APPROVED **[2022] IEHC 588**

THE HIGH COURT

2021 No. 421 SS

BETWEEN

COILLTE TEORANTA
TRADING AS SLIABH BAWN WINDFARM

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 November 2022

INTRODUCTION

1. This matter comes before the High Court by way of a case stated from the Valuation Tribunal. The impugned determination of the Valuation Tribunal is dated 20 February 2020.
2. The Valuation Act 2001 provides that the rateable value of property is to be determined by reference to the "*valuation date*" specified in the valuation order for the particular rating area. The valuation is to be made by reference to the "*actual state*" of the property.
3. On the facts of the case stated, the rateable property, a wind farm, had not been in existence as of the applicable valuation date. By the time the valuation list

came to be published some two years later, however, the wind farm had been constructed and had been operational for approximately six months.

4. Notwithstanding that the wind farm had not been in existence as of the valuation date, the Valuation Tribunal nonetheless decided that the property should be valued as a wind farm. The Valuation Tribunal purported to value the wind farm by reference to its "*actual state*" on the date of the publication of the new valuation list, on the counterfactual assumption that the wind farm had already been constructed and was available to be leased to a tenant as of the valuation date almost two years earlier.

5. This approach, not surprisingly, gave rise to a number of practical difficulties. In particular, there was a significant dispute between the parties as to the data to which regard could be had in determining the value of the wind farm. On one side, it was said that only information which would have been available to the hypothetical landlord and tenant at the valuation date could be considered. On the other, it was said that it was permissible to consider empirical data in respect of the actual operation of the wind farm notwithstanding that this data, obviously, post-dated the valuation date.

6. In the event, neither side was satisfied with the approach adopted by the Valuation Tribunal and both sides requested that the Tribunal state and sign a case for the opinion of the High Court.

7. The case stated ultimately came before me for hearing. It may be useful to flag from the outset of this judgment that I raised a query as to whether, on its proper interpretation, the Valuation Act 2001 required that the "*actual state*" of the property be assessed by reference to the valuation date and not the later date of the publication of the valuation list. On this interpretation, the lands on which

the wind farm was subsequently constructed would not be valued as a wind farm and, indeed, might not have constituted a rateable property at all as of the valuation date. The parties were afforded an opportunity to make written and oral submissions on this issue. In the event, neither party agreed with the mooted interpretation. I will return to consider the implications of this at paragraphs 86 to 93 below.

PRINCIPLES OF STATUTORY INTERPRETATION

8. Before turning to the relevant provisions of the Valuation Act 2001, it is necessary first to make the following general observations. The Valuation Act 2001 is a taxation statute. This has certain implications for the approach to be taken to statutory interpretation. The provisions of Section 5 of the Interpretation Act 2005, which allow for a purposive approach to legislation which is obscure or ambiguous, do not apply to a taxation statute.

9. The proper approach to the interpretation of a taxation statute has been summarised as follows by the Supreme Court in *Bookfinders Ltd v. Revenue Commissioners* [2020] IESC 60 (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 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'."

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.
11. It should also be observed that the starting point for the resolution of a dispute in respect of the rateable value of a property must be the legislation itself, namely the Valuation Act 2001. One might have thought that it would be unnecessary to have to make such a trite observation. However, as the present case illustrates, there is often 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. Such an approach carries the risk that the statements of principle will be

read out of their statutory context and improperly applied to the differently structured legislation in this jurisdiction. These statements of principle, no matter how impressive their pedigree, cannot be regarded as immutable rules of rating.

12. The dangers of relying upon a supposed "*common law*" of rating were cautioned against by the Court of Appeal of England and Wales in *Williams v. Scottish and Newcastle Retail Ltd* [2001] EWCA Civ 185 (at paragraphs 54 to 56) as follows:

> "Both leading counsel agreed (as they had to) that the issue for the court is ultimately an issue of statutory construction, and of applying statutory provisions, correctly construed, to the facts as found by the fact-finding tribunal. However both leading counsel were at pains to emphasise the weighty volume of judge-made law which underlies the modern legislation (and in particular, the statutory hypothesis now found in Sch 6, para 2(1) of the 1988 Act). Mr Holgate went so far as to make occasional references to the 'common law' of rating.
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> Rating law is not unique in that respect. The law of patents and the law of bankruptcy are other examples of bodies of law which, although in principle wholly statutory, owe much to judicial activity in building on fairly primitive statutory foundations, and (to alter the metaphor) still carry the 'intellectual freight which was carried by words or phrases in earlier ... legislation' (Hoffmann J in *Re a debtor (No. 784 of 1991)* [1992] Ch 554, [1992] 3 All ER 376 at p 559 of the former report). In all these areas (and most of all, perhaps, in rating) it is necessary to pay close attention to the way in which successive generations of judges have interpreted and applied the hallowed language of the statute (in this case, the statutory hypothesis).
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> 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. […]".

13. Even greater caution is required when seeking to rely, as an aid to the interpretation of domestic legislation, on statements of principle made in the context of the differently worded legislation in the United Kingdom.

VALUATION ACT 2001: OVERVIEW

14. The Valuation Act 2001 provides for the drawing up and compilation of a valuation list for each rating authority area on a regular basis. This exercise is to be carried out five to ten years after the publication of the previous valuation list for the area.

15. The valuation process is commenced by the making of a valuation order for the rating authority area involved. The valuation order indicates that the Commissioner of Valuation intends to appoint a "*valuation manager*" to draw up and compile a new valuation list for the rating authority area concerned. A "*valuation list*" is defined as a list comprising every relevant property that has been the subject of the valuation mentioned in the valuation order, and the value of that property as determined by that valuation.

16. The valuation order will specify a date by which it is proposed to publish the new valuation list and the subsequent date upon which the valuation list will become effective.

17. Importantly, Section 20 of the Valuation Act 2001 provides that 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 ("***the valuation date***"). It is further provided that the valuation date shall not be later than the date of the making of the valuation order. As explained at paragraphs 35 to 38 below, there will always be a time lag between the specified

valuation date and the subsequent publication of the valuation list. On the facts of the present case, the time lag is approximately twenty-two months.

18. Section 48 of the Valuation Act 2001 provides that the value of a relevant property "*shall be determined*" under the Act by estimating the "*net annual value*" of the property. The concept of "*net annual value*" is defined as follows under Section 48(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."

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.*).

21. Two of the factors identified in the definition of "*net annual value*" will vary depending upon the precise date by reference to which a property's rateable value is determined. First, the "*rent*" which a property might be expected to attract will be affected by changes in prevailing rental market conditions. In a rapidly falling rental market, for example, a difference of even a few years in the reference date may result in a significant difference in rateable value.

22. Secondly, the "*actual state*" of a property and the use to which it is put will change over the course of time. A property may, for example, have fallen into disrepair, or, alternatively, may have been developed for a new, more profitable use. The requirement that the rateable value be estimated by reference to the property in its "*actual state*" has the practical effect that the development potential of the property is largely excluded from consideration when estimating the rateable value. (This does not mean that the carrying out of development is ignored for rating purposes. As discussed at paragraphs 42 to 47 below, a valuation list may be revised subsequently so as to reflect a "*material change in circumstances*" which results in a change in the value of the property or the creation of a new rateable property).

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.

SECTION 19(5) OF THE VALUATION ACT 2001

28. Given their centrality to the issues in dispute, it is necessary to address the provisions of Section 19(5) of the Valuation Act 2001 in some detail. The section reads as follows:

> "(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)—
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> (a) correctness of value, and
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> (b) equity and uniformity of value between properties on that valuation list,
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> 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."

29. The effect of Section 19(5) is qualified by Section 37(4). This provides that the Valuation Tribunal is not constrained to employ a comparative method but may arrive at its determination by reference to whatever method of valuation or combination of methods of valuation as the Valuation Tribunal, in its discretion, may deem appropriate.

30. As appears, Section 19(5) identifies two objectives to be achieved in drawing up and compiling a valuation list: (a) correctness of value, and (b) equity and uniformity of value between properties on that valuation list. These dual objectives were introduced by way of legislative amendment under the Valuation (Amendment) Act 2015.

31. The distinction between the two objectives is, perhaps, best illustrated by reference to *Commissioner of Valuation v. Carlton Hotels Ltd* [2013] IEHC 170,

[2016] 2 I.R. 385. There, the Commissioner of Valuation had argued, unsuccessfully, that the objective of the (unamended) Valuation Act 2001 had been to establish the *relative value* of the property in question, i.e. the property's value relative to other comparable properties, rather than to establish the net annual value of the property as such. The thinking underlying this argument seems to have been that the primary purpose in valuation is to establish uniformity and equity as between ratepayers and that this would be achieved provided that comparable properties were valued on the same basis.

32. The High Court (O'Malley J.) rejected the argument as follows (at paragraph 61 of the reported judgment):

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

33. The judgment goes on to say that the first task, therefore, is to determine the net annual value of the property.

34. The practical effect of the amendment of Section 19 by the Valuation (Amendment) Act 2015 is to make explicit that which had been implicit under the Valuation Act 2001 as originally enacted, namely that the determination of the rateable value of a property should be correct insofar as is reasonably practicable. It is not sufficient merely to ensure that the amount determined to be the rateable value of a particular property is in uniformity with other comparable properties.

35. To this end, 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***").

36. The date of issuance will, by definition, always be later than the valuation date specified by the valuation order for the particular rating area. This is because the valuation date will always precede the date of the making of the valuation order, whereas the date of issuance will always postdate the date of the valuation order. Section 21 provides that the publication date specified in the valuation order shall not be later than three years after the date of the making of the valuation order. The valuation certificates must be issued on a date that is no later than seven days before the date the Commissioner causes the valuation list to be published.

37. It follows, therefore, that there will always be a time lag between the valuation date and the date of issuance. Indeed, in some instances, the date of issuance will not occur until almost three years after the valuation date. (On the facts of the present case, the time lag is shorter, i.e. twenty-two months).

38. In practice, the existence of this time lag will mean that, as of the date upon which the determination of rateable value is made, 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.

39. Were it not for the provisions of Section 19(5), there might have been a question mark as to whether it would be legitimate for the Valuation Tribunal to refer to such newly available data. To put the matter another way, there might have been a question mark as to whether it would be legitimate to determine the rateable value of a property with the benefit of the *hindsight* afforded by the newly

available data. 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.

40. For completeness, brief reference should be made to the judgment of the Court of Appeal in *Dayhoff Ltd v. Commissioner of Valuation* [2022] IECA 35. The Court of Appeal, at paragraph 23 of the judgment, drew attention to 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 Valuation Act 2001. The judgment goes on then to say that very clear (statutory) language would be required to exclude from consideration information which the Valuation Tribunal might otherwise think directly relevant to the task of valuation in hand. Although the Court of Appeal was concerned with a different aspect of the Valuation Act 2001, it is arguable that similar sentiments apply, by analogy, to the interpretation of Section 19(5).

41. I will return to consider the application of Section 19(5) to the circumstances of the present case at paragraph 65 *et seq*. below.

REVISION OF EXISTING VALUATION LIST

42. A "*relevant property*" is defined under Schedule 3 of the Valuation Act 2001 as including electricity generating stations, including where appropriate wind generators, turbines and generators, together with ancillary plant and electrical equipment, including transformers. Schedule 4 of the Act provides that agricultural land shall not be rateable. It follows, therefore, that the construction

of a wind farm on what had previously been agricultural land would result in a new rateable property coming into existence.

43. The Commissioner of Valuation argues 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. It is said 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 they can bear their fair share of the rates burden during the currency of the valuation list.

44. Having regard to this argument, it is necessary to address briefly how the contingency of the value of a property changing during the currency of a valuation list is addressed under the Valuation Act 2001. The general position is that a valuation carried out by reference to the specified valuation date remains effective for a period of between five to ten years until a new valuation ("*revaluation*") is carried out as part of the process culminating in the publication of a new valuation list. There are, however, 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 so as to reflect the change. The valuation list might, for example, be amended so as to include a property which had not previously been rateable. Similarly, the valuation list might be amended so as to state a revised value for a property already included on the list. Put otherwise, whereas a valuation list is effective for between five and ten years, it

is possible to revise the list during its currency so as to reflect changes in value arising from, *inter alia*, development works since the previous valuation date.

45. The power of revision under Section 28(4) of the Valuation Act 2001 is 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 concerned is situate. As put by the Court of Appeal in *Dayhoff Ltd 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.

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.

THE RECEIPTS AND EXPENDITURE METHOD OF VALUATION

48. The Valuation Act 2001 states that the Valuation Tribunal may arrive at its determination by reference to whatever method of valuation or combination of methods of valuation as the Tribunal, in its discretion, may deem appropriate. Of course, if the Valuation Tribunal commits an error of law in reaching its determination, then this may be corrected on appeal by way of case stated. See, generally, *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33 (at paragraphs 36 to 53).

49. The general position is that the assessment of net annual value is done by reference to rental analysis and valuation. This involves consideration of the rents commanded by comparable properties. This method will not, however, be of assistance in circumstances where there is no market rental evidence available. It is common case that there is no actual rental market for wind farms: this is because wind farms are invariably occupied and operated by the owner. Accordingly, the parties agreed that the net annual value of the wind farm should, instead, be estimated by the receipts and expenditure method of valuation (sometimes referred to as the "*R & E method*").

50. It should be explained that the receipts and expenditure method is not a statutory concept, but rather a methodology employed by valuers to estimate the rental value of a property by reference to the profit which a hypothetical tenant might reasonably expect to earn from their occupation of the premises. The logic of

the methodology is that, whereas the statutory concept of "*net annual value*" is a measure of rent, not profit, the rent which the hypothetical landlord and tenant would agree upon will often be directly affected by their expectations as to profit.

51. In brief outline, the receipts and expenditure method involves making an assessment of the gross receipts which might reasonably be expected to be derived from the occupation and use of the property in its actual state, and deducting from that figure the costs of purchases and working expenses. This then produces a figure for what is described as the "*divisible balance*". This is the sum notionally available to be shared between the hypothetical landlord and the tenant. The tenant's share of the divisible balance is assessed as the amount required to induce the tenant to enter into the tenancy, having regard, *inter alia*, to the risk undertaken by the tenant and the need for profit. The remainder of the divisible balance is the amount notionally available to be paid as rent. This is described as the landlord's share.

52. One source of data which is often referred to under the receipts and expenditure method are the financial accounts of the actual occupier of the property. The financial accounts may provide some assistance in deciding what expectations the hypothetical landlord and tenant should be assumed to have in respect of profitability. It is important to emphasise, however, that the ultimate object of the exercise is to determine the net annual value of the property by reference to a hypothetical tenancy. It is assumed that the hypothetical tenant will be a reasonably efficient operator of the property. It may be necessary, therefore, to adjust the figures for profit in the financial accounts to reflect factors such as, for example, the peculiar efficiency or inefficiency of the actual occupier.

53. The parties, and the Valuation Tribunal in its determination, have made reference to a guidance note on the receipts and expenditure method published in 1997 by the (UK) Joint Professional Institutions' Rating Valuation Forum ("***the guidance note***"). The guidance note does not have statutory force in the United Kingdom, still less in this jurisdiction. The parties, at the hearing before me, placed great emphasis on the guidance note and insufficient emphasis on the provisions of Section 19(5) of the Valuation Act 2001.

54. The guidance note addresses the use of financial accounts at §5.5 to §5.11. The guidance note recommends that the accounts available for the years preceding the antecedent valuation date should be carefully examined to ensure that they fairly reflect the proper trading position at that date. The guidance note also states that what it describes as "*hindsight*", i.e. consideration of accounts for years following the antecedent valuation date, may be used as a means of confirming trends discernible at that date.

55. There appears to have been some confusion on the part of the Valuation Tribunal in respect of the nature of the post- valuation date data which the ratepayer was seeking to rely upon. As discussed below, the valuer who gave evidence before the Valuation Tribunal on behalf of the ratepayer had sought to rely on empirical data in respect of energy output from the wind farm. This data would have been directly relevant to the calculation of the gross receipts. This data is reflected in the financial accounts subsequently prepared on behalf of the ratepayer for the years 2017 and 2018. For the purposes of determining the admissibility of the data under Section 19(5) of the Valuation Act 2001, it is the date upon which the empirical data was first available which is crucial, rather than the later date upon which that data is reflected in the financial accounts. This is because the parties

had agreed that the amount for gross receipts should be calculated by simply multiplying the estimated annual energy output of the wind farm (measured in megawatts per hour) by an agreed figure for income. This was not a case where it was necessary, for the purpose of calculating the (hypothetical) gross receipts, to descend to the detail of the financial accounts.

KEY DATES

Valuation date (Section 20)	30 October 2015
Wind farm commences operation	March 2017
Date of issuance of certificate of valuation	7 September 2017
Publication date (Section 21)	15 September 2017
Effective date (Section 21)	31 October 2017

DISCUSSION AND DECISION

56. The Valuation Tribunal purported to value the wind farm by reference to its "*actual state*" on the date of the publication of the new valuation list, on the counterfactual assumption that the wind farm had already been constructed and would have been available to be leased to a tenant as of the valuation date almost two years earlier. As acknowledged by the Valuation Tribunal in its determination, this involved the Tribunal in "*a hypothesis that is divorced from all reality*" as the wind farm did not exist at the valuation date. 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 that date.

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.

58. The parties had agreed that the net annual value of the wind farm should be estimated by the receipts and expenditure method of valuation. The parties had reached some level of consensus as to the first step in the methodology, namely the assessment of the gross receipts. It was agreed that the gross receipts were to be calculated by multiplying the estimated annual energy output of the wind farm (measured in megawatts per hour) by an agreed figure for income. This approach reflects the highly regulated nature of the market for electricity from wind farms whereby the price per unit is fixed by reference to the Renewable Energy Feed-in Tariff ("*REFIT*") scheme.

59. The parties were, however, in dispute as to what the figure for annual energy output should be. The ratepayer submitted that the figure should be based on the actual output of the wind farm for the period March 2017 to 31 December 2018. The Commissioner of Valuation, conversely, submitted that the figure should be taken from an energy production assessment report which had been prepared in 2015, prior to the construction and commissioning of the wind farm. This report had been prepared by an entity known as DNV GL and will be referred to in this judgment as "***the 2015 report***".

60. There was a subsidiary dispute between the parties as to which predicted figure from the 2015 report should be relied upon in the event that it were to be held that regard could not be had to the actual energy output of the wind farm. As appears presently, it is unnecessary to resolve this second issue given my findings on the first issue identified above.

61. The Valuation Tribunal decided to exclude from consideration the data in respect of the actual energy output of the wind farm. The approach taken by the Valuation Tribunal is internally inconsistent. Having decided that the property was to be valued by reference to its "*actual state*" at the date the valuation list was published, the Valuation Tribunal then contradicted itself by stating that the property was to be valued on the counterfactual assumption that no energy had yet been produced at the property. In truth, as of the publication date, the wind farm had already been in operation for approximately six months. No proper explanation is given as to why the empirical data in respect of the actual energy output of the wind farm during this period should be excluded from consideration.

62. The Supreme Court held in *Harper Stores Ltd v. Commissioner of Valuation* [1968] I.R. 166 at 172 that 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. Whereas the Supreme Court judgment was delivered in the context of the earlier legislation, neither party has suggested that the phrase "*actual use*" is intended to have a different meaning for the purposes of the Valuation Act 2001.

63. Physical attributes, such as the energy output of the wind farm and climatic conditions, are as much a part of the "*actual state*" of the property, as is the

existence of structures on the property. Similarly, the ongoing use of the property as a wind farm (which had commenced some six months prior to the date by reference to which the Valuation Tribunal says the "*actual state*" of the lands were to be assessed) also comes within the statutory concept. Indeed, in his written submissions of 28 October 2021, the Commissioner of Valuation accepts that some wind farm locations are more "*windy*" than others, and that this factor must be reflected in the net annual value.

64. Assuming for the moment that it is permissible to employ two different reference dates for the purpose of determining the net annual value of the property, then the property should have been valued as a wind farm which had been operational for six months and regard should have been had to the empirical data in respect of climatic conditions and the energy output of the wind turbines. To do otherwise is to disregard aspects of the "*actual state*" of the property as it stood in September 2017. The Valuation Tribunal erred in law in its interpretation and application of the statutory concept of "*actual state*".

65. Moreover, and in any event, the exclusion of the empirical data is inconsistent with the requirements of Section 19(5) of the Valuation Act 2001. This section provides, *inter alia*, that a valuation list shall achieve, insofar as is reasonably practicable, both (a) correctness of value, and (b) equity and uniformity of value between properties on that valuation list. To this end, the Commissioner of Valuation, and the Valuation Tribunal on appeal, are to refer to relevant market data and other relevant data available on or before the date of issue of the valuation certificates concerned.

66. The empirical data in respect of the energy output of the wind farm for its first six months of operation meets the statutory criteria under Section 19(5). The

empirical data had been "*available*" as of the date the valuation certificate issued (7 September 2017). The empirical data clearly constitutes "*other relevant data*". This is because the figure to be attributed to energy output is relevant to, and has a direct bearing on, the rateable value of the wind farm. The Valuation Tribunal intended to calculate the notional gross receipts of the wind farm by multiplying a figure representing the annual energy output (measured in megawatts per hour) by an agreed amount for income. The figure chosen for this purpose has a direct mathematical relationship to the amount estimated as the rateable value of the property. The use of the actual energy output figure, rather than a figure based on an exercise carried out in 2015 prior to the construction and commissioning of the wind farm, would have advanced the statutory objective that the valuation list should be correct insofar as is reasonably practicable.

67. The approach adopted by the Valuation Tribunal meant that the figure for gross receipts was overstated, which had the consequence that the figure derived for the net annual value of the letting of the wind farm was proportionately overstated.

68. The Valuation Tribunal purported to exclude the empirical data on energy output from consideration for the following reasons:

> "Firstly, the Tribunal does not consider that it would be a legitimate invocation of the hindsight principle in a situation where neither of the two recognised circumstances which warrant the use of hindsight in rating law arise on the facts of this appeal. There is no trend discernible at the valuation date to be proved or disproved. There is no event or expectation in the mind of the hypothetical tenant at the valuation date that materialised after the valuation date. Secondly, the Tribunal is concerned with estimating the rent at which a property might reasonably have been expected to have let on a specific valuation date upon information

> available at that date and not with assessing at that valuation date a fact that lies in the future."

69. With respect, this finding cannot be reconciled with the provisions of Section 19(5) of the Valuation Act 2001. This is because the finding involves the introduction of restrictions on the use of "*relevant data*" which are not provided for under the section itself. The notion of there being only two "*recognised circumstances*" in which it is permissible to have regard to information which had not been available as of the valuation date is one which appears to have been imported from the non-statutory guidance note from the United Kingdom. It has no foundation in the statutory language of Section 19(5). The precise purpose of that section is to enshrine the principle that the valuation list should be correct insofar as is reasonably practicable. To this end, relevant data which is available subsequent to the valuation date is admissible, provided that it is available on or before the date of issue of the valuation certificate concerned. At the risk of belabouring the point, the data in respect of the energy output of the wind farm is directly relevant to the determination of the rateable value, for the reasons explained earlier.

70. In any event, even if the supposed restrictions on the use of hindsight did apply, they would have been satisfied. The energy output of the wind farm would have been the primary factor in the minds of the hypothetical landlord and tenant. The highly regulated nature of the electricity market meant that the price per unit was, in effect, fixed, and therefore the principal determinant of the gross receipts of the wind farm is its energy output. This, in turn, has a direct bearing on the rateable value of the wind farm under the receipts and expenditure method. Any rental bid would have been directly affected by the parties' reasonable expectations as to what the energy output would be.

71. That this is so is confirmed by the content of the 2015 report. The objective of the report, as recited in the introduction thereto, was to carry out an independent analysis of the wind climate and energy production of the then proposed wind farm. The 2015 report was prepared in advance of the operation of the wind farm and at a time when, seemingly, a final decision had yet to be made in respect of the model of wind turbine to be used: the report refers to the two different models of wind turbine then under consideration.

72. The 2015 report contains an assessment of the meteorological conditions of the lands at Sliabh Bawn and also contains what is described as a "*climatic conditions review*" of the then proposed project. A wind measuring device had been installed on the lands and an attempt was made to extrapolate the likely energy output of the wind turbines from the recorded measurements. It is explained in the 2015 report that the location of the wind measuring device is not considered to be representative of all of the turbine locations due to the relatively large distance between the mast and the turbine locations and the difference in elevation. The 2015 report contains a disclaimer to the effect that any wind or energy forecasts, estimates or predictions are subject to factors not all of which are within the scope of the probability and uncertainties contained or referred to in the report. It is further stated that nothing in the report guarantees any particular wind speed or energy output.

73. The nature of the issues addressed in the 2015 report indicate that energy output, which in turn is affected by climatic conditions, is one of the primary factors which would be considered by a potential investor in assessing profitability. Similarly, it is one of the primary factors which would be considered by the hypothetical landlord and tenant. In the present case, the data available as of the

valuation date was speculative only in circumstances where the wind farm had not yet been constructed and commissioned. As of the date of issuance of the valuation certificate, however, there was empirical data available based on six months' operation.

74. If the estimated figure for wind energy as of the valuation date proves to be incorrect, and a more accurate figure is available as of the date of issuance of the valuation certificate, then the logic of Section 19(5) demands that the more accurate figure be relied upon. To do otherwise would be in breach of the statutory imperative to seek to ensure, insofar as is reasonably practicable, that the valuation is correct.

75. The restrictions on the use of "*hindsight*" in the (UK) guidance note appear to have been intended to avoid a situation whereby an entirely unexpected event, which could not reasonably have been foreseen by the hypothetical landlord and tenant as of the valuation date, intervenes and materially affects real world rent. An example might be where there is a sudden unforeseen change in the economy and a crash in property values. No such mischief occurs where relevant data is used to ensure that a more accurate figure is employed for what was always understood to be the principal determinant of the property's rateable value. Even on the Commissioner of Valuation's own case, it is permissible to rely on hindsight to determine the outcome of an event that occurred after the valuation date but was known at the valuation date to impact future receipts or expenditure: see written submissions of 14 October 2022.

76. The second reason stated by the Valuation Tribunal in the passage cited above appears to suggest that it is only information which is available as of the valuation date which is to be taken into consideration. Such a suggestion is

incorrect. The precise purpose of Section 19(5) is to allow reference to be made to relevant data which only becomes available *subsequent* to the valuation date. This data is admissible so as to achieve correctness of valuation.

77. The Commissioner of Valuation advanced a more sophisticated version of this argument at the hearing on 7 October 2022. Counsel on his behalf submitted that data which only became available after the valuation date specified under the valuation order is not relevant for the purposes of the revenue and expenditure method of valuation, and, accordingly, is not "*relevant data*" within the meaning of Section 19(5) of the Valuation Act 2001. This point was elaborated upon subsequently in written submission as follows. It was submitted that the revenue and expenditure method is based on a hypothetical negotiation between a hypothetical landlord and tenant as to the appropriate rent that is assumed to have been negotiated and agreed on the valuation date. It was further submitted that an essential element of this is that events which took place *after* the valuation date could not have been known to the hypothetical parties at the time of the hypothetical negotiation and those parties could not have access to information that concerned events that took place after the valuation date.

78. With respect, the approach advocated for by the Commissioner of Valuation cannot be reconciled with the wording of Section 19(5). The section identifies a clear cut-off date for the admissibility of relevant data. The argument on behalf of the Commissioner is entirely circular: it seeks to define *relevance* by reference to the date upon which the data becomes available. More specifically, the argument involves relying on a supposed limitation on the revenue and expenditure methodology, i.e. to the effect that only data which is available at

the valuation date is relevant, to defeat a statutory provision the precise purpose of which is to define the cut-off date for admissibility.

79. There is nothing in the Valuation Act 2001 which supports the Commissioner's argument. The revenue and expenditure method is not defined for the purposes of the Act, still less is there a statutory limitation which excludes reliance on relevant data which only becomes available subsequent to the valuation date. There is nothing inherent in the logic underlying the receipts and expenditure method which dictates that only data available at the valuation date can be considered. The underlying logic is that the rateable value of a property can be deduced by determining how the notional profit, described as the "*divisible balance*", would be shared between the hypothetical landlord and tenant. The divisible balance is calculated by estimating the profit which the occupation and use of the property in its actual state might reasonably be expected to achieve and deducting from that figure the costs of purchases and working expenses. The more accurate the estimate of receipts and expenditure, the more accurate will be the determination of the rateable value. The use of the empirical data available in respect of the first six months' operation of the wind farm would increase the accuracy of the valuation exercise.

80. Section 19(5) makes it a statutory objective that a valuation list should, insofar as is reasonably practicable, achieve correctness of value. To this end, the section expressly allows for the use of relevant data which only becomes available subsequent to the valuation date. The Commissioner of Valuation has never suggested that the empirical data in respect of the energy output of the wind farm is not relevant in the sense of ensuring the *correct* value for rating purposes. Indeed, no such suggestion could sensibly be made in circumstances

where, as outlined in detail already, the figure for energy output has a direct bearing on the assessment of the rateable value of the wind farm.

81. The principal case law relied upon by the Commissioner of Valuation in support of his argument that there is a non-statutory temporal limitation on the admissibility of relevant data for the purpose of the receipts and expenditure method is the judgment of the Divisional Court in *Barking Rating Authority v. Central Electricity Board* [1940] 2 K.B. 51.

82. The Commissioner cites, in particular the following passage (at pages 62/63 of the reported judgment):

> "The Court was not there saying, and never has said, that quarter sessions or the assessment committee might pay regard to matters affecting the valuation which had occurred after the date of the making of the rate. What was said was that quarter sessions might look at matters which had occurred after the date at which the company's accounts were closed and between the date of the closing of the accounts and the date of the making of the rate. The Court was emphasizing that as the rate might be amended the sessions ought to avail themselves of every light that could be afforded them down to the latest period antecedent to the making of the rate. It is not an authority, nor is there any authority, laying down that the rateable value can be fixed on materials which only come into existence after the making of the rate. An assessment based on profits can be based on ascertained returns. The trend of the returns as shown by such accounts as are existent is material in considering the tenant's share, for it may reasonably be supposed that an ordinary tenant would pay regard to it, but the accounts and the trend of the returns must be examined as they are known at the date of the assessment and not in the light of facts which have only happened and come to be known afterwards, and which could not, therefore, have been considered by either the hypothetical tenant or the landlord at the date of the assessment. The rateable value is not to be fixed, though it may be amended, on the basis of the wisdom which comes after the event."

83. The judgment of the Divisional Court was appealed, and the Court of Appeal of England and Wales held that what was then known as the "*profits basis*" had to

be calculated not on what may happen in the future, but on the profits ascertained down to the latest period before the date of the rate or, in that case, the preparation of the valuation list: *Barking Rating Authority v. Central Electricity Board* [1940] 2 K.B. 493.

84. With respect, this case law is of little or no assistance in resolving the issue before me, namely the correct interpretation of the Valuation Act 2001. The case law was decided by reference to a very different statutory scheme, namely the (UK) Rating and Valuation Act 1925. Relevantly, that statutory scheme did not involve the use of two different reference dates for valuation purposes and did not contain a provision similar to that found at Section 19(5) of the Valuation Act 2001.

85. For the reasons discussed at paragraphs 11 to 13 above, it is dangerous to read judgments from England and Wales out of their statutory context and to attempt to apply their conclusions to the differently structured legislation in this jurisdiction. In any event, even if the conclusions reached by the Court of Appeal of England and Wales could be applied, by analogy, to the Valuation Act 2001, it would not advance the Commissioner of Valuation's case. The decision of the Court of Appeal of England and Wales is to the effect that the cut-off date for the admissibility of financial accounts is the date of the setting of the rate or the publication of the valuation list. This cut-off date would appear to produce a result broadly equivalent to that allowed for by Section 19(5) of the Valuation Act 2001. The "*date of issue of the valuation certificates concerned*" falls just before the "*publication date*".

USE OF TWO DIFFERENT VALUATION DATES

86. Thus far the discussion in this judgment has proceeded on the working assumption that it is permissible to assess the "*actual state*" of the property by reference to the date upon which the valuation list is published, rather than by reference to the valuation date specified by the valuation order. For the reasons set out above, I have concluded that, even if this is the correct interpretation of the legislation, the Valuation Tribunal has erred in law.

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.

CONCLUSION AND NEXT LISTING

94. The Valuation Tribunal erred in law in excluding from consideration the empirical data on energy output from the wind farm. The exclusion of this data is contrary to the provisions of Section 19(5) of the Valuation Act 2001, as

applied to an appeal by Section 37. The exclusion of this data is also inconsistent with the logic of the Valuation Tribunal's finding that the "*actual state*" of the wind farm fell to be assessed by reference to the date upon which the valuation list was published. Physical attributes, such as the energy output of the wind farm and climatic conditions, are as much a part of the "*actual state*" of the property, as is the existence of structures on the property. Similarly, the ongoing use of the property as a wind farm also comes within the statutory concept. By excluding these matters from consideration, the Valuation Tribunal erred in law in its interpretation and application of the statutory concept of "*actual use*".

95. The exclusion of the empirical data is addressed by the third and fourth questions in the case stated. However, the wording of those questions does not precisely capture the essence of the dispute between the parties. The questions refer to the figures in the trading accounts for the years 2017 and 2018. It is apparent from the précis of evidence prepared by the valuer on behalf of the ratepayer, however, that reliance was being placed on the energy output (described as "*an average outturn of 170,000 MWhrs*"). The High Court has an inherent jurisdiction to amend a case stated so as to ensure that the wording accurately reflects the issues of law which arise. (See, generally, *Untoy v. GE Capital Woodchester Finance Ltd* [2015] IEHC 557 and *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118). I propose, therefore, to amend the third and fourth questions so as to substitute the words "*the figures for the energy output from the wind farm available as of the date of issuance of the valuation certificate (7 September 2017)*".

96. The third and fourth questions in the case stated will, therefore, be answered in the affirmative: the Valuation Tribunal did err in law in excluding the empirical data in respect of energy output.

97. It is unnecessary to address the first and second questions in the case stated in circumstances where the figure for energy output should have been based on the empirical data rather than on the content of the 2015 report.

98. The case stated raises a separate issue in respect of the calculation of a (notional) sinking fund to allow the hypothetical tenant to replace physical assets (including wind turbines). The parties are agreed that consideration of this aspect of the case stated should be deferred pending the outcome of an appeal to the Court of Appeal against the decision of the High Court in *Commissioner of Valuation v. Hibernian Wind Power Ltd* [2021] IEHC 49.

99. My provisional view is that 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. As explained at paragraphs 86 to 93 above, I will hear counsel further as to the precise form of any remittal and as to the directions to be made. I will also hear counsel on the appropriate costs order to be made.

100. The proceedings will be listed on 22 November 2022 at 10.30 o'clock for further submissions. If this date is not suitable, the parties must notify the registrar of an alternative date within seven days of today's date.

Approved Garrett Simons

Appearances

Owen Hickey SC and Proinsias Ó Maolchalain for the appellant instructed by Arthur Cox LLP

Andrew Fitzpatrick SC and David Dodd for the respondent instructed by the Chief State Solicitor