

**THE HIGH COURT
REVENUE**

[2021] IEHC 420
[Record No. 2020/89R]

BETWEEN

EXPRESS MOTOR ASSESSORS LIMITED (IN LIQUIDATION)

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Stack delivered on the 21st day of June 2021.

Introduction

1. This is an application by the appellant for an order pursuant to s.949AR of the Taxes Consolidation Act, 1997, ("the TCA") amending the case stated dated 13 July, 2020, whereby Appeals Commissioner Phelan referred a case stated to this court on a point of law. This application was brought by notice of motion dated 10 November, 2020, which cited s.949AF. However, this typographical error was corrected by application to amend at the commencement of the application.

2. The two questions sought to be added to the case stated are as follows:

Question 1 asks if the Commissioner was correct in law "in proceeding to continue with the hearing in ignoring the irregularities of the Revenue Audit process in which the Liquidator's view was that Revenue acted unlawfully in the conduct of the audit, in obtaining information and documentation and in holding interview/meetings with persons who did not represent the company". Question 2 asks if the Commissioner was correct in law "in allowing the Respondent to be in a position to object to any sworn evidence before hearing or seeing the evidence".

3. It is common case that the jurisdiction of this Court is set out in s. 949AR of the TCA. This provides:

"(1) The High Court shall hear and determine any question of law arising in a case stated and—

(a) shall reverse, affirm or amend the determination of the Appeal Commissioners,

(b) shall remit the matter to the Appeal Commissioners with its opinion on the matter, or

(c) may make such other order in relation to the matter as it thinks just, and may make such order as to costs as it thinks fit.

(2) The High Court may send the case stated back to the Appeal Commissioners for amendment, in which case—

(a) the Appeal Commissioners shall amend the case stated accordingly, and

(b) the High Court shall, thereafter, proceed in one of the ways specified in subsection (1)."

4. Before turning to the legal issues that fall to be decided, it is necessary to refer to the Determination of the Appeals Commissioner and to the terms of the case stated itself. In his Determination of 30 April, 2020, Commissioner Phelan specifically referred at paras. 77-81 of his Determination to certain objections that the Appellant had made to the Revenue audit and investigation of its affairs, given that it was in voluntary liquidation at the time of the audit. The Liquidator, who represented the appellant at the hearing before the Commissioner, had objected to the lawfulness of the Revenue audit giving rise to the relevant assessments to tax. The unlawfulness was said to arise by reason of the fact that the Appellant was in voluntary liquidation and therefore could only be properly represented by the Liquidator rather than the Directors. The Appellant relied on s. 677 of the Companies Act, 2014. It was submitted by the Liquidator, who represented the appellant at the hearing before the Appeals Commissioner, that it was unlawful on the part of Revenue to communicate directly with the Directors of the appellant as they no longer had power to represent it.
5. Objection was also made to the fact that a former director had provided books and records of the appellant to Revenue officials and had attended meetings with Revenue without the permission of the Liquidator and in the absence of the Liquidator. One of the complaints made to the Commissioner in the course of the appeal was that the Liquidator had not been properly notified of meetings with the Revenue, and this position was maintained in the application before me. As noted by the Commissioner at para. 78 of his Determination, the Revenue disputed the allegation that the Liquidator had not been notified and, similarly, maintained that position in the hearing of the application before me.
6. While noting the stance of the Revenue at para. 78 of his Determination, the Commissioner however, made it clear that he did not feel that he had jurisdiction to deal with the complaint at all. He continued:

"79. The Determinations that can be made by an Appeal Commissioner are those delineated in ss. 949AK and 949AL of TCA 1997. Those provisions confine the Appeal Commissioners to making a Determination in relation to the assessments, decisions, determinations or other matters which are the subject matter of the appeal actually before the Appeal Commissioners. The jurisdiction of the Appeal Commissioners is confined to interpreting tax legislation and ensuring that the Revenue Commissioners have complied with that legislation. The Appeal Commissioners do not have the jurisdiction to determine whether a legislative provision is discriminatory or unfair or otherwise unlawful, we are not empowered by statute to apply the principles of equity or to grant declaratory relief.

80. Accordingly, I am satisfied that it would be ultra vires for me to embark upon a consideration of, or to make a finding or determination in relation to, the issue of whether the conduct of the Revenue investigation in this case is, as argued by the

Appellant, discriminatory or unfair or otherwise unlawful. I must therefore decline to consider this argument or to make any finding in relation thereto.

81. I do not consider that the jurisdiction of the Tax Appeal Commissioner extends to decide on matters of criminal import.”
7. It is clear, therefore, from the Determination, that the Appeals Commissioner determined that he did not have jurisdiction to entertain the complaints and therefore made no findings of fact whatsoever as to what had occurred in the course of the audit, or whether the Revenue had, as they contended, in fact put the Liquidator on notice of the various meetings. He also declined to make any findings on the alleged unlawfulness of the Revenue officials who carried out the investigation and audit of the appellant’s affairs.
8. In the course of preparing the case stated, various submissions were made to the Appeals Commissioner by the appellant as to the inclusion of questions additional to the one which was ultimately included. The two questions now sought to be included in this appeal by way of amendment were in fact first formulated by Appeals Commissioner Phelan to reflect the submissions made by the appellant as to what should be included in the case stated, albeit that he declined to include them. Instead, he stated a case on a single question and the appeal on that point is awaiting the outcome of this application.
9. As regards the first question, the Commissioner found at para. 26.I, that he did not have the jurisdiction to determine whether the actions of the Revenue Commissioners were unlawful in conducting investigations that arise at the assessments under appeal, as his jurisdiction was determined by ss. 949AK and 949AL, TCA, as amended. In other words, he repeated his finding, previously made in his Determination, that he had no jurisdiction to consider the matter and it was therefore inappropriate to state a case on that question of law for the High Court.
10. In para. 26.II of the case, the Commissioner rejected the application to include the second question, stating as follows:

“I do not consider that there is any point of law raised in this question in relation to an objection raised by the Respondent in relation to any sworn evidence. In fact, I adjourned the appeal for a short time to allow for discussions. On resumption I noted the objection and overruled it on the basis of s. 949AC TCA 1997.”

Issues arising on this Motion

11. Three issues arise for determination. First, Revenue submits that any amendment should be done by this Court rather than returning the case stated to the Appeals Commissioner for amendment. Secondly, there is a dispute between the parties as to whether the questions ought to be introduced into the case stated by amendment. Thirdly, Revenue submits that it was not necessary to bring a motion and the application to amend could and should be dealt with at the hearing of the substantive case stated in this Court.

(i) Whether this Court should amend the case stated or send it back for amendment

12. Counsel for the Appellant submits that subsection (2) is a stand-alone provision which envisages that the power of amendment is separate from the powers of the High Court set out in subsection (1), and therefore provides that only the Appeal Commissioner should amend the case stated. He relied on the principle *expressio unius est exclusio alterius* for the proposition that the explicit power of amendment for the Appeal Commissioner in subs. (2) indicated that this Court enjoyed no power of amendment pursuant to subs. (1). In the course of the hearing, this position was refined in light of the recent decision of Sanfey J. in *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118, and counsel for the Appellant expressed the view that he would be satisfied for this Court, if it thought it appropriate to include the additional questions, to amend the case stated itself.
13. By contrast, counsel for Revenue relied heavily on *O'Sullivan* to argue that it would be unnecessary and inappropriate to send the matter back to the Appeals Commissioner for amendment. In that case, the parties agreed that the High Court had power to amend the questions in the case stated to reflect more accurately the legal issues which arose in that appeal. Sanfey J. referred to the previous decision of O'Malley J. in *Untoy v. GE Capital Woodchester Finance Ltd* [2015] IEHC 557, in which this Court had recast the questions in a case stated by the District Court pursuant to s.2 of the Summary Jurisdiction (Ireland) Act, 1857, as extended by s.51 of the Courts (Supplemental Provisions) Act, 1961. As stated in *O'Sullivan* (at para. 58), s.949AR (2) is permissive only. The discretionary "may" in subs. (2) indicates that this court has a discretion as to whether it would send the case stated back for amendment or whether it would simply proceed to amend itself, and it seems to me on the authority of *O'Sullivan* and *Untoy*, above, that where the case stated contains ample findings of fact to resolve the issue of law, then the High Court will very often proceed to amend the case stated itself and then determine the questions of law, without sending it back to the Appeal Commissioner.
14. It should be noted that s.6 of the 1857 Act provides that, on hearing a case stated under that Act, the High Court "shall ... reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the Court may seem fit." It does not contain an express power of amendment of the case stated.
15. By contrast, s. 7 provides that: "The Court for the opinion of which a case is stated shall have power, if they think fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."
16. It is therefore clear that the 1857 Act, like s. 949AR, provides for a specific power of amendment of a case stated which is exercisable by sending the case stated back to the District Court, but also contains a wide discretion in the High Court to "make such other order in relation to the matter as the Court may seem fit." This was interpreted in *Untoy* as including a power to amend the case stated without the necessity of sending it back to

the District Court and that reasoning was adopted in *Sullivan*, in which Sanfey J. applied the same approach to s.949AR of the TCA.

17. I note that, in doing so, Sanfey J. adopted a logic similar to that of Blayney J. in *Mitchelstown Co-Op Society v. Comr. for Valuation* [1989] IR 210, where he held that the principles which applied to cases stated under the 1857 Act applied equally to cases stated by the Valuation Tribunal to this Court under the Valuation Act 1988.
18. The wide powers in s.6 are very similar to those in s.949AR (1) and the more specific power in s.7 is similar to that in s.949AR (2). While I therefore see the force behind the appellant's arguments, similar provisions in the 1857 Act do not appear to have been interpreted as conferring the exclusive power of amendment on the District Judge who states the case. Sanfey J. has already applied that logic to the TCA and therefore I cannot accept that only the Commissioners have the power to amend a case stated.

(ii) Whether the Court should exercise its discretion pursuant to s. 949AR to amend the case stated

19. That, however, is not the end of the matter as the mere fact that this Court may amend a case stated does not mean that it is appropriate to do so. In *Untoy*, it should be noted, O'Malley J. was satisfied that there were "sufficient findings of fact to enable the court to deal with those aspects of the case that appears to be of most relevance to the transactions in question...". (para. 120). In reliance on that authority, accepting the agreed position of the parties in that case, and noting that the case stated contained the necessary findings of fact to determine the legal issues which required to be determined, Sanfey J. in *O'Sullivan* held (at para. 25) that the necessary amendment could be effected by this Court without the need to send the case stated back to the Commissioner, stating that such a course "would only complicate matters, increase costs and delay the resolution of the matter."
20. The exercise of the power by Sanfey J. in *O'Sullivan*, therefore, was predicated on the case stated containing sufficient findings of fact for the point of law to be introduced by amendment to be determined. However, it is well established that where a case stated does not contain sufficient findings of fact to allow the point of law in a case stated to be determined, it will be sent back to allow those findings of fact to be made: *Mitchelstown Co-Op Society v. Comr. for Valuation*, applying *Emerson v. Hearty and Morgan* [1946] N.I. 35. This is because this Court has no jurisdiction to make such findings itself and can only determine matters of law. It is therefore a matter for the court or body stating the case to set out its findings of fact and its determination, and if this is not done, the case stated must be returned for those findings to be made and included in the case stated.
21. In those cases where the application to amend is made in respect of a case stated and where it is submitted to this Court that additional or different questions of law ought to have been included in the case stated, as was the case in *O'Sullivan*, it would seem sensible for this Court to amend the questions, provided the case stated contains sufficient findings of fact for the determination of the amended questions.

22. Applying this first to Question 1, it must be noted that the Appeals Commissioner deliberately refrained from making findings of fact relevant to that Question. This Court therefore could not, in the course of the case stated, proceed to determine Question 1 without sending the matter back to the Appeals Commissioner for the purpose of making the necessary findings of fact.
23. That in turn raises the prior question of whether this Court should first exercise its discretion to amend the case stated to include the point of law identified in Question 1 before then sending it back for the purpose of making the necessary findings of fact. It seems evident that this court should consider exercising its discretion to include the Question as Commissioner Phelan has already considered including it and has refused to do so. There would be little logic, therefore, in returning it to him for the purpose of considering whether to amend the case stated to include it.
24. Given that it appears to be accepted in the caselaw that the authorities on cases stated under the 1857 Act can provide guidance for cases stated under the TCA, I note that s.4 of the 1857 Act provides that a District Judge can only refuse to state a case if the question is "*merely frivolous*", but not otherwise (and cannot refuse at all any application by the DPP: see *Fitzgerald v D.P.P.* [2003] 3 IR 247 where s.4 in its adapted form is discussed). While a party dissatisfied with such refusal can apply for *mandamus* to compel the District Judge to state a case and, on such application, this Court can form its own view of whether or not the question is "*frivolous*", the procedure under the TCA differs from that under the 1857 Act.
25. Collins and O'Reilly, *Civil Proceedings and the State*, 3rd ed. (Round Hall, 2019), state at para. 2-50 that a party dissatisfied with the contents of a case stated under s. 949AQ (2) of the TCA should proceed by way of motion in the High Court to have it sent back for amendment and not by way of judicial review. They cite *R. v. Commissioners for the Special Purposes of the Income Tax Acts Ex p. Napier* [1987] 3 All ER 529 at 532 in support of this proposition. That case concerned the provision for a case stated in s.56 of the Taxes Management Act, 1970, and is a judgment dismissing an application for judicial review which was based, in part, on a complaint that the case stated did not contain all of the points which the applicant wanted to argue. It was held that, if the Special Commissioner did not agree to include the point at the request of the appellant after circulation of the draft case stated, then the appropriate course was to seek amendment by motion brought in the High Court.
26. As there is a general principle that relief by way of judicial review may be refused where there is an adequate alternative remedy, it seems to me that the approach in *Napier* is indeed applicable in this jurisdiction to a case stated under the TCA and an appellant should apply to amend to include a question which an Appeals Commissioner has refused to include, unless of course there has been a refusal to state a case on any question.
27. The next issue, therefore, is whether this court should exercise its discretion pursuant to s.949AR (2) to amend the case stated to include Questions 1 and 2.

28. As regards Question 1, the key submission made by Revenue was that it should not be included as the point of law is one which is outside the jurisdiction of the Commissioners and therefore outside the remit of this Court in hearing the case stated. I agree with the submission that the exercise by the Revenue Commissioners of powers in the course of the investigation and audit are a matter to be examined by this Court on an application for judicial review against the Revenue Commissioners, and do not form part of the jurisdiction of the Appeals Commissioner when hearing an appeal under the TCA.
29. I was referred to the recent decision of the Court of Appeal (*per* Murray J.) in *Lee v. Revenue Commissioners* [2021] IECA 18 which considered the issue of whether the Appeals Commissioners enjoyed jurisdiction to determine if Revenue had compromised a tax liability. Murray J. referred to *Stanley v. Revenue Commissioners* [2017] IECA 279, [2018] 1 ILRM 397, where the Court of Appeal (*per* Peart J.) held (at para. 33):

“The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued *ultra vires* the Revenue's statutory powers.”

That judgment is authority for the proposition that where unlawfulness of the exercise by the Revenue of their powers is concerned, judicial review is the exclusive remedy and it was interpreted as such by Murray J. in *Lee* (at para. 60). As pointed out by Murray J. (at para. 61) of *Lee*, the Court of Appeal in *Stanley* had accepted the contention cited on behalf of the taxpayer in that case that “the Appeal Commissioners' function is confined to determining whether the quantum of a lawful assessment is correct, and not whether the notice of assessment itself is lawfully issued”.

30. The passage from *Lee* relied upon most strongly by the Revenue in this case was that at para. 76, which states:

“The jurisdiction of the Appeal Commissioners and of the Circuit Court under those provisions of the TCA in force at the time of the events giving rise to these proceedings and relevant to this appeal (ss. 933, 934 and 942) is limited to determining whether an assessment correctly charges the relevant taxpayer in accordance with the relevant provisions of the TCA. That means that the Commissioners are restricted to inquiring into, and making findings as to, those issues of fact and law that are relevant to the statutory charge to tax. Their essential function is to look at the facts and statutes and see if the assessment has been properly prepared in accordance with those statutes. They may make findings of fact and law that are incidental to that inquiry. Noting the possibility that other provisions of the TCA may confer a broader jurisdiction and the requirements that may arise under European Law in a particular case, they do not in an appeal of the kind in issue in this case enjoy the jurisdiction to make findings in relation to matters that are not directly relevant to that remit, and do not accordingly have the power to adjudicate upon whether a liability the subject of an assessment has been

compromised, or whether Revenue are precluded by legitimate expectation or estoppel from enforcing such a liability by assessment, or whether Revenue have acted in connection with the issuing or formulation of the assessment in a manner that would, if adjudicated upon by the High Court in proceedings seeking Judicial Review of that assessment, render it invalid." [Emphasis added].

31. It is clear that no issue of European law arises in this case. Furthermore, no submissions were made to me at hearing to the effect that the jurisdiction of the Appeal Commissioners under Part 40A of the TCA was in any way broader than that enjoyed by them under Part 40, which was considered in *Lee*. The Appeals Commissioner gave in the case stated as his reason for refusing to include Question 1, the fact that the Determinations that could be made by him were those delineated in ss. 949AK and 949AL of the TCA. Section 949AK (1) makes it clear that the jurisdiction of the Appeal Commissioners on an appeal against an assessment is directed to a consideration of whether an appellant has by reason of the assessment been overcharged or undercharged. (While there is jurisdiction also, as acknowledged by subs. (3) and (4) of s. 949AK, to appeal on certain limited grounds contained in s. 959 AF (2), these grounds for appeal relate to the breach by the Revenue of time limits and not to any of the matters raised by the two questions which the Liquidator seeks to introduce into the case stated.)
32. The jurisdiction being exercised by the Appeals Commissioner under s.949AK and 949AL, therefore, does not appear to differ in substance from that considered by the Court of Appeal in *Lee v. Revenue Commissioners*, and that judgment is therefore applicable to this case. Question 1, therefore, relates to legal issues which are outside the jurisdiction of the Appeals Commissioner. This appears to be clear from both *Stanley* and *Lee*.
33. As referred to above, a District Judge can refuse to state a case under the 1857 Act on the grounds that the proposed question is "frivolous". In *Fitzgerald v. Director of Public Prosecutions* [2003] 3 IR 247, Keane C.J. stated that an application for a case stated would be regarded as frivolous where the issues had already been the subject of a case stated and had been determined by another court (at 254). He also stated that an issue might be regarded as frivolous on the ground that no question of law arose or, that if a question of law did arise, it would, depending on the circumstances, be a pointless waste of time to grant the request for a case stated.
34. Of course, s. 949AR contains no equivalent provision to s.4 of the 1857 Act, but it does create a discretion for this Court and, in so doing, it must be necessarily implicit in it that this Court could exercise its discretion against sending a case stated back for amendment where the issue of law sought to be introduced, and in respect of which findings of fact would be required, was one which was "frivolous".
35. Although s. 949AR gives no guidance as to how that discretion is to be exercised, it seems to me that the scheme of the TCA, as explained by Murray J. in *Lee* is such that it would be, in the words of Keane C.J. in *Fitzgerald*, "a pointless waste of time" to seek to remit a case stated in these proceedings to the Appeals Commissioner for the purpose of making findings of fact relevant to an issue of law which is outside the jurisdiction of the

Appeals Commissioner and therefore, outside the jurisdiction of this Court on an appeal by case stated under section 949AR.

36. I therefore decline either to amend the case stated to include Question 1 or to send the case stated back to the Appeals Commissioner to make the findings of fact which would be necessary if such question of law were to be considered.
37. Turning to Question 2, different considerations arise. In the case stated, the Appeals Commissioner held that he did not consider that any point of law had been raised as to the objection by Revenue to the evidence of the Liquidator. In fact, he states that he adjourned the appeal for a short time to allow for discussions and, on resumption of the hearing, he noted the objection and overruled it on the basis of s. 949AC of the TCA.
38. It is notable that in his grounding affidavit in support of this application, the Liquidator accepts (at para. 17) that he "inadvertently gave the impression that [I] was abandoning [my] submission to introduce the email." He then refers to his statement at p. 49, line 13 of the transcript, where he states: "Okay, so we won't have it. It's fine."
39. While he says he did not think that was the end of the matter and believes that the Appeal Commissioner would give him a further opportunity to introduce the email later in the hearing, on a reading of the transcript, Mr. Doran accepts that he gave the impression to counsel for the Revenue and the Appeals Commissioner that he was no longer seeking to introduce the email.
40. At the hearing of the motion, counsel for the appellant accepted that that was the impression given but relies on the fact that the Liquidator was not a lawyer. I do not think that is material. The Liquidator took it upon himself to conduct the hearing before the Appeals Commissioner and therefore took it upon himself to deal with issues of admissibility of evidence in the course of the hearing and to make or withdraw any objections to the evidence.
41. Furthermore, no issue was taken at the hearing of the motion before me as to the actual finding of the Appeals Commissioner which was that the objection was overruled. It was not, for example, suggested that this statement as to how the Commissioner dealt with the objection was factually incorrect. Accordingly, it would seem that Question 2 is directed at questioning the lawfulness of an objection which was in fact overruled.
42. It was common case at the hearing before me that the Appeals Commissioner was bound by the principles of constitutional and natural justice, and also had a greater discretion to permit evidence by reason of the provisions of s. 949AC of the TCA, which, *inter alia*, permits the Appeals Commissioner to "admit evidence whether or not the evidence would be admissible in proceedings in a court in the State." This does not, however, prevent the Appeals Commissioner from hearing objections to the admissibility of evidence and then ruling on them, even if his discretion to admit is wider than a court of law.

43. The broader powers of the Appeals Commissioner to admit evidence that might not be admissible in a court of law could not prevent the Commissioner from hearing an objection, and I do not see how any error of law could have arisen in merely hearing an objection which, as the Appeals Commissioner stated, was in fact overruled.
44. In my view, the point raised is frivolous and it would be futile for me to exercise my discretion to permit Question 2 to be added to the case stated by way of amendment and, indeed, counsel for the Appellant at the hearing did not press vigorously for the inclusion of this question.

(iii) Whether the motion should have been made returnable for the hearing of the substantive case stated

45. I have been asked by Revenue to address whether or not the motion should have been heard as an interlocutory matter or whether it ought to have been heard as part of the case stated itself.
46. On this point, counsel for the Appellant says that there is a distinction between his request for amendment and the nature of the amendment sought in the *O'Sullivan* case, upon which counsel for the Revenue relies. In particular, the Appellant submits that, where entirely new questions are to be added, it is, in the long run, more efficient to hear those matters by way of an interlocutory motion rather than potentially provoking an adjournment of a case stated which has been delivered and listed for hearing. He contrasts the situation which would arise under this kind of application with that which will arise where, as in *O'Sullivan*, the parties are agreeable to amendments of existing questions in order to better reflect the issues of law which fell for determination in the case stated.
47. Revenue bases its submission on the intention of the TCA that these kinds of applications should be disposed of swiftly. For example, an application for a case stated has to be made within 21 days of the final Determination of the Appeals Commissioner. I would accept that, as a general proposition, any case stated should be disposed of as efficiently as possible.
48. Having said that, I think it would be undesirable that there would be any absolute rule that any application to amend could only be made at the hearing of the case stated. If, in fact, the amendments to be made were relatively major and, in particular, if the matter had to be remitted to the Appeals Commissioner to make the necessary findings of fact, it would be more efficient to bring that application in advance of the hearing of the case stated itself.
49. As stated above, Collins and O'Reilly cite with approval the English case of *Napier*, already discussed above. That case made it clear that, under English law, the appropriate application is by way of notice of motion to the Chancery list. That is what the appellant has done in this case.
50. Collins and O'Reilly also state (at para. 1-29), in relation to cases stated pursuant to s.7 of the 1857 Act, that an application to amend "may be made either by motion to the High

Court or when the case should come on for hearing.”, citing *Unkles v. Attorney General* (1873) IR 7 C.L. 462 and *Yorkshire Tyre and Axle Co. v. Rotherham Local Board of Health* (1858) 4 C.B. (n.s.) 362 for this proposition. It is notable that, in both of those cases, the justices had omitted to include material documentary evidence on which they had relied for their findings of fact. These were cases, therefore, where it was clear in advance of hearing the case stated that it required amendment to include all relevant documents. In *Unkles*, it was specifically held that there was no immovable practice that applications to amend would be made at the hearing of the case stated itself.

51. By contrast, in *Christie v. The Guardians of the Poor of the Parish of St. Luke, Chelsea* (1858) 8 El. & Bl. 992; (1858) 120 E.R. 369, an interlocutory application to amend was not entertained, with Lord Campbell C.J. stating that:

“It would be the more convenient practice, where there is a dispute as to whether the case is sufficiently explicit, to let it come on for discussion first; and then, if the Court think it defective, they may send it back for amendment. Cases in which the justices have refused to state a case, or where there has been a perseverance in stating an imperfect case, so as to be equivalent to a refusal, would stand on a different ground.”
52. Crompton J. similarly distinguished between a refusal by the justices and the jurisdiction of the court hearing the case stated to send a case back for amendment if “upon argument, the case is found to be imperfect.”
53. It therefore seems that, where the reasons for the application to amend are related to the omission of relevant evidence or the necessary findings of fact, it would be appropriate to canvass that issue by way of interlocutory motion. Otherwise, having set the matter down for hearing, it might be that the case stated could not proceed and this would result in greater delay in finalising the assessment of Revenue.
54. Such an approach would also be appropriate where the motion to amend comprised, as in this application, in effect an appeal from the refusal of the Appeals Commissioner to include an entirely new and separate question. As contemplated by *Christie*, where there has been a refusal to state a case on a particular issue of law, that may be more appropriately canvassed by way of interlocutory motion, and the hearing date ultimately set and prepared for in the knowledge that only amendments of the kind contemplated by *O’Sullivan*, which consisted of a recasting of the questions of law for determination, can arise.
55. While not providing a hard and fast answer, it seems to me that this approach is in line with the law and practice relating to amendment of pleadings in this Court. Order 28, rule 1 of the Rules of the Superior Courts, specifically provides that pleadings may be amended “at any stage of the proceedings”. Notwithstanding this, applications to amend pleadings in the course of the trial are discouraged and amendment at such late stage is, though possible, regarded as an exceptional course to take: see the Supreme Court in *Wildgust v. Bank of Ireland* [2001] 1 ILRM 24, at 39. The reason why this is discouraged

is that it may cause prejudice to the opposing party who may have prepared, and indeed partly run, the action on a particular basis.

56. However, if the amendment is not a very significant departure from the existing pleadings, and in particular if it would not require any additional evidence, then the amendment may be permitted at the beginning of or even (exceptionally) in the course of the trial. Indeed, where applications to amend are brought, or indeed merely notified to the other side in the course of preparation for a case, there is a frequent and sensible practice of dealing with same on consent at the opening of the action. In other words, the question is one of degree. Minor amendments are readily consented to and dealt with even at a very late stage, whereas more substantial amendments are more likely to be opposed, and to require an interlocutory hearing.
57. While not necessary for my decision, therefore, I think the submissions of counsel for the appellant on this point are correct. Where entirely new questions, separate and distinct from those already in the case stated and requiring findings of fact not already in the case stated, are to be added, it would seem more desirable that any issues in relation to the proposed amendment would be teased out in advance of the hearing of the case stated. It would seem more desirable that, if such a course is necessary in the particular circumstances of the case, that the need for it would be identified by way of an interlocutory motion brought in advance of the hearing of the case stated.
58. By contrast, where the issues of law which require determination are not set out in a satisfactory way, but all of the requisite findings of fact and other matters identified in Emerson are already contained in the case stated, then no such course will be required, and the approach of Sanfey J. in *O'Sullivan* will be the more appropriate course. The correct procedure will therefore depend on the degree of amendment required and on whether the requisite findings of fact are contained in the case stated as originally drafted.
59. In the circumstances of this application, where entirely new questions were set out by the appellant, which go far beyond the question in the case stated as it stands at present, it seems to me that it was appropriate for the appellant to move that application by way of a separate notice of motion to be heard on an interlocutory basis. There will be many other cases, perhaps the majority, where applications to amend a case stated can be more conveniently and fairly dealt with at the hearing of the case stated itself, without increasing costs. However, had no motion been brought in this case, and had the questions been admitted, that would have necessitated the adjournment of the case stated while the matter was sent back to the Appeals Commissioner to make the requisite findings of fact.
60. Accordingly, I think the appellant took the appropriate procedural course in the circumstances of this application, albeit that the appellant has been entirely unsuccessful in the application to amend itself.

Conclusion

61. For all of the above reasons, I refuse the relief sought in the notice of motion.