paragraph 5.11 states:-

> *"In the case of new ventures where previous years' accounts do not exist information of assistance may be found in:*
>
> *(a) any business plan prepared for the new occupier (although the possibility of over-optimism should be taken into account);*
>
> *(b) the accounts of similar ventures.*
>
> *It may be feasible to value such properties by comparison with similar properties by using estimated receipts and expenditure based upon the account of similar properties. The use of hindsight, i.e. consideration of accounts for years following the AVD may be used as a means of confirming trends discernible at the AVD."*

37. Coillte's valuer therefore contended that the Commissioner had significantly overestimated the annual output generated at the wind farm based on the 2015 DNV-GL Report, by adopting an exceptionally high estimated capacity factor of 39.92% as representing the expected long-term mean (at the P50 exceedance level) for two reasons. The first was that the 2015 DNV-GL Report highlights many uncertainties, and the second

was the adoption of a P50 figure potentially gives an overly optimistic estimate. Coillte's valuer was of the view that the hypothetical tenant estimating the likely average annual output in order to predict asset performance was more likely to take a conservative approach by utilising the P90 parameter which he emphasised is the energy production parameter used when a wind farm operator seeks wind farm finance.

38. The Case Stated records that the Commissioner's valuer did not consider Coillte's 2017 and 2018 trading accounts for the 22 month period commencing March 2017 to be relevant to trading conditions at or before the valuation date (30 October 2015). In relation to the use of hindsight, he contended that due to the non-availability of trading data before the valuation date the post-valuation date accounts simply could not provide a means by which to confirm trends at the valuation date. He in fact contended for a higher valuation of €6,530,000 as representing the NAV assessed in accordance with s. 48(3) and the requirements of s. 19(5) of the 2001 Act. He used an average annual output figure of 218,351 MWh per annum based on a capacity factor of 38.92%. He did not consider a P90 value to be appropriate for estimating annual production of a wind farm. The P50 was more appropriate in his view because it is at the centre of the bell curve and has the highest probability of occurrence, and in his view a hypothetical landlord would not accept a rental bid from a tenant based on a ten-year average net energy production predicted on a P90 basis because over a ten-year period, the capacity factor would exceed the P90 figure in nine of those ten years, whereas taking the P50 value over ten years, the capacity factor would be exceeded in five years and not be exceeded in the other five years.

<u>The Tribunal's Determination</u>

39. The Tribunal addressed the energy output evidence, the UK Guidance Note on the R&E method, and in particular the use of hindsight, in the following passages:-

"10.6.1 The R&E method involves using the actual occupier's profits as shown in its accounts as evidence of what the hypothetical tenant would expect to earn and expend in the year commencing on the valuation date to enable a judgment to be made as to the proportion of the profits which the hypothetical landlord and tenant would agree upon as rent. As a general rule an R&E should be based upon trading accounts prior to the valuation date.

10.6.2 In valuing the Property, it must also be borne in mind that any assumption about its capacity factor must not be based on what [Coillte] has achieved or expects to achieve or does achieve after the valuation date. It has to be based on what a reasonable hypothetical tenant would expect to achieve at the valuation date. This involves an exercise of judgment.

10.6.3 While it is appropriate for valuers in estimating the NAV of properties by the R&E method of valuation to have regard to the Guidance Note, too rigid or mechanistic an adherence to the Guidance Note regardless of circumstances is to be avoided. Valuers are expected to use their professional judgment and should not be over-reliant on the Guidance Note as it cannot be expected to cover the precise conditions and circumstances applying to every property. The appeal Property is a case in point. The Guidance Note is the starting point, but a full assessment of the circumstances must also be carried out and taken into account.

10.6.4 The Guidance Note acknowledges the use of hindsight. The final sentence of paragraph 5.11 therefore states:

> *'The use of hindsight i.e. the consideration of accounts for years following the valuation date, may be used as a means of confirming trends discernible at the AVD'.*

In the Tribunal's view it is somewhat unfortunate that this sentence is incorporated in a paragraph that largely deals with the valuation of new ventures where previous accounts do not exist to demonstrate a prior trend. The question of admissibility of evidence such as accounts relating to 'events' after the valuation date is an issue that can arise in respect of all properties whether or not they are new ventures. Furthermore, the use of hindsight is less likely to arise in respect of new ventures which have no accounts than properties with a trading history and previous years accounts from which trends may or may not be discerned.

10.6.5 The use of hindsight is not limited only to confirming trends in existence at the valuation date but may also be used to show the working of a factor in the mind of a hypothetical tenant at the valuation date. Such use is referred to in Ryde on Rating at Section E [para. 672] where it is stated:

> *'A proposal to alter the valuation list may give rise to protracted proceedings on appeal, and may be years after the material date for a valuation on tone of the list, and the question arises whether accounts becoming available after the material date but before the hearing can be taken into account. The practice for many years was to base the valuation on the last accounts available, but to admit in evidence both before assessment committees and quarter sessions the latest available accounts. Where these accounts merely illustrated the working of factors in existence at the material date, the practice could be supported; but it could not extend to the admission of accounts showing the working of a factor which would not have been in the mind of any reasonable hypothetical tenant at the date of the proposal, or, it is submitted, the date for valuations on tone of the list. It would appear,*

> *however, proper to reflect at some point in the valuation factors which either came into existence after the closing of the last account and before the material date or were only partially effective in that account.'*

> *10.6.6 Post-valuation date facts and events are not automatically irrelevant, but caution must be exercised in attaching any weight to information which would not have been available to a hypothetical tenant at the valuation date. The Tribunal considers that data from accounts after the valuation date should not be admitted into evidence as a matter of course. Post valuation accounts are admissible as evidence of value in order to prove or disprove a trend or the financial effect of an expectation at the valuation date and then only where the trend or the expectation has been established by evidence to exist at the valuation date."*

It is notable that the Tribunal does not, in these passages or elsewhere in its decision, undertake any analysis of what might be admitted as evidence by reference to s. 19(5) of the 2001 Act.

40. The Tribunal did not consider it legitimate for Coillte to invoke the hindsight principle to rely upon the actual figures in Coillte's 2017 and 2018 trading accounts given that neither of the two recognised circumstances which would warrant the use of hindsight in rating law arose on the facts of the appeal i.e. (1) there was no trend discernible at the Valuation Date to be proved or disproved, and (2) there was no event or expectation in the mind of the hypothetical tenant at the Valuation Date that materialised after the Valuation Date, and because the Tribunal was concerned with estimating the rent at which the property might reasonably have been expected to have let on 30 October 2015 (the Valuation Date), upon information available at that date.

41. However the Tribunal did not entirely ignore Coillte's 2017 and 2018 trading accounts. It determined that while the outcome of the issues before it could not turn on the actual figures before it in those trading accounts, the figures could be considered on a "*stand back and look*" basis and provided "*a helpful reality check and a degree of support for*" the Tribunal's valuation when determining that the P90 figure for the risk attendant on energy output was to be preferred. It reasoned, in paragraph10.12:-

> *"…In the Tribunal's view, the hypothetical tenant in formulating a rental bid for a property dependent on a naturally fluctuating power resource would not make his rental bid on the basis that he might only achieve the estimated output figure 50% of the time. The assessment of the output of a wind farm with no track record because it commences operations at the valuation date is a different risk from the normal every day risks that a tenant will face running a wind farm business that are taken into account when estimating the tenant's share of the divisible balance. In the opinion of the Tribunal this different risk is appropriately mitigated by the adoption of the P90 figure from the 2015 Report. Whilst the outcome of the issue before the Tribunal cannot turn on the actual figures in the 2017 and 2018 trading accounts, consideration of those figures on a 'stand back and look' basis do provide a helpful reality check and a degree of support for the Tribunal's conclusion. Accordingly, the Tribunal determines that the output figure to be adopted for the valuation of the Property is 191,400 MWh*".

42. The Tribunal therefore accepted Coillte's argument that the hypothetical tenant estimating the likely average annual output to predict asset performance was more likely to take a conservative approach by utilising the P90 parameter than the P50 figure which was contended for by the Commissioner.

The Preliminary Issue

43. This arose from the fact that the wind farm was not in existence at the Valuation Date of 30 October 2015. The trial judge was concerned with reconciling s. 20(1) of the 2001 Act, which requires the Valuation Order to specify one date "*by reference to which the value of every relevant property, the subject of the valuation mentioned in the order, shall be determined*", with s. 48(3) which requires that the NAV in relation to a property be estimated "*in its actual state*". This raised the question whether, on its proper interpretation, the 2001 Act required that the "*actual state*" of the property be assessed by reference to the Valuation Date (30 October 2015, when the wind farm did not exist), and not any later date such as the date of issuance of the Certificate of Valuation (7 September 2017) or publication of the Valuation List (15 September 2017). On one interpretation, the lands on which the wind farm was subsequently constructed could not be valued as a wind farm, and might not have constituted rateable "*relevant property*" as of the Valuation Date.[1]

44. In his judgment on this issue the trial judge notes that the 2001 Act is a taxation statute, and that the provisions of s. 5 of the Interpretation Act, 2005, which allows for a purposive approach to legislation which is obscure or ambiguous, does not apply to a taxation statute. He properly recites the recent authority of the Supreme Court in *Bookfinders Limited v. Revenue Commissioners* [2020] IESC 60, where the court said at paragraph 52:-

> *"It is not, and never has been, correct to approach a statute as if the words were written on glass, without any context or background, and on the basis that, if on a superficial reading more than one meaning could be wrenched from those words, it must be determined to be ambiguous, and the more beneficial interpretation afforded*

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[1] For example, if the property was agricultural land at the Valuation Date, it would have been exempt from rates.

to the taxpayer, however unlikely and implausible. The rule of strict construction is best described as a rule against doubtful penalisation. If, after the application of the general principles of statutory interpretation, it is not possible to say clearly that the Act applies to a particular situation, and if a narrower interpretation is possible, then effect must be given to that interpretation. As was observed in [Inspector of Taxes v. Kiernan [1982] I.L.R.M. 13], the words should then be construed 'strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language'."

45. At paragraph 10 of his judgment, Simons J. observes:-

> *"10. These principles are relevant having regard to a number of arguments advanced on behalf of the Commissioner of Valuation. On one view at least, the Commissioner's case is predicated on reading into the legislation concepts which are not expressly provided for under the Valuation Act 2001. In particular, the notion that there are two different dates by reference to which the valuation exercise is to be carried out is not one expressly provided for under the legislation. To elaborate: the Act does not expressly provide that the "actual state" of a property is to be assessed by reference to the publication date, rather than the valuation date specified for the purposes of Section 20 of the Act. The Commissioner's approach might be said to necessitate giving an impermissibly broad interpretation to the legislation so as to apply the revaluation procedure to a situation whereby a newly constructed property has only come into existence after the valuation date. The more natural interpretation of the legislation is to say that such properties fall to be dealt with subsequently, by way of a revision to the Valuation List under Part 6 of the Valuation Act 2001. See, further, paragraphs 42 to 47 below."*

46. In paragraph 11 Simons J. emphasised that the starting point for resolution of the dispute must be consideration of the 2001 Act, and he deprecated "*a tendency amongst parties and practitioners to bypass the actual statutory language of the Valuation Act 2001, and to rely, instead, on statements of principle set out in guidance notes, textbooks or case law from England and Wales*" which was an approach he considered carried the risk that statements of principle would be read out of their statutory context and improperly applied to differently structured legislation in this jurisdiction. He noted the caution in this respect sounded by the Court of Appeal of England and Wales in *Williams v. Scottish and Newcastle Retail Limited* [2001] EWCA Civ 185, at paragraphs 54 - 56, including the following passage:-

> *"However respect for 'intellectual freight' from earlier centuries must not be carried too far. In particular, it is not helpful to fasten on isolated pronouncements by judges, however eminent, without regard to the context in which they were made and to seek to apply them to an issue which was not before the court. That is especially true of the Victorian cases about railways, docks and waterworks. [...]".*

47. Simons J. then gives his overview of the 2001 Act in relation to the revaluation exercise carried out in each rating authority area over five to ten years after the publication of the previous Valuation List. As he notes this commences with the making of the Valuation Order, following which the Commissioner appoints a valuation manager who draws up and compiles a new Valuation List for the rating authority area. The "*Valuation List*" is defined in s. 21 as "*a list comprising every relevant property that has been the subject of the valuation mentioned in the order*" and the value of that property as determined by that valuation. The Valuation Order specifies the date by which it is proposed to publish the new Valuation List, and the subsequent date upon which the Valuation List will become effective.

Simons J. then refers to s. 20 of the 2001 Act which specifies "*one date*" by reference to which the value of every relevant property the subject of the valuation mentioned in the order "*shall be determined*" ("*the valuation date*"). That date is not later than the making of the Valuation Order, and there will always be a time lag between the valuation date and the subsequent publication of the Valuation List – in the present case, a time lag of some 22 months.

48. The trial judge then quotes s. 48(3) of the 2001 Act, and states:-

> *"19. As appears, the "net annual value" entails an estimate of the rent which might reasonably be expected to be achieved on a hypothetical letting of the property. The basic terms of the hypothetical letting are prescribed: it is a periodic yearly tenancy with the tenant responsible for repairs, insurance, expenses, rates and other taxes. The hypothetical letting is assumed to commence on the valuation date specified in the Valuation Order.*
>
> *20. The property is assumed to be let in its "actual state". The phrase "actual state" connotes all the existing factors that go to make up the premises as they are currently occupied and used or all that would affect the rent that would be paid by a hypothetical tenant (Harper Stores Ltd v. Commissioner of Valuation [1968] I.R. 166 at 172). This includes all the advantages and disadvantages, legal and otherwise, attaching to the premises which would affect the mind of the hypothetical tenant from year to year in deciding what rent he or she would pay (ibid.). If the property is a house in a slum area, it may not be valued as if it were standing in a fashionable road; if it is a shop, it may not be valued as a factory; if it is a garage, it may not be valued as a cinema (ibid.)."*

49. The trial judge then identifies two factors in the NAV that will vary depending on the precise date by reference to which the rateable value is determined – the first being the rent, which may rise and fall between the valuation date and the publication date, and secondly the "*actual state*" of the property which may change over time. Simons J. then proceeds:-

> *"23. The method for determining value prescribed under Section 48 thus necessitates that a reference date be identified against which the condition of the prevailing rental market and the actual state of the property can be assessed. The combined effect of Section 20 and Section 48 would appear to be that these two factors are to be determined by reference to the valuation date specified in the Valuation Order. The statutory language could scarcely be clearer: a Valuation Order shall specify "one date" by reference to which the value of every relevant property "shall be determined". The use of the same phrase, "value ... shall be determined", in Section 48 forges a link between the two sections.*
>
> *24. In the present case, the Valuation Tribunal proceeded on an entirely different basis. The Valuation Tribunal held that, for the purpose of estimating its value, the property is "taken as it actually exists (i.e. in its physical state) at the date when the Valuation List is published".*
>
> *25. This approach involves the use of two different dates for valuation purposes, namely (i) the valuation date actually specified under the Valuation Order (30 October 2015), and (ii) the date of the publication of the Valuation List (15 September 2017). The "actual state" of the property is, supposedly, to be assessed by reference to this second date.*
>
> *26. The rationale for adopting this approach is not explained in the Valuation Tribunal's determination. It is possible—although this is not expressly stated—that*

the Valuation Tribunal might have been seeking to replicate the approach taken to valuation in the United Kingdom. There, the rating legislation expressly identifies two dates by reference to which the rateable value of a property is to be estimated. The notion of determining the rateable value of property by reference to an antecedent valuation date, i.e. a date prior to that prescribed for the compilation of a new valuation list, appears to have been first introduced by way of amendment to the General Rating Act 1967 by the Local Government, Planning and Land Act 1981. Thereafter, the (UK) Local Government Finance Act 1988, as originally enacted, provided that the rateable value shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year if the tenant undertook to be responsible for repairs, insurance, expenses, rates and other taxes. For the purpose of the compilation of a new valuation list, the rateable value is to be determined by reference to the antecedent valuation date. Crucially, the UK legislation then goes on to provide that matters affecting the physical state or physical enjoyment of the hereditament or the mode or category of occupation of the hereditament "shall be taken to be as they are assumed to be on the day on which the list must be compiled". The (UK) Local Government Finance Act 1988 thus expressly identifies two different dates by reference to which the rateable value is to be estimated.

27. There are no equivalent provisions under the Valuation Act 2001. In particular, there is nothing in the Act which indicates that any aspect of the valuation of property is to be determined by reference to the publication date rather than the valuation date. The "publication date" is defined under the Act as the date by which the new valuation list, comprising every relevant property that has been the subject of the valuation mentioned in the order, and the value of that property as determined

by that valuation, is to be published. The publication date does not feature in those provisions governing the determination of the net annual value of property. Rather, the combined effect of Section 20 and Section 48 would appear to be that all factors affecting the net annual value are to be determined by reference to the (singular) valuation date specified in the Valuation Order."

50. The trial judge then recites s. 19(5), which bears repeating:-

"(5) The Valuation List as referred to in this section shall be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue of the valuation certificates concerned, and shall achieve both (insofar as is reasonably practicable)—

(a) correctness of value, and

(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."

As the trial judge points out, the effect of s. 19(5) is qualified by s. 37(4) which provides in effect that the Valuation Tribunal is not constrained to employ a comparative method but may arrive at its determination of NAV by reference to whatever method of valuation or combination of methods of valuation as the Tribunal in its discretion deems appropriate.

51. In the context of this preliminary issue, at paragraph 35 of his judgment, Simons J. acknowledges that:-

> *"...Section 19(5) allows reference to be made to data which has become available subsequent to the valuation date. It is expressly provided that the Valuation List shall be drawn up and compiled by reference to relevant market data and other relevant data available on or before the date of issue of the valuation certificates concerned ('date of issuance')".*

As Simons J. notes, the date of issuance will by definition always be later than the valuation date, which precedes the making of the Valuation Order, and s. 21 provides that the publication date must be not later than three years after the making of the Valuation Order and valuation certificates must be issued on a date no later than seven days before the Commissioner causes the Valuation List to be published. As Simon J. notes in paragraph 38, in practice this time-lag will mean that data relevant to the valuation of a property "*may have since become available which had not previously been available as of the specified valuation date.*" This of course has particular relevance to the issue of what evidence of energy output was admissible and should have been considered, but it is relevant to quote his conclusion on this in paragraph 39 where he states:-

> *"...Section 19(5) puts this question beyond doubt: it is legitimate to use data which only becomes available subsequent to the specified valuation date, provided that the statutory criteria are met. The data must have been available as of the issuance date, and the data must constitute relevant market data or other relevant data."*

52. From paragraph 43 on, Simons J. addresses the Commissioner's argument that it would be contrary to the intention of the Oireachtas were a newly constructed wind farm, which was in existence as of the publication date, to be omitted from the Valuation List or assessed

as having a nil value simply because the wind farm had not been in existence as of the valuation date. That argument was that such an outcome would undermine a core objective of the statutory scheme, namely, to capture all relevant properties situate in the rating authority area so that they can bear their fair share of the rates burden during the continuance of the Valuation List.

53. The trial judge's response to this was to rely on s. 28 of the 2001 Act. Noting that a "*revaluation*" is effective for between five to ten years and is part of a process culminating in the publication of a new valuation list, he refers to "*certain exceptions to this where there has been a 'material change in circumstances' resulting in a change in the value of the property or the creation of a new rateable property*". In such circumstances the Valuation List may be revised to reflect the change, and this power of revision is set out in s. 28 of the 2001 Act "*contingent on a material change of circumstances having occurred, in relation to the particular property, since a valuation under section 19 was last carried out in relation to the rating authority area in which the property is situate*" (paragraph 45). Simons J. notes, as it was put by this court recently in *Dayhoff Limited v. Commissioner of Valuation* [2022] IECA 35, at paragraph 5, a revision may be undertaken only if there has been a material change of circumstances since the property was last valued. He then proceeds:-

> *"46. The language used in the section is significant. The "change" in the circumstances of the particular property is to be measured by reference to the date upon which a "valuation" was last carried out, rather than by reference to the dates upon which the Valuation List was, variously, drawn up and compiled, published, or became effective. This reflects the distinction made under Section 19(4) itself between (a) the carrying out of a valuation of each property and (b) the drawing up and compilation of a valuation list.*

> *47. We know from Section 20 of the Valuation Act 2001 that the value of property is to be determined by reference to the specified valuation date which must predate the making of the Valuation Order. The combined effect of these legislative provisions, when read in conjunction with the definition of "material change in circumstances" under Section 3, is that the change is to be measured against the circumstances of the particular property as of the valuation date. If, for example, there has been a change in the value of a property caused by the making of structural alterations to that property since the valuation date, then the existing Valuation List can be revised to reflect this change in value. Moreover, if a newly constructed property has come into being since the valuation date, then, again, the existing Valuation List can be revised to reflect this change in circumstances."*

54. In the next section of his judgment Simons J. proceeds with an analysis relating to the energy output issue, and I will return to that later in the judgment. In so doing, he proceeds on the basis that the Valuation Tribunal held that the wind farm had to be valued on the assumption that it did exist and was vacant and available to let on the valuation date, observing:-

> "*57. The Valuation Tribunal's determination does not set forth the reasons for proceeding on the basis of this unreal hypothesis. The determination does not engage with the legislative provisions governing the valuation of property. In particular, the determination does not explain how, having regard to the provisions of Section 20 of the Valuation Act 2001, it is permissible to value property by reference to any date other than the valuation date which has been specified by the Valuation Order. I will return to this point at paragraph 86 below. The balance of the discussion under the present heading proceeds on the working assumption that it*

is permissible to assess the "actual state" of the property by reference to the publication date."

55. The trial judge then expresses his views on this issue, starting at paragraph 87:-

"87. As flagged earlier, however, there must be a question mark as to whether this working assumption is correct. As discussed at paragraphs 14 to 27 above, the ordinary and natural meaning of the legislation is that the valuation exercise is to be carried out solely by reference to the prescribed valuation date. If this is the proper interpretation of the legislation, then it appears prima facie *that the Valuation Tribunal has misunderstood the provisions of the Valuation Act 2001 insofar as they apply to rateable properties which only come into existence subsequent to the valuation date. It is at least arguable that such properties fall to be dealt with by way of the revision procedure under Part 6 of the Valuation Act 2001, rather than by reading the concept of a second valuation date into the legislation.*

88. This issue of statutory interpretation is one which was raised, for the first time, by the court itself at the hearing of the case stated. It is not an issue which had been raised by the parties before the Valuation Tribunal. The hearing of the case stated was adjourned to allow the parties to consider the issue and to make written and oral submissions on same. At the resumed hearing on 11 February 2022, both parties made submissions to the effect that the Valuation Tribunal's approach was correct and that the "actual state" of the property did, indeed, fall to be assessed by reference to the date of the publication of the Valuation List and not the valuation date specified under the Valuation Order.

89. (The ratepayer subsequently finessed its position at a directions hearing on 28 February 2022, saying that whereas its previous submissions could not be

withdrawn, it did not wish to make any further submissions on the issue of statutory interpretation. This position was maintained on the final day of the hearing, 7 October 2022.)

90. Even in proceedings which are exclusively adversarial, the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties (O'Callaghan v. An Bord Pleanála [2017] IESC 60). More generally, a judge may for reasons of fairness, and with the intention of arriving at a correct answer, invite submissions on any point not already argued in written or oral submissions (Casey v. Minister for Housing, Planning and Local Government [2021] IESC 42). Not to do so could give rise to a result which is wrong in law, or incomplete or likely to create an unsatisfactory precedent (ibid.).

91. The need for an objective—and accurate—interpretation of the underlying legislation is especially important in the context of the case stated procedure under Section 39 of the Valuation Act 2001. The case stated procedure allows for a form of dialogue between the Valuation Tribunal and the High Court (and the appellate courts) whereby the Tribunal states a case for the "opinion" of the High Court. A judgment delivered on a case stated will often decide questions of law which transcend the circumstances of the particular proceedings, and the judgment will be relied upon as a precedent in other proceedings before the Valuation Tribunal. It would seem unsatisfactory, therefore, were a case stated to be decided on the basis of an interpretation of the Valuation Act 2001 which the court is concerned may be incorrect.

> *92. Subject always to hearing submissions from the parties, my provisional view as to the appropriate way in which to proceed is as follows. An order should be made setting aside the Valuation Tribunal's determination of 20 February 2020, with a direction that the Tribunal reconsider the valuation of the wind farm. Such an order is necessary regardless of the question of statutory interpretation raised by the court. This is because, leaving aside entirely that question of statutory interpretation, the court's findings on the narrower issue of the relevant considerations to be taken into account in valuing the wind farm necessitate that the determination be set aside.*
>
> *93. My provisional view is that the court order might contain a further direction that the Valuation Tribunal should address the broader question of statutory interpretation as part of its overall reconsideration of the matter. This would allow the Valuation Tribunal to expressly address the question and to set out a proper statement of reasons for whatever conclusions it reaches. In the event that either party were to request that a (fresh) case be stated to the High Court, this court would have the benefit of the considered views of the Valuation Tribunal on the question before embarking upon its own consideration of the question of statutory interpretation."*

<u>Discussion of Preliminary Issue</u>

56. The Commissioner in no uncertain terms argued before this court, as it did in the High Court, that the wording of the 2001 Act allows newly constructed property to be added to the Valuation List and to be included in the *revaluation* process, and to have the NAV estimated under s. 48(3) by reference to the *actual state* of the property at the date the valuation is carried out. Notwithstanding that the trial judge's opinion appears to have been

expressed *obiter*, it was clearly of concern to the Commissioner, and it is not hard to see why that might be so. It is conceivable that between newly constructed properties and other properties that may have been demolished or otherwise ceased to exist, or ceased to be "*relevant property*" within Schedule 3 of the 2001 Act, there may be many additions or exclusions from the Valuation List as first prepared, and the revised Valuation List as it finally appears on the Publication Date. The consequence of the opinion expressed by Simons J., if correct, must be that newly constructed properties could not be the subject of *revaluation* as they are not at the Valuation Date, *relevant property*; such properties can only, independently of the *revaluation* process, be the subject of *revision.* I also note that while Coillte may not have pursued submissions on the issue before the High Court, it never raised any jurisdictional issue in its appeal to the Tribunal, and before this court in its written and oral submissions it agreed with the Commissioner's position.

57. In the opening part of the passage from the decision in *Bookfinders Limited* quoted by the trial judge and recited above, the Supreme Court reiterated that it is not "*correct to approach a statute as if the words were written on glass, without any context or background*", albeit that if there is ambiguity in a taxation statute, a narrow interpretation that favours the taxpayer may be preferred. In viewing the context it is important to acknowledge that the interpreting court can look to the purpose of the statute as a whole, and should construe related provisions, if possible, to operate harmoniously.

58. This arose in *Dayhoff Limited v. Commissioner of Valuation* [2022] IECA 35 (Murray J., Whelan and Pilkington JJ. concurring) where this court was concerned with a revision of a valuation of property C, formed by the amalgamation of two other properties A and B. Section 49 of the 2001 required the revision of a *relevant property* to be made by reference to the values "*as appearing on the valuation list relating to the same rating authority area*

as that property is situate in, of other properties comparable to that property" and the court had to decide whether A and B were *other properties,* as the Commissioner contended. Murray J. in paragraph 17 states:-

> *"17. Central to the proper understanding of s.49(1) in this regard is the definition of 'material change of circumstances' appearing in s.3(1). [Material change of circumstances], it will be recalled, is the trigger for a revision, and it is with the process of valuation on a revision that s.49(1) is concerned. The two provisions must be construed together and, in particular, each must be understood as being concerned with the same components within the valuation process… ."*

Murray J. then considers the definition in s. 3(1) and refers to s. 28 (which concerns *revision),* and he goes on to state:-

> *"22. I have earlier observed that s.49(1) must be construed so as to operate harmoniously with these provisions."*

Adopting this approach Murray J. found that for the purposes of s. 49(1) properties appearing on the valuation list that are subsequently amalgamated to form a new '*relevant property*' for the purposes of the 2001 Act are '*other properties*' and "*different valuation units*" and were therefore comparables to which the Commissioner/the Tribunal could have regard. Murray J. in paragraph 23 states:-

> *"23. There are a series of closely related considerations of context that support this construction. The first is the importance of ensuring that the valuing body has before it all information necessary to achieve a fair and just valuation in accordance with the rules provided for in the Act. The construction contended for by Dayhoff is, as Mr. Hickey SC readily acknowledged, exclusionary. Its consequence would be that*

> *neither the Commissioner nor the Tribunal could have regard to a valuation which they might otherwise think directly relevant to the task of valuation in hand. To my mind very clear language would be required to justify that conclusion."*

59. A similar approach should be adopted to considering the preliminary issue in this appeal. The first point to made is that the clear intention of the 2001 Act is to enable the valuation of all commercial properties other than those "*not rateable*" under Schedule 4 of the 2001 Act (which includes in particular properties used for domestic, agricultural and charitable purposes) thus enabling local authorities to levy rates on commercial properties to fund their statutory activities. Core to this objective is that the valuation should be based on data that is available; and the principles of "*equity and uniformity of value between properties*" apply, whether the valuation takes place under a "*revaluation*" or under a "*revision*". It would be fundamentally at odds with the concept that each rateable property must contribute taxes to the local authority if a commercial property that should be rated escapes valuation for a period of time.

60. This is expressly recognised in s. 19(2) where, following the making of a Valuation Order, the valuation manager must organise and secure valuation of "*every relevant property on the Valuation List or existing Valuation List situate in the rating authority area specified in the order and any relevant property entered on that list between the making of the valuation vrder and the publication of the list.*" The "*existing Valuation List*" is not set in stone – the process is intended to encompass all *relevant property*, including newly constructed property, or property used for domestic or agricultural purposes which, during the period of the revaluation process, converts to being a *relevant property*. This statutory obligation is buttressed by subsection (5) which requires that the Valuation List be drawn up and compiled "*by reference to relevant market data and other relevant data <u>on or before the</u>*

<u>date of issue of the Valuation Certificates concerned</u>" (emphasis added). The clear intention of these provisions is to ensure that during the period commencing with the making of the Valuation Order up to the date of issue of the Valuation Certificate (in this case the period was 26 January 2016 to 7 September 2017) new *relevant property* not only can be, but must be added to the Valuation List.

61. This is also made clear by s. 46 of the 2001 Act, as amended, which places the obligation on an occupier of a property to furnish "*specified particulars*" in a specified form to the Commissioner within 28 days from the date on which a Valuation Order is made relating to the relevant rating authority area. Subsection (3) (as inserted by s. 25 of the Valuation (Amendment) Act, 2015), bears repeating:-

> *"25. Section 46 of the Principal Act is amended by substituting for subsection (3) the following:*
>
> *"(3) The occupier of—*
>
> > *(a) a relevant property which comes into existence after the date on which a valuation order is made in relation to the rating authority area in which the property is situated,*
> >
> > *(b) a relevant property which was not relevant property on the date on which such an order is made in relation to the rating authority area in which the property is situated, or*
> >
> > *(c) a relevant property, on the coming into occupation of that property for the first time or on the entering into a new tenancy agreement in respect of that property,*

(not being property referred to in paragraph (a) or (b) of section 19(2)) shall, within 28 days from the date on which the property has come into existence, become relevant property or come into occupation or a new tenancy agreement has been entered in respect of it, as the case may be, provide in writing to the Commissioner the specified particulars with respect to that property."

62. The legislative scheme is therefore designed to ensure that all new *relevant property* coming into existence after the date of the Valuation Order is added to the list, and that specified particulars are provided in order that it may undergo revaluation.

63. This construction is consistent with the provisions of Part 6 of the 2001 Act relating to "*Revision of Valuations*". Section 28(4) provides that a Revision Manager "*if he or she considers that a material change of circumstances which has occurred <u>since a valuation under section 19 was last carried out</u> in relation to the rating authority area in which the property concerned is situate ...*" (emphasis added); then "*(a) if that property appears on the Valuation List relating to that area*" the Revision Manager may amend the valuation or exclude the property from the list on the ground that it is no longer *relevant property* or that it falls within Schedule 4 and is non-rateable, or "*(b) if that property does not appear on the said valuation list and it is relevant property*" then the Revision Manager may carry out a valuation of the property and include it on the list. Critical to this provision are the words "*since a valuation under section 19 was last carried out*". The scheme of the Act is that revisions are not carried out when a revaluation under a s. 19 Valuation Order is in process. The revaluation process occurs once every five to ten years, and the publication date that marks the end of that process must be not later than three years after the date of the making of the Valuation Order (s. 21(3)). During the *revaluation* process new relevant properties can be added to the Valuation List, and that is the appropriate method of ensuring that a

relevant property that has recently come into existence is valued; if a relevant property comes into existence after the publication date (and before any new revaluation is ordered) then it is appropriately dealt with under Part 6 and the *revision* process. That this is the statutory framework was recognised by Murray J. in *Dayhoff* where he states:-

> *"5. ...(vi) Relevant property may be ascribed a rateable valuation on the valuation list in one of two ways. The rating authority may conduct a* revaluation *of the list in respect of its area, which involves a re-assessment of the rateable valuation of all rateable properties in that area, or it may undertake a* revision *of the list in respect of an individual entry on the list. The valuation of a premises may thus be assessed prior to a revaluation or between revaluations.*
>
> *(vii) Under s.28 of the Act, a revision may be undertaken only if there has been a 'material change of circumstances' ('MCC') since the property was last valued."*

64. With respect to the trial judge, the opinion that he expresses fails to take any or any adequate account of these provisions which set the framework and context for *revaluation* under Part 5 and consideration of the words "*actual state*" in s. 48(3). He relies principally on s. 20 of the 2001 Act which requires that a Valuation Order specify "*one date*" by reference to which the value of relevant properties are to be determined, which date is not to be later than the making of the Valuation Order. If that had the effect that properties newly constructed after the making of Valuation Order, which self-evidently have no *actual state* for the purposes of s. 48(3) at the Valuation Date or on the date of the Valuation Order, could not have their NAV assessed, it would lead to the absurdity that, notwithstanding the express terms of s. 19(2), no new relevant property could be entered on the Valuation List "*between*

the making of the valuation order and the publication of the list". It would also render meaningless the obligation to provide "*specified particulars*" within 28 days provided for in s. 46 that is directed at the occupiers of such new *relevant properties.*

65. I also agree with the submission of counsel for the Commissioner that s. 20 does not speak to the question of whether a property is a *relevant property.* Rather, once a property is on or is added to the Valuation List under s. 19(2) it is to be treated as a "*relevant property*", it must then have its NAV estimated under s. 48.

66. Nor does s. 20 say that the "*actual state*" of the relevant property, as referred to in s. 48(3) of the 2001 Act, *must* be taken as being the *actual state* at the valuation date. Rather it is clear from the scheme of the 2001 Act that the valuation process is one that takes place over time, between the date of the Valuation Order and the issue of the Certificate of Valuation. It is true that s. 20 sets a valuation date, but as s. 19(5) makes clear, "*relevant market date and other relevant data available on or before the date of issue of the valuation certificates concerned*" is relevant to the valuation exercise and must be considered in order to achieve correctness of value, and equity and uniformity. It follows that while the Valuation Date is fixed by the Valuation Order the estimate of NAV will necessarily be carried out by reference to the *actual state* of the relevant property at the time the valuation is carried out, and relevant data available up to the date of the issue of the Certificate of Valuation is admissible, and if presented must be considered. This necessarily includes the data comprised in the 2015 DNV-GL Report and the projections in that report in relation to energy output from the (yet to be constructed) wind farm, because this relates directly to what was at the Valuation Date anticipated to the be trading profit from the operation of the wind farm.

67. Section 49 of the 2001 Act adds further support to this. Subsection (1) provides that if the value of a relevant property falls to be determined for the purposes of s. 28(4) *viz.* under a *revision* due to material change of circumstances that has occurred since a valuation under s. 19, the determination is to be made by reference to the values "*as appearing on the Valuation List relating to the same rating authority area as that property is situate in, of other properties comparable to that property.*" In other words, in a *revision* the first port of call in establishing the NAV is the value of other comparable properties in the same rating area on the Valuation List, or what is frequently called "*the tone of the list*". This tone may be established by valuations of comparable properties which have not been appealed, or, where appeals have taken place, the values have been established by the Tribunal. Section 49(1) therefore supports the view that *revisions* under Part 6 are not appropriate while a *revaluation* is taking place, and instead relate to the process that is appropriate if there is a material change in circumstance or a new relevant property comes into being after the publication of a Valuation List. This indeed is what Murray J. says in *Dayhoff* in the extract from paragraph 5 quoted earlier. In my view this answers the suggestion at paragraph 87 of the judgment of Simons J. where he suggests that it is arguable that relevant properties coming into existence subsequent to the valuation date fall to be dealt with by way of *revision*.

68. In my opinion therefore, s. 20 can be read harmoniously with ss. 19, with Part 6 (in particular sections 27 and 28), and ss. 46, 48 and 49 of the 2001 Act. This means, in my opinion, that a "*relevant property*" coming into existence after the date of the Valuation Order and before the publication date can be added to the Valuation List, and its NAV estimated for the purposes of s. 48(3) by reference to its *actual state*, and on the basis of market and other data available at the date on which the valuation is carried out and available up to the issue of the Certificate of Valuation. It follows that in my opinion the

Commissioner was entitled to add the wind farm to the Valuation List, and to estimate its value accordingly, and the Valuation Tribunal had jurisdiction to hear Coillte's appeal, and the Valuation Tribunal had jurisdiction to state a case for the opinion of the High Court.

First Issue: Whether the Tribunal erred in determining the NAV on the basis of the estimate of energy output in the 2015 DNG-GL Report and excluding from its consideration post Valuation Date actual energy output data available at the date of issuance of the Valuation Certificate (7 September 2017).

69. The issue as so stated covers questions (3) and (4) as reframed by the trial judge in his judgment and perfected order. His answer was that the Tribunal erred in excluding the empirical date in respect of energy output available at 7 September 2017. I agree with his answer and his reasoning on this issue.

70. The Tribunal considered that under the R&E method as a general rule the calculation should be based on trading accounts prior to the Valuation Date, and that any assumption as to capacity factor i.e. the windfarm energy output, should be based on what a reasonable hypothetical tenant would expect to achieve based on information available at the Valuation Date. In this instance this information could only be gleaned from the 2015 DNV-GL Report (originally issued in September 2014, and with updated versions issued in January 2015, July 2015 and lastly December 2015), and not on the actual data on energy output which informed the post Valuation Date accounts for 2017 and 2018. As I have noted earlier the Tribunal was referred to paragraph 5.11 of the Guidance Note which concerns *hindsight* and considered, in paragraph 10.6.6 of its decision, that:-

> *"Post-valuation date facts and events are not automatically irrelevant, but caution must be exercised in attaching any weight to information which would not have been available to a hypothetical tenant at the valuation date. The Tribunal considers that*

> *data from accounts after the valuation date should not be admitted into evidence as a matter of course. Post valuation accounts are admissible as evidence of value in order to prove or disprove a trend or the financial effect of an expectation [e.g of recession] at the valuation date and then only where the trend or the expectation has been established by evidence to exist at the valuation date."*

71. It therefore rejected Coillte's submission that the R&E calculation should have proceeded on the basis of the 2017 and 2018 trading accounts at the outset, and only considered them as a "*helpful reality check*" under a limited application of the hindsight principle when preferring the adoption of the conservative P90 figure in respect of the risk that predicted energy output would not be attained.

72. As we have seen, trial judge took a different view in relation to the actual energy output data up to 7 September 2017. In submissions to this court counsel for the Commissioner contended that the High Court was incorrect, and the Tribunal had correctly based the estimate of NAV on the 2015 DNV-GL Report, and correctly excluded consideration of the data on actual output for March-September 2017 which I have set out in a Table earlier in my judgment.

73. The Commissioner first raised the rather metaphysical argument that windiness is not part of the *actual state* of a property, as it is dependent on atmospheric conditions, and therefore energy output figures are not related to the *actual state.* Secondly it argued that as the 2017 and 2018 output figures would not have been available to the hypothetical tenant and landlord at the time of their negotiation on the Valuation Date they were not 'relevant data' and should not have been considered at all. For the same reason it was argued that it could not be said that the 2017 and 2018 trading accounts confirmed a trend such that they might be considered in an exercise in applying *hindsight* in accordance with paragraph 5.11

of the UK Guidance Note. The Commissioner therefore submitted that only the December 2015 estimates of energy output[2] should have been taken into account.

74. The metaphysical argument about windiness must be rejected. The locations at which wind farms are built are usually chosen precisely because their topography benefits from a prevailing wind and the capacity of the turbines to produce energy is dependent on that wind. Thus for the hypothetical tenant scientifically measured energy output is part of the *actual state* of a wind farm as it represents in essence the output that the turbines have actually generated or are likely, year on year, to generate by their operation. It is data arising from the physical circumstances of the property and the turbines and related plant that the hypothetical tenant and landlord would undoubtedly take into account. This applies with equal force to the energy output projected by the 2015 DNV-GL Report, the only difference being that the data informing the Report is scientifically estimated based on wind measurement rather than being based on recorded energy output.

75. On the second argument it would appear from the Tribunal determination that it did not consider whether s. 19(5) of the 2001 Act rendered the energy output figures admissible data in the calculation of the gross profits under the R&E method. I agree with the trial judge that the energy output data for the period March to 7 September 2017 upon which the 2017 accounts are (in part) based is "*other relevant data*" for the purposes of s. 19(5) of the 2001 Act and therefore was both admissible and relevant evidence in the estimation of the NAV under s. 48(3). It relates to the *actual state* of the wind farm and was evidence that the hypothetical tenant would have regarded as relevant to the profit making potential of the

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[2] By extrapolation from the forecast energy output figures in the Report the projected gross income from the wind farm could be estimated for the Valuation Date - based on the 2015 REFIT 2 reference price for large-scale wind farms with fixed balancing payment giving a total guaranteed REFIT 2 price of €79.92 per MW, and based on a fixed purchase price under a Power Purchase Agreement made on 22 February 2015 between Sliabh Bawn Power DAC and Sliabh Bawn Supply DAC of €74.90 per MW on 30 October 2015 (the Valuation Date).

wind farm, and hence the rent that a tenant might reasonably be expected to pay. Once it was presented, it had to be considered by the Tribunal.

76. Further the measured energy output had to be considered as s. 19(5)(a) of the 2001 Act requires the valuation to achieve "*correctness of value*". The Tribunal falls into error if there is a possibility that correctness will not be achieved where there is reliance on estimates alone, to the exclusion of hard data that is available, even if that data is a snapshot limited in time. Any limitations in that hard data go to the weight to be accorded to it rather than admissibility and relevance to the valuation.

77. The data on energy output for the months of March - 7 September 2017 pointed to the estimate of gross receipts under the R&E method based solely on the 2015 DNV-GL Report of estimated output being overstated. It was relevant and ought to have been admitted and considered and factored into the decision on NAV.

78. The Tribunal based its decision to exclude the empirical output data on the basis that it involved invoking the *hindsight* principle in circumstances where no trend was discernible at the valuation date to be proved or disproved, and there was no event of expectation in the mind of the hypothetical tenant at the Valuation Date that materialised after the Valuation Date. Insofar as the Tribunal made a finding that such data should not be considered based on the UK Guidance Note and UK or Commonwealth caselaw on *hindsight,* it fell into error. I agree with the trial judge that that caselaw must now be viewed with caution, and that the notion that *hindsight* can only be used in two recognised circumstances cannot be reconciled with or oust the plain and ordinary meaning of s. 19(5); that statutory provision now governs the position in this jurisdiction. It is clear that s. 19(5) is not constrained in its ambit so far as it relates to "*other relevant data available on or before the date of issue of the valuation certificate*".

79. That however leads to the further conclusion that energy output data post-dating the date of issue of valuation certificate is not relevant or admissible to the estimation of NAV under s. 48(3). Section 19(5) is clear in setting a cut off date for the "*relevant market data and other relevant data*" that may be considered: that cut-off date is the date of issue of the valuation certificate.

80. Counsel for Coillte, in seeking to persuade the Tribunal, the High Court, and this court that the Tribunal could – and should – have had regard to the 2017 and 2018 wind farm accounts in their entirely, placed much reliance on the Lands Tribunal decision in *China Light & Power Co Ltd. v. Commissioner of Rating and Valuation* [1996] RA 475 for the proposition that the principle of hindsight may be used so that evidence from accounts post dating the valuation date may be considered. The Lands Tribunal at page 494 - 495 stated:-

> *"Both Valuers approaches involved exercising varying degrees of hindsight. Hindsight may be available to a Valuer depending on the statutory or other terms of reference. Where hindsight can be used it is obviously desirable, if the material is available, to achieve greater accuracy by using actual figures rather than falling back on assumption-based projection. This Tribunal has for many years encouraged Valuers to take advantage of hindsight where, as a matter of law, that course is permissible. At times Valuers too readily ignore post relevant date evidence, by self-imposed rules of practice that have no basis in law.*
>
> *If authority for taking advantage of the benefit of hindsight is required, it is to be found in the judgment of Lord MacNaghten in Bwllfa & Merthyr Dare Steam Collieries (1891) LTD v Pontypridd Waterworks Co. [1903] AC 426. Although the House of Lords was concerned with an arbitration compensation award, the judgment is of wider application. Lord MacNaghten declared at p. 431:*

> *'In order to enable him to come to just conclusion it is his duty, I think, to avail himself of all the information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?'*

There are no statutory or other restrictions, when determining rateable values, which prohibit the use of hindsight. The Tribunal during the hearing of rating appeals, has frequently admitted evidence based on hindsight. Valuation evidence based on hindsight is equally admissible on this appeal. It follows that Mr. Duncan was entitled to refer directly to the annual accounts to 30 September 1990, without having to resort to any assumption, as to the information which would have been available to the hypothetical tenant at the earlier date of 1 July 1990.

Mr. Cheng was similarly entitled to use hindsight to the even later date of the annual accounts for the year ending 30 September 1991. Calculations based on actual growth and depreciation rates, are clearly to be preferred to calculations based on projections."

81. While superficially attractive, the problems with this reliance are evident from the quote which emphasises that the possible use of hindsight will depend *inter alia* on the statutory terms of reference. Section 19(5) of the 2001 Act is the statutory term of reference for the evidence that may be considered, and it restricts the use of post valuation data to the cut-off date of issue of the valuation certificate. Accordingly the Tribunal hearing an appeal from the Commissioner – which will necessarily occur after that the issue of the valuation certificate – is constrained by s. 19(5) to consider relevant evidence that is *available* on or

before the date of issue of that certificate. Evidence of energy output covering any period post 7 September 2017 up to the date of hearing of the appeal by the Tribunal, whether presented in the form of raw data or in a secondary form in accounts, cannot therefore be considered. This makes sense, because such data could not have been presented to or considered by the Commissioner. Moreover, if it were permissible for it to be considered by the Tribunal it would run contrary to the principles of equity and uniformity, also enshrined in s. 19(5), by allowing Coillte to use hindsight evidence to dampen the NAV when another operator that has not appealed the valuation or whose appeal has been heard at an earlier point in time may not enjoy the same advantage.

82. In conclusion, this is an unusual case in that not only were there no pre-valuation date accounts, but also there was no comparable market data on windfarms to which reference could be made. In such circumstances I agree with the trial judge that in order to achieve '*correctness of value*' it was important that the Tribunal consider and give appropriate weight to such data as came into existence after the valuation date – but only up the date of issuance of the valuation certificate. This data is clearly relevant to the R&E method of calculating the estimated actual output and hence the estimated gross income from the windfarm at the Valuation Date. The Tribunal could of course also consider the estimates of energy output in the 2015 DNV-GL Report. This is not, as the Commissioner suggests, deploying two different reference dates; rather it is using the Valuation Date as the reference date but also considering *other relevant data available on or before the date of issue of the valuation certificate* as a basis for the estimating the NAV and/or to adjust or reflect on what are only estimates of energy output in the 2015 DNV-GL Report. This is all the more so because the 2015 DNV-GL Report is replete with references to factors giving rise to a high level of uncertainty and risk in the predicted output figures, not least because of the use of a single mast for measuring of wind was "*not considered representative of all the Sliabh Bawn*

turbine locations" (page 32 of Report). It is of course entirely a matter for the Tribunal as to what weight it gives on the one hand to the 2015 DNV-GL Report and on the other the energy output data from March 2017 to 7 September 2017.

Second Issue: Whether the Valuation Tribunal erred in law in determining that the hypothetical tenant would make his rental bid on the basis of P90 (i.e. the estimated annual energy output that would probably be exceeded 90% of the time) rather than P75 or P50.

83. I have earlier quoted paragraph 10.7 from the Tribunal determination that explains what is meant by the P90, P75 and P50 values and why they are so important to estimation of the NAV in respect of a wind farm. In essence they describe the differing level of risk in relation to average energy output that a developer, investor, and funding bank would consider, and by extension what the hypothetical tenant would consider and what that tenant would be prepared to pay for rent year on year under the rating construct in s. 48(3).

84. Based in the first instance solely on the 2015 DNV-GL Report the Tribunal preferred the P90 value of 191,400 GWh/annum over the P50 value of 217,600 GWh/annum (or the alternative of a midway P75 value of 197,600 GWh/annum) contended for by the Commissioner. It is important to note again that the Tribunal excluded the post Valuation Date actual figures, stating in paragraph 10.11 that "*it is only from the 2015 Report that we can adjudge what assumptions the hypothetical tenant would have made in preparing his rental bid*", although it did rely on Coillte's trading account for 2017/2018 at the '*stand back and look'* stage of the R&E analysis. The Tribunal's reasoning for preferring P90 was as follows:-

> *"10.11 ... The investigations and assessments described in the 2015 Report were extensive and, as clarified and explained in the Report, the predicted outcomes*

depend on a number of factors i.e. the uncertainties. The hypothetical tenant is presumed to be a reasonable competent wind farm operator. He would have read the whole of 2015 Report and would know that the average long-term energy production estimates are exposed to those uncertainties. He would see that the Report recommends that the customer consider each of the uncertainties carefully. He would see in the Executive Summary that DNV-GL recommend that if the customer wished to reduce the uncertainty further wind measurements would have to be undertaken at locations more representative of the location of the proposed turbines. So, with what degree of certainty at the valuation date would the hypothetical tenant have viewed the estimated long-term energy output figures in the 2015 report? In the opinion of the Tribunal the hypothetical tenant would have wanted, and would have been entitled to, adopt a conservative approach to the predicted output knowing that predictions have potential for error as there may be bad wind years ahead or poorer turbine performance levels than anticipated and that a wrong assessment of the long term output could have serious implications for the viability of his business during the early years of operation. In the Tribunal's view the hypothetical tenant in formulating a rental bid for a property dependent on a naturally fluctuating power resource would not make his rental bid on the basis that he might only achieve the estimated output figure 50% of the time. The assessment of the output of a wind farm with no track record because it commences operations at the valuation date is a different risk from the normal everyday risks that a tenant will face running a wind farm business that are taken into account when estimating the tenant's share of the divisible balance. In the opinion of the Tribunal this different risk is appropriately mitigated by the adoption of the P90 figure from the 2015 report. Whilst the outcome of the issue before the Tribunal cannot turn on

the actual figures in the 2017 and 2018 trading accounts, consideration of those figures on a 'stand back and look' basis do provide a helpful reality check and a degree of support for the Tribunal's conclusion. Accordingly, the Tribunal determines that the output figure to be adopted for the valuation of the Property is 191,400 MWh.

10.12 A further important reason for not accepting the capacity factor of 38.92%, in the Tribunal's judgment is that Mr. Hazel took an unduly narrow and constrained approach to his valuation without standing back and considering the challenge faced by the hypothetical tenant in estimating the Property's energy potential based on predictions, and the uncertainty that would have been in his mind given the lack, at the valuation date, of actual concrete information, upon which he could make a confident assessment of the Property's future output. His decision to adopt a capacity factor of 38.92% which is not in fact the capacity factor for the predicted P50 output figure of 217,600 MWh in the 2015 Report indicates that he placed greater weight on the information provided by the Appellant's Asset Manager in his email of the 10th May 2017 than the estimated figures in the 2015 Report, which were the only figures that would have been available to the hypothetical tenant. In any event, even if Mr. Hazel had adopted an output figure based on the slightly lower capacity factor of 38.78% from the 2015 Report the P50 long term energy output prediction would in the Tribunal's view have been perceived by the hypothetical tenant as carrying an unacceptable risk upon which to formulate the rental bid for the reasons given above. The Appellant's trading accounts for the property should have served as a reality check for Mr. Hazel's valuation. He should have realised that the figures in those accounts cast serious doubt on some of his valuation assumptions."

[Emphasis added]

85. The trial judge considered that that he did not need to resolve this issue given his prior finding that the Tribunal should have had regard to the empirical data available viz. the actual figures on energy output available up to 7 September 2017, in assessing the NAV. While in my judgment that may strictly speaking be correct, in deference to argument before this court, and in the interests of clarity, I will deal more fully with the Commissioner's submissions on this issue.

86. The Commissioner argued firstly that the Tribunal erred in only viewing this issue from the perspective of the hypothetical tenant when determining that such a tenant would have taken a conservative view given that at the Valuation Date the windfarm was not operational. Secondly it was submitted that the Tribunal erred in using hindsight to take into account the output figures for 2017/2018 in support of its '*stand back and look*' exercise.

87. This issue brings into focus the extent to which the court on a Case Stated should afford *curial deference* to the Tribunal determination in circumstances where the Tribunal is obliged by paragraph 4(3) of the Second Schedule to the 2001 Act to issue "*a written judgment setting forth the reasons for its determination in each appeal*". In *Premier Periclase Ltd. v. Commissioner of Valuation* [1999] IEHC 8 Kelly J. expressed the view that the Tribunal was the type of expert administrative tribunal which Hamilton C.J. had referred to in his judgment in *Henry Denny and Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34, and that findings of fact should not be disturbed on appeal unless they were incapable of being supported by the facts or based on an erroneous view of the law, and that the High Court should be "*slow to interfere*" with decisions of the Tribunal and "*should only do so on the basis of an identifiable error of law or an unsustainable finding of fact*" (page 26).

88. In the recent decision of this court in *Stanberry Investments Limited v. Commissioner of Valuation* [2020] IECA 33 (Murray J., Haughton and Power JJ. concurring) Murray J. reviewed the legal authorities, including the decision of Kearns J. in *M&J Gleeson & Co v. The Competition Authority* [1999] 1 ILRM 401 where he posited a sliding scale of review by reference to the degree of specialisation of the decision making body, such that the greater the level of expertise and specialised knowledge the greater would be the reluctance of the court to substitute its own view. Murray J. comments in paragraph 48 that Kearns J. clearly did not believe that he was introducing any new concept into the law, and he then observes:-

> *"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. ...*
>
> *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 represents 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."

89. I am satisfied the Tribunal's finding in favour of P90 is essentially a finding of fact that lies within the zone of expertise of the Tribunal. It was based on the evidence that was before it – the 2015 DNV-GL Report, and the evidence of the parties' respective valuers.

90. Moreover, when the Tribunal decision is read as a whole it is clear that it did take into account what would have featured at the hypothetical negotiation, involving the hypothetical tenant *and* the hypothetical landlord. Applying its valuation expertise and experience there was clearly evidence before it from which the Tribunal was entitled to find that the hypothetical tenant would have taken a conservative approach to the predicted energy output, particularly having regard to the "*uncertainties*" identified in the 2015 DNV-GL Report. The Tribunal was not obliged to prefer P50, on the basis that the hypothetical landlord might have started negotiating at a lower figure and settled on P50; or to prefer P75 as a figure somewhere in the middle. In my view the Tribunal gave clear and cogent reasons for preferring the P90 value.

91. However, as the High Court found and this court has affirmed, the Tribunal should have had regard in the first place to the actual figures for energy output available for March 2017 to 7 September 2017 in assessing that output and hence the relevant P value, and it should not have had regard to any figures in the trading accounts based on data post-dating 7 September 2017 to support these findings. It follows that in so far as the Tribunal relied on entirety of Coillte's trading accounts and data post-dating 7 September 2017 to support its '*stand back and look*' exercise, it erred in law. This error, while it may ultimately not be of any great significance, was a clear error in having regard to evidence to which regard should not have been had, and accordingly the P value issue must also be revisited by the Tribunal.

Disposition

92. In relation to *the preliminary issue*, I respectfully do not agree with the opinion of the trial judge expressed *obiter* at paragraph 87 of his judgment that *prima facie* the Tribunal misunderstood the provisions of the Valuation Act 2001 insofar as they apply to rateable properties which only come into existence subsequent to the valuation date, that "*the ordinary and natural meaning of the legislation is that the valuation exercise is to be carried out solely by reference to the prescribed valuation date*", and that it is "*at least arguable that such properties fall to be dealt with by way of the revision procedure under Part 6 of the Valuation Act 2001, rather than by reading the concept of a second valuation date into the legislation.*"

93. In my opinion s. 20 can be read harmoniously with ss. 19, with Part 6 (in particular sections 27 and 28), and ss. 46, 48 and 49 of the 2001 Act. This means, in my opinion, that a "*relevant property*" coming into existence after the date of the "*valuation order*" and before the "*publication date*" can be added to the "*valuation list*", and its NAV estimated for the

purposes of s. 48(3) by reference to its "*actual state*", and, by reason of s. 19(5), on the basis of market and other data available at the date on which the valuation is carried out and available up to the issue of the "*certificate of valuation*".

94. As to the substantive issues, no issue was taken with the trial judge's reframing of questions (3) and (4) in the Case Stated. I would answer the questions as so reframed as follows:-

(1) The parties agree that there was no need to answer this question in light of the answers to questions (3) and (4) (as reframed).

(2) The Tribunal erred in law in preferring the adoption of the P90 value only so far as it took into account evidence of Coillte's energy output data from trading accounts for 2017/2018 that was not limited to the period March 2017 to 7 September 2017 when undertaking the exercise of '*stand back and look*' as part of the R&E method of valuation.

(3) The Tribunal erred in law in determining that the outcome of the issue before the Tribunal could <u>not</u> turn on the figures for the energy output from the wind farm available at the date of issuance of the valuation certificate (7 September 2017).

(4) The Tribunal erred in law in determining the output of the property on the basis of an estimate of output when the figures for energy output from the wind farm available as of the date of issuance of the valuation certificate (7 September 2017) were available which established the true position accurately and fairly.

(5) It is unnecessary to answer this question in light of the answers to (3) and (4).

(6) The Tribunal erred in law in admitting into evidence and considering accounts from 2017 and 2018 in the context of *'stand back and look'* in so far as that involved admitting and considering data that post-dated the date of issuance of the valuation certificate (7 September 2017).

(7) The parties agreed that it was unnecessary to consider this question.

(8) The parties agreed in the High Court that this question should be deferred pending the outcome of an appeal to the Court of Appeal in *Commissioner of Valuation v. Hibernian Wind Power Ltd.* [2021] IEHC 49. That decision was delivered on 22 May 2023 and is reported at [2023] IECA 121 and the Court of Appeal approved the decision of the Tribunal in that case that a sinking fund should be allowed over a 15 year period (the duration of guaranteed revenue under the REFIT Scheme) rather than only the last 5 years of the 20 year asset-life of the wind farm.

95. Accordingly pursuant to s. 39(6) of the 2001 Act the appeal should be remitted to the Tribunal with the opinion of this court thereon.

Costs

96. In the High Court Coillte was awarded its costs, including all reserved costs, against the Commissioner, and that order is also appealed by the Commissioner. On *the preliminary issue*, which took up perhaps half of the written and oral submissions before this court, the Commissioner succeeded in securing a different opinion to that expressed by the trial judge. However, that issue strictly speaking was not the subject of any order of the High Court, and further it was an outcome that was supported by Coillte in its submissions. I also bear in mind that the opinion on this issue expressed in this judgment will be of considerable

practical benefit to the Commissioner in ongoing and future revaluations, and I can see no reason why Coillte should bear any costs relative to that issue in either court.

97. In respect of the two substantive issues it cannot be said that Coillte was "*entirely successful*" either in High Court or on appeal, or in its cross appeal, for the purposes of s. 169(1) of the Legal Services Regulation Act, 2015. This is because neither court was persuaded that the Tribunal was entitled under the *hindsight* principle to have regard to evidence in the 2017 and 2018 trading accounts based on data post-dating 7 September 2017. Notwithstanding this, in my view Coillte was substantially successful in both courts, but its failure on one issue should lead to a modest deduction of the costs that it is entitled to recover.

98. Accordingly it is my provisional view that in the exercise of its discretion this court should award Coillte 80% of its costs of the High Court and 80% of its costs on the appeal, to include all reserved costs, such costs to be adjudicated upon by a legal costs adjudicator in default of agreement. Should either party wish to dispute this proposed costs order they should so indicate in writing to the Court of Appeal Office by email within 7 days of the electronic delivery of this judgment, and therein set out the alternative costs order for which they contend. In that event the court will schedule this matter for a short costs hearing on 9 April 2024 at 10.00 am. In default of notification of any dispute on the proposed costs order within the said 7 day period the proposed costs order will be perfected. Should any party seeking a costs hearing fail to obtain the alternative order for which they contend that party will be at risk of having to bear the costs of such hearing.

Pilkington and Butler JJ. having read this judgment are in agreement with same and the orders that are proposed.

APPENDIX 1

Questions asked in Case Stated

(1) Whether the Valuation Tribunal erred in law in determining that "*A value of P90 or P75 or P50 describe an annual value of energy production from the intermittent resource with a probability of 90% or 75% OR 50%, respectively. P90 is the annual energy production which is reached with a probability of 90%. The risk that an annual energy of P90 is not reached is 10%. For P50, there is a 50% chance that the annual energy production will be* reached (or not be reached) at any given time" when it was common case that P90, P75 and P50 figures measured the probability of exceedance and not probability *per se*.

(2) Whether the Valuation Tribunal erred in law in determining that the hypothetical tenant in formulating the rental bid for a property dependent on a naturally fluctuating power resource would not make his rental bid on the basis that he might only achieve the estimated output figure 50% of the time, that the assessment of the output of a wind farm with no track record because it commences operations at the valuation date is a different risk from the normal every day risks that a tenant would face running a wind farm business that are taken into account when estimating the tenant's share of the divisible balance and this different risk was appropriately mitigated by the adoption of the P90 figure from the 2015 Report, when under section 48 of the Act the Tribunal is required to estimate the rent which would be agreed by the hypothetical tenant and the hypothetical landlord and this requires assessment of the position of both the hypothetical landlord and the hypothetical tenant.

(3) Whether the Valuation Tribunal erred in law in determining that the outcome of the issue before the Tribunal could not turn on the actual figures in the 2017 and 2018 trading accounts.

(4) Whether the Valuation Tribunal erred in law in determining the output of the property on the basis of an estimate of output when actual accounts for 2017 and 2018 were available which established the true position accurately and fairly.

(5) Whether the Valuation Tribunal erred in law in determining that neither of the two recognized circumstances which warranted the use of hindsight in rating law arose on the facts of this appeal, that there was no trend discernible at the valuation date to be proved or disproved and, in particular, that there was no event or expectation in the mind of the hypothetical tenant at the valuation date that materialized after the valuation date, in circumstances when the output of the windfarm was an event or expectation that would have been central to the thinking of the hypothetical tenant on the valuation date.

(6) Whether the Valuation Tribunal erred in law in admitting into evidence and considering accounts from 2017 and 2018 in the context of stand back and look.

(7) Whether the Valuation Tribunal erred in law in failing to have adequate regard to or to take into consideration the issues of curtailment and constraint in adopting the estimate for output that it did.

(8) Whether the Valuation Tribunal erred in law in determining that the annual sinking fund payments would be established over a period of 15 years whilst revenue is guaranteed under the Refit Scheme, not the life of the asset (20 years), in light of the Act including section 48 and the assumptions thereunder, when the Tribunal is required to estimate the net annual value 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 its actual state are to be borne by the tenant under section 48 of the Act.

APPENDIX 2

Reframed Questions (3) and (4)

3. Whether the Valuation Tribunal erred in law in determining that the outcome of the issue before the Tribunal could not turn on ~~the actual figures on the 2017 and 2018 trading accounts~~ the figures for the energy output from the wind farm available as of the date of issuance of the valuation certificate (7 September 2017).

4. Whether the Valuation Tribunal erred in law in determining the output of the property on the basis of an estimate of output when the figures for the energy output from the wind farm available as of the date of issuance of the valuation certificate (7 September 2017) available which established the true position accurately and fairly.