

APPROVED

[2023] IEHC 542



THE HIGH COURT

2021 No. 423 SS

**IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 39 OF THE
VALUATION ACT 2001**

BETWEEN

**POWERCON WIND ENERGY LTD
TRADING AS CARROWLEAGH WINDFARM**

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 9 October 2023

INTRODUCTION

1. This appeal comes before the High Court by way of a case stated from the Valuation Tribunal. The unusual feature of the case stated is that the rateable property, a wind farm, straddles two rating authority areas.

NO REDACTION REQUIRED

2. The contingency of a rateable property being situate partly in one rating authority area and partly in another is expressly addressed by the Valuation Act 2001 (at Section 61). The default position is that the overall value of the property is to be apportioned between each of the rating authorities concerned. Here, a dispute arose at the hearing before the Valuation Tribunal as to whether this section could be relied upon in circumstances where separate valuation certificates had not, seemingly, been issued by the Commissioner of Valuation in respect of the two parts of the wind farm.
3. The Valuation Tribunal declined to make a finding on this dispute on the basis that the point was not properly before the Valuation Tribunal because it had not been advanced as a ground of appeal in the notice of appeal. The principal issue to be addressed in this judgment is whether the Valuation Tribunal erred in law in adopting this approach. The other issues in the case stated only properly arise for determination in the event that the Valuation Tribunal's approach on the first issue is upheld.

VALUATION ACT 2001 AND CROSS-BOUNDARY PROPERTIES

4. The contingency of a rateable property being situate partly in one rating authority area and partly in another rating authority area is addressed by Section 61 of the Valuation Act 2001. There are two possible approaches which may be adopted as follows. The first approach is that the overall value of the property may be apportioned between each of the rating authorities concerned. The second, alternative approach is that the property may be valued as if it were, counterfactually, situate in a *single* rating authority area. Put otherwise, the legislation contains a form of deeming provision, whereby a property may, at the

discretion of the Commissioner, be deemed to be situate in only one rating authority area. The entirety of the rates referable to that property would then be paid to that rating authority.

5. The first of these two approaches represents the default position: unless the Commissioner has exercised his *discretion* to deem the property to be situate in only one rating authority area, the property is to be valued as a single entity and the amount assessed is to be apportioned between each of the rating authorities concerned. This is regulated by subsections 61(2) to (4) of the Valuation Act 2001 as follows:

“(2) In relation to relevant property that is situate in 2 or more rating authority areas, the Commissioner shall apportion between each of the rating authorities concerned the value of the property determined under this Act in such manner as he or she considers appropriate and so much of that value as is so apportioned to each such authority shall, accordingly, be the value of the part of the property situate in the area of the authority.

(3) Any provision of this Act conferring a power to issue a valuation certificate or a new valuation certificate shall, in relation to property that is the subject of an apportionment under subsection (2), be construed as requiring that there be issued, on the occasion of the power being exercised, a separate such certificate to each rating authority in respect of which that apportionment is made.

(4) The value of the property which is stated in such a certificate shall be the value of the property as provided for in the apportionment under subsection (2).”

6. Importantly, these provisions envisage that the Commissioner will issue a *separate* valuation certificate to each rating authority in respect of which such an apportionment is made. In the present appeal, it *appears* that a valuation certificate was only issued in respect of that part of the wind farm which is

located in the rating authority area in respect of which the revaluation exercise was being carried out. (The treatment of the second part of the wind farm does not seem to have been expressly addressed in evidence: there is no direct evidence that a second valuation certificate was issued). The Ratepayer had sought to raise an objection at the hearing before the Valuation Tribunal to the effect that the apparent failure to issue a valuation certificate in respect of that part of the wind farm which was located in the other rating authority area precluded the Commissioner from relying upon Section 61.

PROCEDURAL HISTORY

7. The case stated concerns the valuation of a wind farm which straddles the boundary between County Mayo and County Sligo. The overall wind farm consists of sixteen wind turbines and a grid connection. Thirteen of these wind turbines and the grid connection are situate within County Mayo. The remaining three wind turbines are situate in County Sligo.
8. The valuation certificate, the subject-matter of the appeal to the Valuation Tribunal, was issued in the context of a revaluation exercise which has been carried out in respect of County Sligo. The valuation order is dated 23 November 2015. The “*valuation date*” specified under the valuation order for the purposes of Section 20 of the Valuation Act 2001 is 30 October 2015.
9. One of the principal legal issues which required to be determined by the Valuation Tribunal concerned the correct approach to be adopted in valuing a rateable property which straddles two rating authority areas. The parties advocated for radically different approaches and the Valuation Tribunal was

called upon to determine which is the correct approach. As explained presently, the Valuation Tribunal failed to do so.

10. The rival contentions of the parties only came into focus for the first time during the course of the oral hearing before the Valuation Tribunal. On one side, it was contended that the three wind turbines in County Sligo should be valued as a separate property; on the other, it was contended that the entire wind farm should be valued as a single entity, and that the (aggregate) value then apportioned between the two rating authority areas. These rival contentions are elaborated upon below.
11. The Ratepayer's contention had been that the valuation should be made on the assumption that the hypothetical tenancy would be confined to that part of the overall property which is situate within the relevant rating authority area. On this assumption, the hypothetical tenancy would consist of the three wind turbines situate in County Sligo. The three wind turbines would have to be valued on the basis that they were being leased separately from the balance of the wind farm and thus would not have the benefit of a grid connection. It was contended that such an arrangement would likely be less attractive to the hypothetical tenant and that the divisible balance should be adjusted accordingly to reflect this. It was further contended that the divisible balance should be split 50:50 as between the hypothetical landlord and tenant.
12. The response made, on behalf of the Commissioner, to this argument had been to cite the provisions of Section 61 of the Valuation Act 2001. Counsel on behalf of the Commissioner is recorded as having submitted that the Commissioner had exercised the power conferred upon him under subsection 61(2) to value the Carrowleagh Wind Farm and as having apportioned the value attributable to the

three turbines in Sligo County Council's area to that rating authority. It was further submitted that the decision to apportion cannot be reviewed by the Valuation Tribunal as its jurisdiction is delimited, by Section 34 of the Valuation Act 2001, to considering an appeal against the Commissioner's determination of value. On this analysis, whereas the Commissioner's determination of the value of the *entire* wind farm would be amenable to an appeal, the subsequent decision to apportion that value as between the two rating authority areas is unappealable. The Commissioner has since confirmed in his written submissions of 28 April 2023 that he stands over this analysis.

13. It seems that the valuer acting on behalf of the Ratepayer had opted to respond to the Commissioner's submissions at the hearing rather than go first, with the result that the "*last word*", as it were, went to the Ratepayer. The Ratepayer's valuer is recorded as having submitted that—if Carrowleagh Wind Farm had been valued and that value was apportioned—the valuation had no impact whatsoever for the rating authority of Mayo County Council because no revision of the valuation of the wind farm had been carried out: only that part of the property in County Sligo, comprising three wind turbines, had been valued and only one rating authority had been notified of the valuation.
14. The Valuation Tribunal appears to have accepted that the Commissioner was entitled to value the wind farm as a single property and to apportion the value between each rating authority area. This, presumably, is the reason that the Valuation Tribunal's determination does not directly address the Ratepayer's argument that the hypothetical tenant would require a larger share of the divisible balance to compensate for the hypothetical tenancy being confined to three wind

turbines. This argument falls away if the valuation is to be made by reference to a hypothetical tenancy which comprises the entire of the wind farm.

15. The Valuation Tribunal declined, however, to make any finding on the objection that a valuation certificate had not been issued in respect of that part of the overall wind farm which is situated within the rating authority area of Mayo County Council. The Valuation Tribunal held that this point was not properly before the tribunal because it had not been advanced as a ground of appeal in the notice of appeal. See paragraph 58 of the Valuation Tribunal's determination of 10 June 2020 as follows:

“The final point that was argued, albeit very much as a make-weight point, concerned section 61 of the Act. When giving evidence [the Ratepayer's valuer] made it clear that he was not taking the point that the whole of Carrowleagh Wind Farm should have been valued. The Tribunal notes that he was not aware until the hearing was underway that the Respondent was relying upon section 61 of the Act in response to his claim that the tenant's share of the divisible balance ought to be increased to 50% as the Property had no grid connection. There is no doubt that Section 61 of the Act empowers the Respondent to value a relevant property that is situated in two rating authority areas and to apportion the value of that relevant property as determined between each rating authority in such manner as the Respondent considers appropriate and having exercised the power, to send each rating authority a separate certificate of valuation. Whilst the Tribunal considers that there is some merit in the criticism levelled by [the Ratepayer's valuer] in his reply to Counsel's submissions and taking a benevolent view, it might be said that the Respondent has complied with the spirit, if not the strict letter of the statutory provision, the point is not properly before the Tribunal not having been advanced as a ground of appeal and the Tribunal makes no finding upon it.”

16. The Ratepayer was dissatisfied with the determination and requested the Valuation Tribunal to state and sign a case for the opinion of the High Court pursuant to Section 39 of the Valuation Act 2001.

17. Insofar as relevant to the issue of the valuation of cross-boundary properties, the questions of law posed in the case stated are as follows:

“The questions of law arising in the Case Stated are whether the Valuation Tribunal was correct in law in determining:

- (a) the valuation of the Property on the basis of an apportionment of Carrowleagh and not as a separate relevant property, in light of the 2001 Act including section 48 and the assumptions thereunder and section 17.
 - (b) in observing that the Commissioner had complied with the spirit, if not the strict letter, of section 61 of the Act.
 - (c) in determining that the Commissioner had valued the Property in accordance with section 61 of the Act in circumstances where the valuation of the part of Carrowleagh in the rating authority area of County Mayo had not been revised at the time of the purported exercise of the powers under section 61 of the Act.
 - (d) in determining that the purported apportionment of the valuation of the Property under section 61 and the Commissioner’s failure to value the Property as a separate relevant property was not properly before the Tribunal and in not making any finding on it on the basis that it had not been advanced as a ground of appeal in circumstances where [the Ratepayer] had not been aware until the hearing was underway that the Commissioner intended to rely upon section 61 of the Act and therefore could not have advanced the issue as a ground of appeal.”
18. As appears, the question of law at point (d) above is directed to the lawfulness of the Valuation Tribunal’s decision not to make any finding on the objection that a valuation certificate had not been issued contemporaneously in respect of that part of the overall wind farm which is situate within the rating authority area of Mayo County Council. Logically, this question of law should be addressed first by the High Court as part of its determination of the case stated. This is because the implication of the question is that the Valuation Tribunal has not

heard and determined the merits of the objection. If the High Court were to decide that the objection had been properly before the Valuation Tribunal, then the matter should, arguably, be remitted to the Valuation Tribunal to allow it to make a finding on the interpretation and application of Section 61 of the Valuation Act 2001.

19. For completeness, it should be recorded that the case stated poses three additional questions of law. The first two of these relate to the calculation of the sinking fund, and of the operating costs of the wind farm, respectively. The parties agreed that no submissions should be made in respect of these points pending the outcome of an appeal to the Court of Appeal in other proceedings. The Court of Appeal has since delivered its judgment in *Hibernian Wind Power Ltd v. Commissioner of Valuation* [2023] IECA 121. The parties will be afforded an opportunity in due course to advance submissions as to what the appropriate order to be made in the present case is in consequence of that judgment. The third additional question of law is whether the Valuation Tribunal can increase the valuation in circumstances where it has found against the appellant. This turns on the interpretation of Section 37 of the Valuation Act 2001 which, on one reading at least, might suggest that the valuation may only be increased or decreased where the appeal has been “*allowed*”.
20. The case stated initially came on for hearing before me on 23 March 2023. At the conclusion of the hearing, the parties were given liberty to file supplemental written submissions addressing the contention, which had been advanced on behalf of the Commissioner before the Valuation Tribunal, to the effect that the Commissioner’s decision to apportion value between two rating authority areas cannot be reviewed by the Valuation Tribunal. The submissions were duly filed,

and the case stated was listed for mention on 15 May 2023. The parties confirmed on that date that they wished to have an opportunity to make further oral submissions to the High Court. The hearing resumed for that purpose on 26 July 2023. On that occasion, a further issue came to the fore. It emerged that the parties are in disagreement as to what should happen in the event that the High Court were to find that the Valuation Tribunal erred in failing to address the Ratepayer's objection. The position adopted by the Commissioner is that, in such an eventuality, the High Court should rule upon the interpretation of Section 61 of the Valuation Act 2001 notwithstanding that the Valuation Tribunal did not do so. The parties were given liberty to file short written submissions on the question of whether the High Court should determine an issue which had not been addressed by the Valuation Tribunal. The parties delivered submissions on 12 September and 3 October 2023, respectively. I will return to address these submissions at paragraph 40 *et seq.* below.

DISCUSSION AND DECISION

21. The Valuation Tribunal declined to make any finding on the objection that a valuation certificate had not been issued contemporaneously in respect of that part of the overall wind farm which is situate within the rating authority area of Mayo County Council. The Valuation Tribunal held that this point was not properly before the tribunal. (The relevant passage has been cited at paragraph 15 above).
22. For the reasons which follow, I have concluded that the Valuation Tribunal acted in breach of fair procedures in adopting this approach and that the breach amounts to an error of law on its part. In particular, it was disproportionate for

the Valuation Tribunal to rely on a pleading point having regard, first, to the fact that the Commissioner only disclosed his reliance upon Section 61 of the Valuation Act 2001 at the hearing; and, secondly, to the importance of the legal issue.

23. Any analysis of the legality of the Valuation Tribunal's approach must begin with a consideration of the statutory provisions regulating the appeal process. An appellant, who seeks to challenge the valuation of a property, is required under Section 35 of the Valuation Act 2001 to specify the grounds on which he considers that the value of the property is not a determination of its value that accords with that required to be achieved by Section 19(5) of the Act. The appellant is also required to specify what he considers ought to have been determined as the property's value.
24. These requirements are elaborated upon by rules made by the Valuation Tribunal, with the consent of the Minister for Finance, pursuant to Section 11 of the Valuation Act 2001. The appeal in the present case was lodged in October 2017 and thus predates the coming into force of the current version of the rules. The appeal had been subject to the previous version of the rules, namely the Valuation Act 2001 (Appeals) Rules 2008. The references which follow are all to that version.
25. Relevantly, a notice of appeal is regulated by Rule 10 as follows:

“The Notice of Appeal shall set out exhaustively the Grounds of Appeal upon which the appellant intends to rely. These Grounds of Appeal may not be changed or extended (and liberty to amend will not be granted) save in exceptional circumstances. The Tribunal shall not entertain any amendments to the grounds of appeal at hearing and in particular the adducing of new grounds of appeal other than in exceptional circumstances. The Tribunal will adjudicate on such matters having regard to the Rules of the Superior Courts.”

26. Rule 11 provides as follows:

“The Tribunal may waive compliance with a rule, or excuse non-compliance with a rule, if the Tribunal considers that to do otherwise would be likely to cause injustice or unreasonable expense or inconvenience.”

27. The default position is, therefore, that an appellant is required to set out his grounds of appeal exhaustively in his notice of appeal and will only be allowed to extend these grounds of appeal or adduce new grounds in “*exceptional circumstances*”. The Valuation Tribunal may excuse non-compliance with a rule if to do otherwise would be “*likely to cause injustice*”.

28. Counsel on behalf of the Commissioner placed emphasis on the judgment of the High Court (MacMenamin J.) in *Nangles Nurseries v. Commissioner of Valuation* [2008] IEHC 73. On the facts, the High Court held that the Valuation Tribunal had fallen into error in purporting to deal with an issue which was not properly before it. Whereas it is correct to say, as counsel for the Commissioner does, that the judgment attaches significance to the importance of the notice of appeal, the *ratio* of the judgment is also informed by the fact that the offending issue had not been raised in submissions or evidence. See paragraphs 68 to 70 of the judgment as follows:

“In the case stated the issue of this container store was merely mentioned at one paragraph, simply in the context of the Tribunal determination that the container store was a ‘farm building’ and thus not rateable. The container store is not mentioned at all in the submission to the Tribunal made on behalf of the Commissioners. It is mentioned only obliquely in the précis of evidence submitted to the Tribunal on behalf of [the Ratepayer] in the context of references to ‘a proper storage area’ and a ‘bad looking, corrugated, green horticultural shed’. However, there is no evidential material before this Court to demonstrate that the issue of this container store was ever put fairly and squarely as an issue which is to be the subject matter of an appeal to the Tribunal or a determination thereby. As a simple matter of

compliance with the Act, and as fair procedures, such an issue should have been clearly identified.

In the absence of such identification it follows that this issue was not appropriately dealt with and therefore the Tribunal fell into error. It proceeded to deal with an issue which was not properly before it and had not been the subject matter of the appeal, submissions, or evidence.

In the light of this fact it would be inappropriate to make any further observations on matters which are yet to be determined by the Tribunal both as issues of fact and law. It may be certain that the matters dealt with in the course of this judgment will be of assistance to the Tribunal.”

29. As appears, the *ratio* of the judgment is that the Valuation Tribunal had erred in purporting to deal with an issue which had never been put “*fairly and squarely*” as an issue which was to be the subject-matter of an appeal to the Valuation Tribunal or a determination thereby. The issue had not been the subject-matter of the appeal, submissions, or evidence. By contrast, in the present case, the Section 61 issue is one which had been fairly and squarely raised at the hearing before the Valuation Tribunal (albeit not in the notice of appeal).
30. The High Court (Butler J.) in *John Pettitt & Son Ltd v. Commissioner of Valuation* [2001] IEHC 67 held that an issue, which had not been pleaded in the notice of appeal, might nevertheless be considered by the Valuation Tribunal where this is required in the interests of justice. See pages 10 and 11 of the judgment as follows:

“[...] It [is] accepted that whilst, as a general rule, where a ground of appeal has not been advanced before the Commissioner it will not be possible to raise it before the Tribunal nevertheless, in exceptional circumstances w[h]ere the interest of justice requires, the Tribunal will permit the raising of a ground, the reception into evidence and the reliance of a point of law none of which have previously been raised so far or adduced. I conclude that, as the instant case proceeded, and as confusion after confusion emerged and abounded it would not have been possible in any equitable way to proceed with the appeal and to make a decision

thereon without first having the said issue fully explained, debated and discussed. The Tribunal was, plainly, entitled to so conclude.”

31. This judgment is closer to the facts of the present case. Here, the circumstances of the case meet the threshold of exceptionality. A significant legal issue, namely, the interpretation and practical operation of Section 61 of the Valuation Act 2001, only emerged for the first time at the oral hearing before the Valuation Tribunal. The Commissioner had made no prior reference to his supposed reliance on this statutory provision. It is not apparent from the valuation certificate; the consideration of the representations report; the Commissioner’s valuer’s précis of evidence; nor the legal submissions filed. This is so notwithstanding that the question of the correct approach to be adopted in assessing a property which straddles two rating authority areas had been squarely raised as an issue in the appeal by the Ratepayer’s valuer in his précis of evidence.
32. The first time either party made express reference to the provisions of Section 61 was at the hearing before the Valuation Tribunal on 25 February 2020. Even then, there was some confusion as to the precise operation of the section and its interaction with Section 34 which defines the scope of the statutory right of appeal. The Commissioner’s stance before the Valuation Tribunal had been that the Commissioner had exercised the power conferred upon him by subsection 61(2) to value the (entire) wind farm and had apportioned the value attributable to the three turbines in County Sligo to that rating authority. The Commissioner had further contended, by reference to Section 34, that the decision to apportion value cannot be reviewed by the Valuation Tribunal. The logical consequence of this contention, if accepted, is that the Valuation Tribunal

should only have considered whether the valuation of the entire wind farm was correct. If the Valuation Tribunal had been satisfied that the valuation was correct, it should have left the decision on apportionment undisturbed. Yet, the Valuation Tribunal purported to *increase* the value in the valuation certificate to €419,800. This was done without any engagement with the argument based on Section 34.

33. In all the circumstances, it was unduly harsh of the Valuation Tribunal to hold the Ratepayer to the notice of appeal. The Valuation Tribunal's determination expressly records (at paragraph 58) that the Ratepayer's valuer was not aware until the hearing was underway that the Commissioner was relying upon Section 61 of the Valuation Act 2001. An appellant should not be punished for failing to have included an issue in his notice of appeal when he could not have reasonably known of same, having regard to the limited materials available at the time the notice of appeal was being prepared. Equally, the Commissioner should not be allowed to rely upon his own failure to explain adequately, at the time of the issuance of the valuation certificate, the basis of the assessment. There is an organic link between the provision of reasons and the preparation of grounds of appeal. As reiterated by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, the provision of reasons by a decision-maker is intended to serve a number of purposes in the context of a statutory right of appeal. First, to enable a person affected by a decision to understand why the particular decision was reached; secondly, to enable a person to ascertain whether or not they have grounds on which to appeal the decision; and thirdly, to allow the appellate body to engage properly in such an appeal. Here, the Ratepayer *qua* appellant cannot reasonably

be criticised for not having raised Section 61 as an issue in his notice of appeal, having regard to the paucity of reasons provided by the Commissioner.

34. In assessing the fairness of the approach of the Valuation Tribunal, it is appropriate to have regard to the course of the appeal proceedings in the present case. The issue of the proper approach to cross-boundary property was squarely raised in the précis of evidence filed on behalf of the Ratepayer. Thus whereas it is correct to say that this had not been pleaded as a ground of appeal, it had been raised in advance of the oral hearing and can have caused no prejudice to the other side. It is also apparent from the summary of the Ratepayer's valuer's evidence that he expressly identified the cross-boundary issue as one of the three principal issues to be determined on the appeal. The Commissioner's response was to suggest that the valuation exercise had been carried out pursuant to Section 61 of the Valuation Act 2001. Crucially, this suggestion was only made for the first time during the course of the hearing before the Valuation Tribunal.
35. An appeal to the Valuation Tribunal takes the form of a *de novo* hearing (*Carlton Hotel Dublin Airport Ltd v Commissioner of Valuation* [2013] IEHC 170, [2016] 2 I.R. 385). It is the first time that a ratepayer has the opportunity of obtaining an oral hearing. An overly rigid approach to defining the scope of the appeal by reference to the notice of appeal has the potential of creating an injustice in some cases. This is especially so where, as in the present case, the Commissioner's reasoning is elaborated upon at the oral hearing.
36. It is also appropriate to have regard to both the significance and the novelty of the legal issue. The meaning and effect of Section 61 of the Valuation Act 2001 was not some peripheral issue; rather, it goes to the core of the statutory function upon which the Valuation Tribunal was engaged, namely, the determination of

the valuation of rateable property which straddles two rating authority areas. The treatment of cross-boundary property is a potentially difficult issue in the context of a statutory scheme which is predicated on separate rating authority areas. The Valuation Tribunal could not have properly adjudicated upon the appeal before it without addressing its mind to the interpretation and application of Section 61 of the Valuation Act 2001. On one reading at least, Section 61 requires the Commissioner—and the Valuation Tribunal on appeal—to make a formal determination upon the value of the *entire* of the property as a necessary first step, prior to the carrying out of the apportionment exercise. Indeed, on the Commissioner’s argument, the statutory appeal to the Valuation Tribunal is *confined* to the determination of the overall value of the rateable property, i.e. the entire wind farm, and does not extend to a review of the Commissioner’s apportionment of that value as between the rating authorities concerned. Yet, there is nothing in the Valuation Tribunal’s determination of 10 June 2020 which attributes a value to the entire wind farm; and, insofar as the Valuation Tribunal purported to *increase* the valuation of that part of the wind farm which is situate in Sligo, the Valuation Tribunal seems to have thought that it did have jurisdiction under Section 34 to review the apportionment contrary to the Commissioner’s argument. None of this is addressed in the determination.

37. Moreover, it is at least arguable that the seeming omission by the Commissioner to issue a separate valuation certificate in respect of that part of the wind farm which is situate in County Mayo offends against the general statutory aspiration that a valuation list should, insofar as is reasonably practicable, achieve both (a) correctness of value, and (b) equity and uniformity of value between properties on that valuation list. There does not appear to have been any

evidence adduced before the Valuation Tribunal as to how that part of the wind farm which is situate in County Mayo has been treated for rating purposes. It seems from the submissions made to the High Court that a revaluation exercise has not yet been carried out in respect of the Mayo rating area. There must be a risk, therefore, that two parts of the self-same property have wildly different valuations. Whereas such a discrepancy would occur in the context of two distinct valuation lists, it is, again, at least arguable that this is the type of mischief which the statutory requirement under Section 61, i.e. to issue separate valuation certificates contemporaneously in respect of each rating authority area, is intended to avoid.

38. That the legal issue is a complex one is confirmed by the fact that the Commissioner's own position on the issue has evolved over the course of the proceedings. The submissions on behalf of the Commissioner, as recorded in the Valuation Tribunal's determination, refer to the Commissioner having exercised the statutory power to apportion the value between Counties Mayo and Sligo. The Commissioner's written legal submissions of 4 November 2021 refer to the Commissioner's valuer as having given evidence before the Valuation Tribunal that the "*discretion*" under Section 61 had been exercised. This is materially different from the interpretation of the section contended for on behalf of the Commissioner in oral submission at the hearing of the case stated before the High Court. It was submitted then that the provision is *mandatory* and affords no discretion to the Commissioner (save in cases where the Commissioner has invoked the deeming mechanism under subsection 61(1)). None of this is intended as a criticism of the Commissioner; rather, it reflects the novelty and complexity of these statutory provisions.

39. In conclusion, the Valuation Tribunal, in order for it to adjudicate properly on the appeal before it, was required to address the interpretation and application of Section 61 of the Valuation Act 2001. The Valuation Tribunal should have reached a conclusion on the Ratepayer's objection that a separate valuation certificate has not, seemingly, been issued contemporaneously in respect of that part of the wind farm situate in Mayo. The Valuation Tribunal should also have reached a conclusion on the Commissioner's submission that an appeal under Section 34 of the Valuation Act 2001 is *confined* to the determination of the value of the relevant property, i.e. the entire wind farm, and does not extend to a review of the Commissioner's subsequent apportionment of that value as between the rating authorities concerned. These two issues both go to jurisdiction. The failure of the Valuation Tribunal to reach findings on these issues represents an error of law on its part.

SHOULD THE HIGH COURT NOW RULE UPON THE QUESTION OF INTERPRETATION

40. The fact that the Valuation Tribunal has failed to rule upon a number of significant issues presents a practical dilemma. Should the matter be remitted to the Valuation Tribunal for reconsideration, or, alternatively, should the High Court itself now rule upon the issues? This would involve the High Court deciding these issues *ab initio*, i.e. in the absence of the Valuation Tribunal having considered same.
41. The Commissioner contends that the High Court should determine these issues itself. It is submitted, by reference to the wording of Section 39 of the Valuation Act 2001, that the legislation does not envisage a scenario in which a question of law, which has been referred to the High Court by way of case stated, is not

determined by the High Court and is instead remitted to the Valuation Tribunal. It is further submitted that the interpretation of Section 61 of the Valuation Act 2001 is a “*pure question of law*”.

42. In response, it is submitted on behalf of the Ratepayer that the High Court is not required to answer each and every question of law without regard to the *other* answers that have been given in response to a case stated. Emphasis is laid on the High Court having an inherent jurisdiction to amend a case stated so as to ensure that the wording accurately reflects the issues of law which arise. It is further submitted, by reference to points of law (a), (b), (c) and (e) in the case stated, that if the Valuation Tribunal did not engage in a sufficient fact-finding exercise, then the other points of law do not properly arise.

Decision

43. The starting point for an adjudication upon these rival submissions must be Section 39 of the Valuation Act 2001. This section provides for a restricted right of appeal to the High Court: the appeal takes the form of a case stated on a point of law rather than a *de novo* appeal. The High Court is concerned with the legality of the determination reached by the Valuation Tribunal and is not entitled to consider the matter as if it had come before the High Court at first instance. The scheme of the legislation is that issues of valuation will be addressed, in the first instance, by the Valuation Tribunal. Thereafter, there is a limited right of appeal to the High Court. The parties are entitled to a two-tier decision-making mechanism, with a full hearing at first instance followed by a restricted right of appeal to the High Court.
44. It would be inconsistent with the limited nature of the appeal were the High Court to make findings *ab initio* on significant issues of law which have not been

considered at first instance. Moreover, to do so would deny the parties the benefit of a two-stage decision-making process. None of this is to suggest that the High Court has to defer to the Valuation Tribunal on questions of law: it most certainly does not have to do so for the reasons explained by the Court of Appeal in *Stanberry Investments Ltd v. Commissioner of Valuation* [2020] IECA 33. Rather, the point is that it would disrupt the decision-making mechanism prescribed under the Valuation Act 2001 for the High Court to make findings *ab initio*.

45. It is apparent from the wording of subsection 39(5) of the Valuation Act 2001 that the High Court has a broad discretion as to the form of order to make on a case stated:

“The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit.”

46. As appears, it is expressly envisaged that the High Court may remit the matter to the Valuation Tribunal. This indicates that, in some cases, there will be issues remaining to be determined and that such determination should, in the first instance, be made by the Valuation Tribunal rather than the High Court.
47. The Commissioner’s submissions are predicated on a misunderstanding of the opening words of subsection 39(5). More specifically, the Commissioner seeks to render the phrase “*shall hear and determine any question or questions of law arising on the case*” as imposing a mandatory obligation on the High Court to determine each and every question posed in a case stated, irrespective of whether it arises from the decision actually made by the Valuation Tribunal. This is incorrect. It has never been the position that all questions posed must be

answered. It often happens that a particular answer to one of the questions posed in a case stated will render it unnecessary to determine certain others. The High Court regularly declines to answer moot questions on this basis.

48. The High Court will only determine points of law “*arising*” out of the determination of the Valuation Tribunal. A point which has not been decided by the Valuation Tribunal cannot be said to arise out of the determination. In this regard, a useful analogy can be drawn with the certification of leave to appeal under Section 50A(7) of the Planning and Development Act 2000. It is well established that leave to appeal will only be granted in respect of a point of law which arises out of the impugned decision and not merely from discussion or consideration of a point of law during the hearing. Similarly, a point of law can only properly be said to have arisen on a case stated where the point was actually decided by the Valuation Tribunal.
49. Here, the Valuation Tribunal expressly declined to make a finding on the Ratepayer’s objection that the provisions of Section 61 of the Valuation Act 2001 did not apply in the absence of separate valuation certificates having been issued to the respective rating authorities. Accordingly, the Valuation Tribunal’s determination does not address the interpretation of Section 61. There is no point of law “*arising*” in this regard.
50. The High Court has decided the appeal on the narrow ground that the Valuation Tribunal erred in failing to address this issue. The appropriate remedy is to remit the matter to the Valuation Tribunal. This allows for the issue to be heard and determined by the Valuation Tribunal at first instance. It allows for the calling of evidence as to how precisely that part of the wind farm situate in County Mayo has been treated for valuation purposes. It may be, for example, that such

evidence indicates that there is a significant disparity in valuation between the two parts of the wind farm.

51. It would be contrary to the scheme of the legislation, and would deny the parties the benefit of two-tier decision-making, were the High Court to decide this issue itself in the absence of same having been the subject of a first instance decision by the Valuation Tribunal and in the absence of findings of fact in respect of that part of the wind farm situate in County Mayo. Moreover, in the present case, the Ratepayer has been denied a fair hearing at first instance and this breach would not be fully remedied were the High Court to decide the points *ab initio*.
52. For completeness, it is necessary to address two judgments relied upon by the Commissioner. The first is the judgment of the Supreme Court in *T. v. T.* [1983] I.R. 29. The procedural difficulty identified there had been that the High Court had purported to refer a case stated back to the District Court for additional findings in advance of the High Court having made any decision on the matter. The Supreme Court held that this was an “*unpermitted expedient*” in that the District Court was *functus officio*. By contrast, in the present appeal the High Court has addressed, in part, the merits of the case stated and has concluded that the answer to one of the questions posed is sufficient to dispose of the case stated.
53. The second judgment relied upon is *Director of Public Prosecutions v. Petkov* [2013] IEHC 202. The Commissioner emphasises a sentence (at paragraph 42) to the effect that the High Court is “*bound to answer the questions of law raised on the basis of the District Judge’s findings of fact*”. The Commissioner appears to interpret this sentence as authority for the supposed principle that it is mandatory for the High Court to answer all of the questions of law that have been referred to it. With respect, the principle being articulated in the judgment

is a different one, namely that the High Court, in answering a case stated, is “*bound*” by the findings of fact made by the referring court or tribunal. It does not say that the High Court is “*bound*” to answer all of the questions.

CONCLUSION AND FORM OF ORDER

54. The appeal by way of case stated is resolved on the narrow ground that the Valuation Tribunal breached fair procedures and erred in law in failing to address the Ratepayer’s objection predicated on Section 61 of the Valuation Act 2001.
55. Accordingly, the fourth question of law posed in the case stated, i.e. that described at item (d) below, is answered in the negative:

“The questions of law arising in the Case Stated are whether the Valuation Tribunal was correct in law in determining:

[...]

- (d) in determining that the purported apportionment of the valuation of the Property under section 61 and the Commissioner’s failure to value the Property as a separate relevant property was not properly before the Tribunal and in not making any finding on it on the basis that it had not been advanced as a ground of appeal in circumstances where [the Ratepayer] had not been aware until the hearing was underway that the Commissioner intended to rely upon section 61 of the Act and therefore could not have advanced the issue as a ground of appeal.”
56. For the reasons explained at paragraphs 40 to 51 above, it would be contrary to the scheme of the legislation, and would deny the parties the benefit of two-tier decision-making, were the High Court to decide these issues itself in the absence of same having been the subject of a first instance decision by the Valuation Tribunal. Accordingly, the matter will be remitted to the Valuation Tribunal for reconsideration.

57. The Valuation Tribunal also erred in law in failing to address the Commissioner's objection as to the scope of the statutory right of appeal, i.e. the argument made by reference to Section 34 of the Valuation Act 2001. This argument should also be considered on remittal.
58. It is neither necessary nor appropriate for the High Court to address, in the context of this case stated, the argument predicated on the wording of Section 37(2) of the Valuation Act 2001. This argument will only properly arise for determination in a scenario whereby the Valuation Tribunal has purported to *increase* the valuation, as stated in the valuation certificate, in circumstances where it has *disallowed* an appeal. It cannot be assumed, at this remove, that the remittal in these proceedings will produce such an outcome.
59. These proceedings will be listed before me on 23 October 2023 at 10.45 AM, for mention, with a view to fixing a hearing date for submissions on the final form of order. The issues to be addressed include whether the questions of law in respect of the calculation of the sinking fund, and of the operating costs of the wind farm, respectively, require to be answered now in light of the judgment of the Court of Appeal in *Hibernian Wind Power Ltd v. Commissioner of Valuation* [2023] IECA 121. In the interim, the parties are requested to ensure that a copy of the various sets of supplemental legal submissions, which have been furnished to the court, have also been filed in the Central Office of the High Court.

Appearances

Proinsias Ó Maolchalain for the appellant instructed by Eversheds Sutherland LLP
Andrew Fitzpatrick SC and David Dodd for the respondent instructed by the Chief State Solicitor

Approved
Gemma S. Mans