

*Unapproved  
No redaction required*



**THE COURT OF APPEAL**

**CIVIL**

**Record No 2021/152**

**Neutral Citation Number [2023] IECA 121**

**Collins J**

**Whelan J**

**Haughton J**

**BETWEEN**

**HIBERNIAN WIND POWER LIMITED**

*Appellant*

**AND**

**COMMISSIONER OF VALUATION**

*Respondent*

**JUDGMENT of Mr Justice Maurice Collins delivered on 22 May 2023**

**BACKGROUND**

1. In contrast to those who enter the *Inferno* of Dante, those entering the world of rating law may not be required to abandon all hope. However, as this appeal illustrates, it certainly helps if they are prepared to relax their grip on reality. It is, as the Valuation

Tribunal aptly observed, a world where “*fiction prevails over fact*”, in which the basic “*rating construct*” – the calculation of the net annual value (“NAV”) in accordance with what is now section 48 of the Valuation Act 2001 (as amended, the “2001 Act”) – is premised on a hypothetical or “*imaginary*” tenancy, negotiated between an imaginary landlord and an imaginary tenant.<sup>1</sup>

2. The Appellant (“*Hibernian*”) is a subsidiary of the ESB. It owns and operates Grouse Lodge Wind Farm, a wind turbine electricity generating facility with six 2.5 megawatt (MW) turbines with a total installed capacity of 15 MW, which is located near Rathkeale, Co. Limerick, within in the rating area of Limerick City and County Council. Grouse Lodge Wind Farm was developed in 2010.<sup>2</sup> In this judgment, I shall refer to it as “*the Property*”. There is no dispute that the Property is “*relevant property*” for the purposes of the 2001 Act (“*wind generators, turbines and generators, together with ancillary plant and electrical equipment, including transformers*” are expressly included in Schedule 3) and equally there is no dispute that Hibernian is in rateable occupation of the Property and the “*occupier*” of it for the purposes of the 2001 Act.

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<sup>1</sup> Determination of the Valuation Tribunal, para 10.14, citing Lord Buckmaster in *Poplar Assessment Committee v Roberts* [1922] AC 93, at 98.

<sup>2</sup> The Property was therefore in operation as a wind farm as at the revaluation date. Accordingly, the issues that arose in *Coillte Teoranta t/a Sliabh Bawn Windfarm v Commissioner of Valuation* [2022] IEHC 588 are not presented here.

3. On 6 August 2015, as part of a revaluation of commercial properties in Limerick City and County, and following an internal appeal from an initial higher valuation,<sup>3</sup> the Commissioner of Valuation (“*the Commissioner*”) determined the NAV of the Property at €1,128,000 as at 1 March 2012 (the revaluation date).<sup>4</sup> Hibernian appealed that valuation to the Valuation Tribunal on the basis that it was “*excessive, inequitable and bad in law and not in accordance with the provisions of the Valuation Act 2001*”.<sup>5</sup> The appeal was heard over 5 days with valuation evidence being called by both sides.
4. The 2001 Act does not prescribe any particular valuation methodology. Section 48(1) provides that the “*value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.*” Section 48(3) then provides that, subject to section 50,<sup>6</sup> for the purposes of the Act “*‘net annual value’ means, in relation to a property, the rent for which, one year with another, the property*

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<sup>3</sup> Section 30 of the 2001 Act provided for an appeal to the Commissioner from certain decisions of a valuation manager, revision officer or other officer of the Commission. The section was repealed in 2015.

<sup>4</sup> A proposed Valuation Certificate indicating a proposed valuation of €1,100,000 issued on 10 June 2014. Following representations under section 29 of the 2001 Act, that valuation was increased to €1,275,000 and a Valuation Certificate in that amount issued on 17 December 2014. That valuation was revised further on appeal to the Commissioner and on 6 August 2015 a further Valuation Certificate issued pursuant to section 33 of the 2001 Act in the amount of €1,128,000.

<sup>5</sup> Notice of Appeal to the Valuation Tribunal (10 September 2015), para 6(a). Specific grounds of appeal are then set out in an attached document.

<sup>6</sup> Section 50 sets down certain rules that apply when the “*notional cost of constructing or providing the property or part is used*” as the basis for valuation and has no relevance here as neither party now seeks to rely on the construction methodology (Hibernian had initially relied on the contractor’s method but abandoned that approach before the Tribunal).

*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”.*

5. This hypothetical tenancy is the statutory or rating construct (also referred to in the cases as the “*valuation construct*”) referred to above. The rule set out in Section 48(3) is the fundamental rule of all valuation but there are other relevant provisions of the 2001 Act to which it will be necessary to refer in due course.
  
6. Here the parties were ultimately agreed that, in the absence of open market rental evidence for the Property or for similar properties (i.e. other windfarms), the Property was best valued using the receipts and expenditure (R & E) method (sometimes referred to as the “*profits basis*”).<sup>7</sup> The 2001 Act makes no reference to the R & E method but its use is well-established in the area of rateable valuation. Its application is the subject of a detailed Guidance Note entitled “The Receipts and Expenditure Method of Valuation for Non-Domestic Rating” published in 1997 by the Joint Professional Institutions’ Rating Valuation Forum, which consists of a number of UK bodies involved in valuation, including the Institute of Revenues Rating and Valuation (IRRV), the Royal Institution of Chartered Surveyors and the Valuation Office (“*the Guidance Note*”). While the Guidance Note has no formal legal status in this

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<sup>7</sup> The absence of any rental data effectively excluded the application of the rental/comparative method of valuation.

jurisdiction, it is commonly relied on by valuers, by the Valuation Tribunal and by courts here.

7. The *Guidance Note* gives the following general outline of the R & E method:

*“4.1 An explanation of the R&E method as applied by valuers can be found in the case of Kingston Union AC v Metropolitan Water Board (1926);*

*‘From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant’s profit and the cost of repairs and other statutable deductions and treated the balance remaining (which should presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern.’*

*4.2 It is necessary to look at this explanation in the light of modern practice and development of the R & E method through caselaw. The methodology is based upon the approach set out below:*

*(a) Gross Receipts should be determined by taking into account all income reasonably able to be derived from occupation of the property.*

*(b) The proper Cost of Purchases made in order to produce those receipts should be deducted to determine the Gross Profit.*

*(c) From the Gross Profit the Working Expenses should be deducted to determine the Divisible Balance.*

(d) *The Divisible Balance is the sum available to be shared between the landlord and the tenant. It comprises two main elements:*

(i) *the **Tenant's Share** – to provide a return on any tenant's capital employed and a reward to the tenant for his venture reflecting the extent of the risk and the need for profit. This is deducted from the Divisible Balance to leave:*

(ii) *The **Landlord's Share**, i.e. the rent payable (which becomes the rateable value).”*

8. The Guidance Note goes on to explain that “*under the requirements of a valuation for rating it has to be assumed that the property is vacant and to let and that the occupation is that of a hypothetical tenant who is generally assumed to occupy the property for the purpose for which it is actually used*” adding, however, that “*the nature of such hypothetical occupation may result in the adjustment of the facts relating to the actual occupation*” (para 5.1). The Guidance Note deals with the treatment of the accounts of the “*actual occupier*” (para 5.5 and following), discusses repairs to the rateable property and the potential need to allow for a sinking fund to allow for the repair or replacement of a “*major item*” (para 5.30 and following) and addresses at some length the related concepts of the “*divisible balance*”, the “*tenant's share*” and the “*landlord's share*” (para 5.45 and following). It also advises valuers to “*stand back and look*”, reviewing each of the elements of a valuation to ascertain whether they have been correctly applied and produce a credible result (para 5.59). Noting that it is likely that comparables will not be available in sufficient numbers to enable a valuation to be

prepared on a rental/comparative basis (as otherwise the R & E method would not have been used), the Guidance Note advises that, as part of the “*stand back and look*” exercise, the valuer should “*consider the valuation produced against the background of valuations relating to similar properties and/or businesses*” and, where the valuation does not appear to “*fit the pattern*”, it should be reviewed (para 5.60)

9. As the Tribunal noted (Determination, para 5.1), the application of the R & E method in any given case can be complex. Here, however, the parties were agreed on most aspects of the valuation but there was a dispute about two issues (Determination Stated, para 5.1). One was as to the apportionment of the divisible balance. The Commissioner considered that the appropriate apportionment was 70% (landlord): 30% (tenant). Hibernian, on the other hand, argued for a 50%:50% division. The second was whether a sinking fund should be allowed as an expense and, if so, what the period for such sinking fund should be. The Tribunal proceeded to address those two issues in the reverse sequence and so shall I.
  
10. As regards the sinking fund issue, Hibernian’s position was that it was appropriate to allow for a sinking fund by reference to a 15 year period (corresponding to the term of the REFIT Scheme<sup>8</sup>). In other words, the (hypothetical) tenant would bear the cost of

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<sup>8</sup> Successive *Renewable Energy Feed-In Tariff* (REFIT) Schemes were adopted by the Government from 2006 on in order to ensure that Ireland met its targets for electricity generation from renewable sources. The Schemes gave certainty to renewable electricity generators by providing them with a minimum price for each unit of electricity exported to the grid over a 15 year period. The last REFIT Scheme (REFIT 3) closed in December 2015. A different scheme - the Renewable Electricity Support Scheme (RESS) – is now in place. Hibernian was a beneficiary of REFIT 2.

replacing the turbines as a tenant's expense over a period of 15 years, rather than the 20 year period corresponding with their design-life/anticipated lifespan. The Commissioner had previously (in the section 30 appeal) accepted that a sinking fund should be allowed over a 20 year period (corresponding to the design life of the turbines) but, before the Tribunal, took the position that the sinking fund should be calculated by reference to a 5 year period only, representing the final 5 years of the 20-year asset life, on the basis that a comprehensive maintenance contract would/could be in place for the first 15 years.<sup>9</sup>

11. In its Determination, the Tribunal accepted that a sinking fund should be allowed over 15 years (the duration of the REFIT Scheme) (Determination, para 10.16). In its view, both the hypothetical tenant and the hypothetical landlord had every reason to expect that serious structural problems would arise in respect of the wind farm and a sinking fund provision was a matter that would affect both of them in agreeing a rent for “*a wind farm comprising extremely costly but wasting assets*” (*ibid*). It considered that a “*prudent tenant*” would look to establish a sinking fund over a period of 15 years while revenue was guaranteed under the REFIT Scheme and that a “*reasonable landlord*” would insist on the same 15-year period so that the future capital sum required to replace the turbines would be secured “*during the period when the tenant's income is guaranteed thereby avoiding any uncertainty as to the tenant's ability to make the necessary contributions to the fund thereafter*” (*ibid*). The Tribunal rejected Mr McMorrow's evidence that a sinking fund was only required for the final 5 years of the

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<sup>9</sup> That position was – correctly – not maintained by the Commissioner before the High Court or on appeal before this Court.

asset-life of the turbines and his contention that it was double-counting to allow annual maintenance costs and a sinking fund allowance over the first 15 years of asset-life (Determination, para 10.17).

12. As regards the proper apportionment of the divisible balance, the parties and their experts differed on how to assess the (hypothetical) tenant's risk and the level of return to be allowed for its (notional) capital investment. A significant element of that dispute was whether the assessment was to be made on the basis of Hibernian's actual financial accounts. Hibernian's valuer, Mr Algar, sought to rely on average wind farm figures for income and expenditure (extracted from the available accounts of wind farms in the REFIT Scheme) rather than on the actual income and expenditure evidenced by his client's accounts. That approach was criticised by the Commissioner's valuation witness, Mr McMorrow (a valuation manager in the Valuation Office).
13. A further issue arose from the approach adopted by Mr McMorrow. He produced two valuations. The first valuation was a full R & E valuation based on Hibernian actual accounts for 2012 and 2013 and projected/budgeted figures for 2014 and 2015, which he subsequently amended following sight of the maintenance contract that Hibernian had put in place.<sup>10</sup> On the basis of his analysis, he estimated the NAV at €100,052 per

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<sup>10</sup> No point appears to have been taken at any stage – and certainly none was taken before this Court – as to the reliance on accounts and projections post-dating the revaluation date (March 2012). If any such point had been raised, the effect of section 19(5) of the 2001 would have to be considered. Section 19(5) is set out in full later in this judgment but, in relevant part, provides 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*”. All of the financial information relied on here appears to have been available before that date.

MW (Determination, para 10.7) The second valuation<sup>11</sup> was derived from average figures for price per megawatt hour (MWh) and operational costs per megawatt hour extrapolated from the Commissioner’s R & E valuations of all 10 wind farms in County Limerick, including the Property (all of which had been revalued by the Commissioner as part of the Limerick City and County revaluation exercise).<sup>12</sup> Using those values, and applying the relevant capacity factor (explained in footnote 11 below), Mr McMorrow proceeded to calculate an average NAV/MW for each wind farm (varying from €44,000 all the way up to €112,000) from which, in turn, he derived an overall average NAV/MW value (referred to by him as the “*Standard NAV/MW*”) of €73,000, to which a capacity factor adjustment was applied and a NAV for the Property (amounting to €1,128,000) being arrived at.<sup>13</sup> This basis of valuation was strenuously challenged by Hibernian.

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<sup>11</sup> Amended Scheme of Valuation at Appendix 1 to Mr McMorrow’s Second Precis of Evidence (Page 518 of the Book of Pleadings).

<sup>12</sup> The average price per megawatt (€/MWh) calculated by Mr McMorrow for the different windfarms ranged from €66/MWh to €91/MWh, while the average operational costs (also expressed in (€/MWh)) varied across the different wind farms from €9/MWh to €23/MWh:

<sup>13</sup> Different windfarms have different capacity factors. The capacity factor is the ratio of actual energy output over a set period to the theoretical maximum output (capacity) over the same period, expressed as a %. Appendix 1 indicates that the capacity factor of the Property was 34%, whereas the capacity factor of the other windfarms used as comparators by Mr McMorrow varied from 31% to 41%. For the purposes of calculating the “*Standard NAV/MW*” applied a capacity factor of 33% (which appears to be a *median* rather than *average* value). He then applied a “*capacity factor adjustment*” to the Standard NAV/MW of 1.030 – presumably to reflect Hibernian’s actual capacity factor – to calculate its NAV.

14. In its Determination, the Tribunal concluded that the appropriate apportionment of the divisible balance was 65% (landlord):35% (tenant) (para 10.21). In calculating what that divisible balance was in financial terms, the Tribunal adopted the averaged figures for income and expenditure used by Mr McMorrow in the first valuation exercise carried out by him, which were derived from Hibernian's actual accounts/budget forecasts (Determination, para 10.18). It considered that those figures provided a more reliable guide to the approach that would be taken by the hypothetical tenant than the figures that Mr Algar had relied on (*ibid*). That finding was not the subject of any challenge. The Tribunal also rejected the approach applied by Mr McMorrow in his second valuation. In its view, the scheme used to produce that valuation was not based on evidence of rents nor did it have the force of an "*established tone*" given that it was not based on agreed valuations (the Tribunal noted in this context that all 10 wind farms in Limerick had appealed their rateable valuations to the Tribunal). Valuation on the R & E basis was, in the Tribunal's view, the "*more appropriate method as it reflects the true trading situation of [Hibernian]*" (Determination, para 10.10).
15. Those inputs, in conjunction with the other agreed elements of the valuation, produced a NAV of €1,020,000, equivalent to €68,000 per MW (Determination, Appendix 1).
16. The above is of necessity a somewhat simplified description of the disputed issues before the Valuation Tribunal and of the Tribunal's adjudication on those issues but it suffices to set the scene for the moment.
17. Section 39 of the 2001 Act provides that a party to an appeal before the Valuation Tribunal who is dissatisfied with its determination of the appeal "*as being erroneous in*

*point of law*” may appeal to the High Court by way of case stated. On the stating of a case, section 39(5) provides that:

*“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.”*

18. Here, the Commissioner was dissatisfied with the Tribunal’s Determination and requested it to state a case. A Case Stated was duly prepared which, as mandated by section 39(3) *“set forth the facts and the determination of the Tribunal”* and identified the following questions of law for the determination of the High Court:

*“(1) Was the Valuation Tribunal correct in law in determining that:*

*(a) That the annual sinking fund payments would be established over a period of 15 years whilst revenue is guaranteed under the Refit Scheme (Paragraph 10.16), rather than the life of the asset (20 years) in light of the Valuation Act 2001 as amended generally and in particular s. 48 and the hypothetical tenancy envisaged thereby;*

*(b) that there is little reason to distinguish strongly the respective interests of the landlord and tenant in maintaining the wind farm (Paragraph 10.16) in*

*light of the Valuation Act 2001 as amended generally and in particular s. 48 and the hypothetical tenancy envisaged thereby;*

*(c) the net annual value under s.48 by reference only to the income and expenses in the actual accounts of the actual occupier (Appendix) in light of the Valuation Act 2001 as amended generally and in particular s. 48 and the hypothetical tenancy envisaged thereby;*

*(2) Were the reasons given by the Tribunal at paragraph 10.17 correct or adequate in law, in light of the contents of the maintenance contract submitted in evidence to the Tribunal”*

As will become apparent, the questions at 1(b) and (2) have effectively fallen away and the High Court addressed only the questions at (1)(a) and (1)(c) and this appeal is concerned only with those questions.

## HIGH COURT JUDGMENT

19. The Commissioner's appeal was heard by the High Court (Owens J). In his judgment of 26 January 2021 ([2021] IEHC 49) he identified the issues to be addressed as follows:  
(1) whether the Tribunal was correct in assessing the NAV of the Property on the footing that section 48(3) of the 2001 Act allows a deduction of an average annual amount calculated over a 15 year period to establish a fund to enable the tenant to replace physical assets which will be worn out at the end of a 20 year period (to which he answered "No") and (2) whether the Tribunal was correct in law in disregarding valuation evidence extrapolated from financial accounts relating to 10 wind farms in Co Limerick (including the Property) which used an average price per megawatt hour and an average operational cost per megawatt hour to arrive at an average NAV per megawatt of capacity for the Property (to which he answered "Yes").
  
20. On the first of these two issues – the sinking fund issue – Owens J noted that it was common case that the turbines had a 20 year lifetime. It was also common case that it was appropriate to make an allowance against gross receipts for the sum which the hypothetical tenant would be required to set aside out of revenue, year by year, in order to provide a sinking fund to cover replacement of the turbines. That annual expense was properly brought into account as a tenant's expense "*necessary to maintain*" the property in a state to command the hypothetical rent in calculating the sum available as the divisible balance (Judgment, para 6). When judgments spoke of annual payments to a sinking fund, they mean an allowance of the "*probable average annual cost*" in the sense of a sum that the tenant must annually lay by as a reserve and invest "*to make*

*good, when it shall become necessary, an inevitable loss by the destructive agency of time*” (Judgment, para 7, citing Cockburn CJ in *R (Boxford Overseers) v Wells* (1867) LR 2 QB 542, at 548).

21. The Judge observed that the effect of allowing a sinking fund on a 15 year basis would be that a sufficient reserve fund would be accumulated at the end of 15 years, rather than at the end of 20 years (when the turbines would actually require replacement). The reserve fund could be invested at the end of 15 years until needed in year 20, at which point it would exceed the amount required to replace the turbines. No adjustment had been made by the valuers to allow for that fact. Differing from the Tribunal’s analysis at para 10.16 of its Determination, the Judge stated that section 48(3) does not mandate that the terms of the hypothetical tenancy from year to year will include a contractual provision notionally negotiated between the (hypothetical) landlord and the (hypothetical) tenant for the establishment or duration of a sinking fund. Rather, the position is that section 48(3) allows the hypothetical tenant to include the annual expense of establishing such a reserve as an expense in calculating his bid for the yearly tenancy. The “*statutory assumption*” (in section 48(3) of the 2001 Act) was 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 .. are borne by the tenant.*” In the Judge’s view, that wording of section 48(3) did not permit the “*probable average annual costs*” of an outlay necessary in order to maintain property in its current state at the end of 20 years to be calculated by reference to a 15 year period (Judgment, para 16). The purpose of the statutory requirement to average out the probable costs and expenses and quantify them as an annual cost was to arrive at “*the rent for which, one*

*year with another, the property might .. be reasonably expected to let from year to year”*  
at the valuation date on the basis of a yearly tenancy of indefinite duration.

22. The Judge concluded his analysis on the sinking fund issue in the following terms:

*“17. The potential hypothetical tenant bidding to occupy the property is only concerned with the “probable average annual cost of the...expenses (if any) that would be necessary to maintain the property” in its actual state. Commercial considerations which might motivate a tenant to choose to make advance provision by setting aside annually into reserves an amount in excess of the probable average annual amount necessary to meet expenses to be borne by the hypothetical tenant under s.48(3) are not relevant. None of the authorities cited to me at the hearing support the case made by HWP on this issue.”*

23. As to the second issue (whether the Tribunal was correct in law in determining the NAV by reference only to the annual accounts of the actual occupier, Hibernian), the Judge considered that the Tribunal had adopted the correct approach. In his view, the R & E method did not permit the approach advocated by the Commissioner. A hypothetical tenant would not have had access to the accounts of the other wind farm operators in Limerick (the accounts were confidential and the Commissioner had had access to them only by virtue of his powers under the 2001 Act) (Judgment, para 32). In his view, the exercise of looking at accounts of similar enterprises when using the R & E method differed from the exercise of looking to established NAVs of similar enterprises, which in an R & E valuation could be considered as part of the “*stand back and look*” element

of the valuation exercise. Examining the underlying accounts of a similar property could be relevant only if the accounts and/or other financial information relating to the property being valued were insufficient to give a true and fair view of the likely receipts and expenditure of the property if let at the valuation date, as for instance where the property being valued was a new venture (Judgment, paras 35-37; para 45). There could be many potential variables reflected within receipts and expenditures extrapolated from the accounts of a number of different windfarms, such as differences in scale, location and the use of different business models. Accordingly, “*it would be impossible to get any degree of assurance from an averaging exercise that like is being compared with like, even where an attempt is made to adjust for those variables*” (Judgment, para 39). The purpose of the valuation exercise was to value a specific property and “*not some imaginary property which might have notional average levels of annual receipts and expenses*” (Judgment, para 40). Where reliable accounts and financial information were available, they should always be the “*starting point*”, though it might be necessary to make adjustments for the purpose of the valuation exercise (Judgment, paras 46-47). In the Judge’s view, any suggested NAVs per MW capacity for wind farms in Co. Limerick which derived from the accounts of those properties were not a reliable benchmark. All of the valuations for those wind farms were under appeal and therefore little or no weight could be given to those valuations in terms of establishing a “*tone of the list*” (referring in this context to the decision of this Court (Murray J; Haughton and Power JJ agreeing) in *Stanberry Investments Limited v Commissioner of Valuation* [2020] IECA 33.

24. The Judge concluded his consideration of this issue as follows:

*“The evidence derived from the extrapolation was not admissible for the ‘equity and uniformity’ purpose for which it was tendered. It was not relevant to any valuation matter referred to in the “Guidance Note”. It was of such a general nature that it could not be used in a “stand back and look” approach to assess the “correctness” of the divisible balance element in the of the R&E valuation exercise. It was introduced as a substitute for analysis of the accounts and financial information concerning receipts and expenditure of the wind farm. It was not available to the potential market of hypothetical tenants.” (Judgment, para 48)*

The Tribunal had thus acted correctly in rejecting this evidence.

25. The Order made by the High Court recited its answers to the two questions it had addressed and, by consent, ordered pursuant to section 39(6) of the 2001 Act that the appeal be remitted to the Tribunal. The parties were directed to bear their own costs.

## **APPEAL AND CROSS-APPEAL**

26. Section 39(7) provides for a further appeal from the High Court to the Supreme Court. The reference to the Supreme Court is now to be read as a reference to this Court: section 74(1) of the Court of Appeal Act 2014.
  
27. Hibernian appeals the High Court's determination that the Tribunal had erred in its treatment of the sinking fund. The Commissioner opposes that appeal and also cross-appeals from the Judge's determination of the second question.
  
28. Detailed written submissions were delivered by the parties addressing all issues and counsel made forceful and helpful oral submissions at the hearing. I shall refer further to the arguments made in discussing the issues falling for determination by this Court.

## DISCUSSION

### *The Standard of Review*

29. As regards the proper approach to the determination of appeals by way of case stated from the Tribunal, Hibernian referred the Court to the “*seminal decisions*” of the High Court (Kelly J) in *Premier Periclase Ltd v Commissioner of Valuation* [1999] IEHC 8 and of this Court in *Stanberry Investments Limited v Commissioner of Valuation*.
30. In *Premier Periclase Ltd*, Kelly J expressed the view that the Tribunal was the type of expert administrative tribunal which Hamilton CJ had referred to in his judgment in *Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34. Kelly J also referred to the judgment of Keane J in which he stated that the findings of fact made by a Social Welfare Appeals Officer could not be disturbed on appeal “*unless they were incapable of being supported by the facts or were based on an erroneous view of the law.*” The High Court should, in Kelly J’s view, “*be slow to interfere*” with decisions of the Tribunal and should “*only do so on the basis of an identifiable error of law or an unsustainable finding of fact*” (at page 26).
31. Hibernian prays in aid the following passage from the judgment of Murray J in *Stanberry Investments Limited v Commissioner of Valuation*:

“51 .... *Unlike the position under consideration in Attorney General v. Davis, when the Oireachtas prescribed an appeal on a point of law from a decision of the Valuation Tribunal, it must be assumed that that process would*

*operate cognisant of the fact that issues will arise in the course of a valuation appeal which are peculiarly suited to the expert determination of the specialist body. These include considerations such as the reliability of comparators, the appropriate method of valuation, and the correct approach to application of particular valuation concepts such as the tenant's share or divisible balance. In those cases, where an appeal on a point of law presents an issue of underlying fact or inference in relation to matters within those zones of expertise, the Courts should certainly afford very significant weight to the decision of the expert body.”*

32. It should also be noted, however, that earlier in his judgment Murray J stated that the proposition that the court should be “*slow to interfere with the decisions of expert administrative Tribunals*” such as the Tribunal here was, unless significantly qualified, apt to mislead, observing that “[*a*]dministrative tribunals, expert or otherwise, obtain no deference on pure issues of law” and “*errors of fact simpliciter do not present any issue of curial deference either*”. There was thus only limited scope for any form of “*curial deference*” (para 49). Nor did the Tribunal’s determinations attract some “*supercharged presumption of validity*” (para 52).

### ***The Sinking Fund Issue***

33. There was no dispute here that the design life of the wind turbines was 20 years. In the imaginary universe of rating law, that is “*a real world reality that must be acknowledged*” (Determination 10.14). Ultimately – and in agreement with the Judge –

I consider that the Tribunal failed to acknowledge that reality and was led into error as a result.

34. The Commissioner argues that it is well-established in the authorities that, where it is considered appropriate to allow for the creation of a sinking fund to replace an asset or assets, the deductions should be calculated over the lifetime of the asset.
35. That this is, at least, the general rule is not disputed by Hibernian. Neither does Hibernian dispute that the turbines were depreciated on that basis in its accounts (i.e. over a 20 year period).
36. The Court was referred to a large number of authorities. The earliest of these, the decision of the Queen's Bench Division in *R (Boxford Overseers) v Wells* (1867) LR 2 QB 542, was referred to by Owens J in the High Court. Giving the judgment of the court, Cockburn CJ stated that provision for a future liability to reconstruct the rateable property (such as buildings or machinery) was, in principle, "*an expense which may properly be included among the expenses necessary to maintain an hereditament, consisting in part of subjects perishable, in a state fit to command the rent, and which it does, in fact, while standing and in use command*" and also referred to "*a sum annually laid by to make good, when it shall become necessary, an inevitable loss by the destructive agency of time*".
37. The statutory provision at issue in *R (Boxford Overseers) v Wells* – section 1 of the Parochial Assessments Act 1836 – contained very similar language to that in section 48(3) of the 2001 Act. Section 1 referred to the deduction of "*the probable annual*

*average cost of the repairs, insurance and other expenses necessary to maintain [the property] in a state to command such rent*". If (so the Commissioner says) the cost of replacing the rateable property is to be regarded as coming within the "*costs of the repairs .. and other expenses necessary to maintain*" the property, it follows that what section 48(3) permits to be allowed by way of expense is the "*probable annual average cost*" involved which, it is said, necessarily implies that the cost of replacement must be averaged over the lifetime of the property requiring replacement. I should say that I did not understand the Commissioner's position to be that the cost of sinking fund payments is "*synonymous with the cost of repairs*" as is suggested by Hibernian. The essential point being made by the Commissioner, as I understand it, is that, if a sinking fund is to be provided for, that can only be because, on the facts, it comes within "*repairs .. and other expense necessary to maintain*" the property, thus coming within the scope of section 48(3) of the 2001 Act and therefore subject to the statutory mandate that what is to be allowed is the "*probable annual average cost*" involved.

38. *Appenrodt v Central Middlesex Assessment Committee* [1937] 2 KB 48 was also referred to by the Commissioner but the circumstances at issue there differ so significantly from the circumstances here that I consider that no real assistance can be got from the observations of Scott LJ on which the Commissioner placed reliance.<sup>14</sup>

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<sup>14</sup> I should add also that the issue of whether "*the probable average annual cost of repairs*" and of "*insurance*" are governed by the words "*necessary to maintain the property in that state*" in section 48(3) – an issue which was discussed, in a somewhat different statutory context in *Appenrodt* and later in *Wexler v Playle (Valuation Officer) v Metropolitan Borough of Battersea* [1961] 1 QB 217 and to which Hibernian's submissions give some attention – does not fall for consideration here. No question relating to allowing a deduction for insurance arises

39. The Commissioner also brought the Court to *Underdown v Clacton Pier Co Ltd* [1958] RVR 460 and *Brighton Marine Palace and Pier Co v Rees* [1961] RVR 614. In *Underdown* one of the issues was the contribution that ought to be allowed against the replacement of Clacton Pier. There appears to have been little dispute that the physical lifespan of the Pier was 100 years but the ratepayer contended that it would have reached the end of its useful life, and would require to be replaced as out-of-date, at a much earlier point in time (after 55 years). Observing that the “*purpose of a sinking fund is not an insurance against change of taste but to replace the actual structure when it has worn out*”, the Lands Tribunal rejected that argument and allowed an annual sinking fund contribution based on a 100 year lifespan (at page 462). In *Brighton Marine Palace and Pier Co v Rees* the Lands Tribunal adopted a similar approach. As was the case in *Underdown*, the Tribunal appears to have proceeded on the basis that, once the asset life was determined, the allowance for the sinking fund was to be calculated mathematically, that is to say what was to be allowed was the amount which, on an annual basis over the lifetime of the asset (and making an allowance for interest), would produce a fund matching the cost of replacement.

40. According to *Ryde on Rating and the Council Tax* (Looseleaf, 2023) (“*Ryde*”)<sup>15</sup>

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here. As for “*repairs*”, it seems to me that there can be no question that section 48(3) only permits an allowance in respect of repairs that are necessary to “*maintain the property in that state*”.

<sup>15</sup>Division E, Chapter 3, J, para 191.

*“A renewal fund for the hereditament, when appropriate, is an expense necessary to maintain the hereditament in a state to command the rent. Whether such a fund should be allowed will, it has been said, depend on two factors. First, the type of construction of the buildings, for this affects their life, and, second, the duration of the occupation. If, as in the case of a statutory undertaking, the occupation is likely to be permanent, a renewal fund is allowed; but in the case of premises usually occupied on short terms, there would be no occasion for it. If there is an actual rent in evidence with a repairing liability, the repairing liability may preclude a sinking fund in addition.”*

41. *Ryde* cites *R v Wells*, as well as a further decision of the Lands Tribunal, *Humber Ltd v Jones and Rugby RDC* (1959) 5 RRC 23, as authority for the proposition in the first sentence of the above passage. It follows from that proposition that, where it is appropriate to make allowance for a sinking fund in assessing what rent would be payable for the rateable property, it is subject to the provisions of section 48(3) and in particular to the statutory rule that what is to be allowed is “*the probable annual average cost*” of replacement. *Humber Ltd v Jones and Rugby RDC* is also cited as authority for the proposition in the second sentence, which is expanded on in the remainder of the passage. *Humber Ltd v Jones and Rugby RDC* did not involve an R & E valuation. In its decision, the Tribunal noted that, when using the R & E method (or, as it referred to it, “*the profits basis*”) “*an allowance for a sinking fund for renewals is customary, but the same cannot be said when using other methods of arriving at an assessment*” (at page 35). The decision went on to identify the two factors identified in *Ryde* above. On the facts, the Tribunal did not consider it appropriate to make an

allowance for a sinking fund, on the basis that the cost of repairs was an expense that the tenant would have to meet under the terms of the actual lease (at page 36).

42. *Humber Ltd v Jones and Rugby RDC* clearly identifies “*duration of the occupation*” as a factor in deciding whether it is appropriate to provide for a sinking fund/renewal fund at all. Nothing in that decision – or in *Ryde* – suggests that duration of the occupation is a relevant factor in determining the period by reference to which such a sinking fund, if it is to be provided for, falls to be calculated.
43. There was, nonetheless, considerable debate about the likely duration of the assumed tenancy here. Before addressing that debate further, however, there is a further textbook extract to which I should refer, namely a passage from Plimmer, *Rating Law & Valuation* (1998) which is set out in a decision of the Lands Tribunal for Northern Ireland to which we were referred, *Kennedy Entertainments Ltd v Commissioner of Valuation*. At para 6.5.40, the author states that the authorities indicate that, in approaching the issue of renewal, additions should be made “*for sinking funds to replace such depreciating items as buildings, rateable plant and machinery etc but not, of course, land*” and that one should “*calculate the replacement costs of each item, and spread it over its predictable useful life*”. That passage clearly supports the position of the Commissioner here.
44. I should also refer to what is said in the *Guidance Note*. At para 5.33 it refers to a sinking fund generally being “*required to meet the cost of future repairs and renewals as and when it should become necessary to carry them out.*” To enable this to be practicable, the Note continues, “*the primary consideration, once the cost of the works,*

*etc, estimated as at the relevant valuation date has been determined, will be ensure that the fund provides that capital sum at the appropriate date.”* The “*appropriate date*” seems clearly to refer to the date when the asset (the “*major item*” referred to in para 5.31 of the Notice) will require replacement/renewal. Again, that appears to support the position of the Commissioner here. The Guidance Note also suggests, however, that the “*continuance of occupation*” is a major factor in calculating the “*annual fund*” (which appears to be used as a synonym for “*sinking fund*”): para 5.32. The Guidance Note goes on to state that the “*duration of the hypothetical tenant’s period of occupation will determine both the extent of the repairs which might reasonably be expected to be undertaken and also the timescale for provision of the capital sum(s) to meet their cost*” (para 5.34).

45. It is unclear to me how paras 5.32 and 5.34 of the Guidance might operate in practice. In particular, it is not clear to me how the guidance is intended to operate where, for instance, the hypothetical tenancy is estimated as being for a period of 6-8 years (which is what Hibernian suggest is the position here) and where the assets require replacement after 20 years (which is the agreed position here). It may be that the Note intends to suggest that, in such circumstances, the hypothetical tenant should be considered to bear a *pro rata* share of the cost of replacement, spread over the duration of the hypothetical tenancy. Such an outcome would effectively align with the approach apparently required by section 48(3). If some different approach is being suggested – such as that, in a scenario such as that just mentioned, the entire cost of replacement might be borne by the hypothetical tenant over the 6-8 years duration of the hypothetical

tenancy - it is difficult indeed to see how such an approach would be consistent with section 48(3). Clearly, in the event of any such inconsistency, the statute must prevail.

46. Before leaving the Guidance Note, it may be noted that it does not suggest that the calculation of the sinking fund/annual fund should be based on an assessment of what a prudent hypothetical tenant and a reasonable hypothetical landlord would have agreed in a hypothetical negotiation.
47. We were referred to many authorities concerning the duration of the hypothetical tenancy that is central to the valuation exercise under the 2001 Act, including *R v South Staffordshire Waterworks Company* (1885) 16 QBD 359, *Consett Iron Company Ltd v Assessment Committee for Durham* [1931] AC 396 and a decision of the Hong Kong Lands Tribunal involving the valuation of electricity power stations, *China Light and Power Co Ltd v Commissioner of Rating and Valuation (No 1)* [1997] 4 HKC 461 (in which, it may be noted, the Tribunal found that the probable duration of the hypothetical tenancy was 4 years).<sup>16</sup> It is clear from the authorities that the tenancy is “*from year to year*” and is not to be equated with a tenancy for a term of years. It is a tenancy of indefinite duration, in terms of landlord and tenant law, a periodic yearly tenancy

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<sup>16</sup> *China Light and Power* did not involve any issue relating to a sinking fund (under Hong Kong law the hypothetical landlord, not the tenant, was liable for the cost of repairs, insurance and other expenses). Nevertheless, the following passage from the judgment of the Tribunal (at 471E) has resonance here: “*In rating appeals the terms of the hypothetical tenancy invariably impose strains upon reality. This occurs even more so when the profits method has to be adopted. The situation which then arises was aptly summed up by Mr FitzGerald, when he observed that it may even require the Tribunal to move from the hypothetical to the incredible.*”

capable of termination by notice. None of that is in dispute, though the Commissioner emphasises that, while the tenancy is from year to year, that does not give rise to any assumption that the tenancy will last only for a year. On the contrary, the Commissioner says, it must be assumed that there is a reasonable expectation of its continuance.

48. Interesting as this debate may be to some, and notwithstanding what is said in the *Guidance Note*, it is difficult to see its relevance to the resolution of the sinking fund issue here. The Tribunal did not make any finding as to the likely duration of the hypothetical tenancy. Its view that the sinking fund should be calculated by reference to a 15 year period, rather than to a 20 year period, was *not* based on any finding that the hypothetical tenancy was likely to last for 15 rather than 20 years. Hibernian did not make that case before the Tribunal or before the High Court or this Court. In submission before us, Mr Hickey made it clear that his client considered that the probable duration of the hypothetical tenancy here was, at most, somewhere between 6 and 8 years. But if that be so – and I express no view on the point at all – it provides no rationale for the Tribunal’s view that the sinking fund should be calculated by reference to a 15 year period. But, of course, the Tribunal took that view on the basis that 15 years was the duration of the REFIT Scheme, not on the basis of any prediction as to the duration of the hypothetical tenancy. Similarly, the conclusion of the High Court that the sinking fund should be calculated over a period of 20 years was premised on the agreed fact that such was the design-life of the turbines, not on any view that the tenancy would necessarily last for that period. The issue of the duration of the hypothetical tenancy is, in my view, an irrelevant distraction.

49. It is clear from the High Court’s judgment that Owens J was of the view that the Tribunal had erred in law in reaching the conclusion it did on the sinking fund issue. In his view, the issue fell to be determined by reference to section 48(3) of the 2001 Act, not by reference to a hypothetical negotiation between landlord and tenant. If that is correct, then no issue of deference to the views of the Tribunal arises: *Stanberry Investments Limited v Commissioner of Valuation*.
50. Here, it was common case that the design-life of the turbines is 20 years. I agree with the view of the High Court that, in the circumstances, it was not consistent with section 48(3) of the 2001 Act to calculate a notional sinking fund by reference to a 15 year period. As Owens J observes, the effect of that approach is to permit a deduction for each of the 15 years that exceeds – and, in relative terms, significantly exceeds<sup>17</sup> – the “*probable average annual cost*” of replacing the turbines (my emphasis). In my view, the terms of section 48(3) make it clear that the expense of replacing the turbines must be averaged out over the entirety of their 20 year design life. Allowing the sinking fund to be built up over a shorter period of 15 years has the result that a sum that is more than “*the probable average annual cost*” of replacement is allowed as a tenant deduction for 15 years, while nothing at all is allowed for the final 5 years before the need to replace the turbines arises. I agree with the Judge that such an approach is impermissible having regard to the terms of section 48(3).

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<sup>17</sup> According to the Commissioner (and this does not appear to be disputed by Hibernian), in order to build up the sinking fund over 15 years rather than 20 years “*the tenant has to put away 42.44% extra annually*” (Submissions, para 11).

51. As already noted, Hibernian accepts that the “*general rule*” is that where it is considered appropriate to allow for the creation of a sinking fund to replace an asset or assets, the deductions should be calculated over the lifetime of the asset. In my view, that is not simply the *general rule*, it is *the rule* and it was not open to the Tribunal to depart from it here.
52. It follows that I agree with the Judge that commercial considerations which might motivate a tenant to choose to make advance provision by setting aside annually into reserves an amount in excess of the “*probable average annual cost*” are not relevant (Judgment, para 17). Such an approach cannot be reconciled with the clear terms of section 48(3) and would introduce a wholly undesirable uncertainty in its application which would in turn undermine the effective operation of the valuation regime. I do not mean to suggest that, as regards other aspects of the valuation regime, commercial considerations should not be to the fore. We were referred by Hibernian to a number of cases where, in other valuation contexts, courts and tribunals have invoked commercial considerations, including *Commissioner of Valuation v Roadstone Ltd* [1961] IR 239 and *Hardman (Valuation Officer) v British Gas Trading Limited* [2015] UKUT 53. However, the question here is not what commercial considerations (however identified) might be said to suggest; rather, it is what section 48(3) prescribes. In my view, section 48(3) prescribes this aspect of the hypothetical tenant’s bid; it is not a matter for (hypothetical) negotiation.
53. Even if I took a different view on that point, the Tribunal’s analysis in this respect is not at all persuasive in my view. It is, in my view, wholly implausible to hypothesise a

tenant negotiating a tenancy “*from year to year*” agreeing to significantly overpay into a sinking fund in circumstances where (as Hibernian itself emphasises) the tenancy may be terminated long before the necessity to replace the turbines arises. While the Tribunal’s finding as to what prudent landlord and tenant would have agreed is described as a finding of fact in the Case Stated, it is not a “*finding of fact*” in any ordinary sense of that term or a finding of the kind at issue in cases such as *Mara v. Hummingbird Limited* [1982] ILRM 421 or *Premier Periclase Ltd v Commissioner of Valuation* (or, in the appellate context, *Hay v O’ Grady* [1992] 1 IR 210). It is, rather, yet a further hypothesis, based on essentially speculative assertions and assumptions as to the economic outlook for renewable generation in a post-REFIT universe, occurring long after the operative valuation date. While weight is certainly to be given to the views of the Tribunal, the Court is entitled to come to a different view and in my opinion the Determination does not identify any cogent reason why a sensible tenant – occupying on foot of a year to year tenancy which could be terminated by notice at any time after the first year - would have agreed to significantly over-contribute to the sinking fund in the manner the Tribunal suggests. The fact that Hibernian is depreciating the cost of the turbines over a 20 year period, rather than the 15 year life of the REFIT scheme, further undermines its case, and the Tribunal’s conclusions, on this point.

54. In any event, in light of my view that the Judge was correct in finding that the Tribunal’s conclusion was inconsistent with section 48(3), it is not necessary to press this analysis any further.

55. There is one further argument made by Hibernian that I should briefly address. Mr Hickey submitted that there is nothing in section 48(3) preventing the Tribunal from taking a period less than the lifespan of the asset (here, a period of 15 years) and then dividing the cost of replacement over *that* period. That, Mr Hickey said, was consistent with section 48(3). I do not agree. Dividing the replacement cost of an asset with a 20 year lifespan over a 15 year period does not produce the “*probable average annual cost*” of replacement (again, my emphasis). The “*probable average annual cost*” is produced by dividing the replacement cost over 20 years (subject to whatever adjustment may be necessary to account for interest).
56. Accordingly, I agree with the Judge that the Tribunal’s finding on the sinking fund issue was wrong in law and I would therefore dismiss Hibernian’s appeal.

### ***The Accounts Issue***

57. The second and final issue is whether the Judge erred in finding that the Tribunal was correct in law in determining the NAV by reference to Hibernian’s actual accounts and in rejecting the alternative valuation scheme advanced by Mr McMorrow on behalf of the Commissioner.
58. In my view, the Judge made no error. The alternative valuation scheme advanced by the Commissioner had no foundation in the 2001 Act, was fundamentally inconsistent with the R & E method and was not capable of providing a reliable basis for assessing

the NAV of the Property. That being so, it was rightly rejected by the Tribunal and by the High Court.

59. As for the 2001 Act, the valuation here was carried out as part of a general revaluation, pursuant to a valuation order made by section 19(1) of the 2001 Act rather than by way of revision under section 28. It follows that section 49 of the 2001 Act has no application to the valuation exercise. That is not in controversy.

60. Section 19(5) of the 2001 Act (inserted by the Valuation (Amendment) Act 2015) provides that:

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

*(a) correctness of value, and*

*(b) equity and uniformity of value between properties on that valuation list,*

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

*relative to the value of other properties on that valuation list in that rating authority area.”*

61. Section 19(5) came into operation in June 2015, at which point Hibernian’s section 30 appeal was pending. That may explain why the provision did not feature significantly in argument. However, the Commissioner argues that uniformity and equity were principles of rating law ever before the enactment of section 19(5). That is certainly so, but the proper operation of those principles must be understood.

62. In *Ladies Hosiery and Underwear Ltd v West Middlesex Assessment Committee* [1932] 2 KB 679, Scrutton LJ referred to the “*vital principle that as between different classes of hereditaments, and as between different hereditaments in the same class, the valuation should be fair and equal*” (at 688). However, earlier in his judgment Scrutton LJ had identified another “*vital principle of the law of rating*”, namely that “*each hereditament should be independently assessed*” (at 686). And having articulated the principle of fairness and equality, he immediately qualified it:

*“there is a third important qualification, that the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error”* (688).

63. The decision of the King’s Bench in *Stirk & Sons Limited v Halifax Assessment Committee* [1922] 1 KB 264 was cited in *Ladies Hosiery and Underwear Ltd v West*

*Middlesex Assessment Committee* as an illustration of correctness being sacrificed for the sake of uniformity. There a divisional court considered that a supplemental valuation list was bad because a 25% increase in valuations had been applied across the board. In the words of Branson J, the rating authority had fettered its discretion “*by making a general rule, and has sought to apply to a number of hereditaments, which must be subject to all sorts of varying considerations, the one inflexible rule that the value is deemed to have risen by 25%.*” That was not how the authority should exercise its functions (274).

64. In *Commissioner of Valuation v Carlton Hotel Dublin Ltd* [2013] IEHC 170, [2016] 2 IR 385 (which predated the enactment of section 19(5)), there was a dispute as to the appropriate valuation of certain hotels and nursing homes. The Commissioner contended that he (and the Valuation Tribunal) were bound to determine appeals by reference to the valuation of other comparable properties in the valuation list – the application of “*the tone of the list*” subsequently considered by this Court in *Stanberry Investments Limited v Commissioner of Valuation*. That issue does not arise here as the Commission accepts that there is no “*tone of the list*” on which to rely. But, as here, the principle of uniformity and equity was relied on by the Commissioner to justify the disputed assessments. The following observations of O’ Malley J are therefore of note:

“[61] *The Commissioner is certainly correct in saying that uniformity and equity are essential to the administration of the rating system, as they are in relation to any tax. Like must be treated alike. However, there is a logically prior issue and that is whether liability to the tax in question has been properly*

*assessed in the first place. There is no merit in the uniform application of a mistake.”*

65. The Commissioner’s approach here did not involve individual or independent assessment of the Property. Rather, it relies on the application of a “*Standard NAV/MW*”. While that “*Standard NAV/MW*” is derived from the windfarms operating in Co. Limerick, the logic of the Commissioner’s approach would equally apply to all windfarms operating in the State and would permit all such windfarms to be valued by the same formula – the “*Standard NAV/MW*” adjusted by the appropriate Capacity Factor Adjustment multiplied by the windfarm’s capacity (and it is apparent from *Coillte Teoranta v Commissioner for Valuation* that the Commissioner has sought to apply a standard €/MWh to windfarms outside Limerick).
66. The “*Standard NAV/MW*” calculated by Mr McMorrow does *not* represent the efficient hypothetical operator. No such assessment has been undertaken by him. The “*Standard NAV/MW*” is simply the product of the mathematical averaging of the various (and varying) values from each windfarm. That exercise does not account for the variables that affect the operation (and therefore the output and cost base) of individual windfarms. That point is made by Owens J at para 39 of his judgment. It has also been made by the Valuation Tribunal in some of the many determinations provided to us: see for instance *West Clare Windfarm SER v Commissioner of Valuation* at 10.15 (*de minimis* windfarms will typically have proportionately higher operating costs than large scale windfarms), *Reirk Energy Limited v Commissioner of Valuation* at 11.7 (energy output of a wind farm is highly dependent upon the weather conditions present at the

wind farm site as well as the type, size, and capacity of its wind turbines and in term of estimating energy output, the accounts of other windfarms are not useful unless those wind farms are similarly located on a site of similar terrain and have the same type and height of wind turbine). As it is aptly stated in Hibernian's written submissions, "*wind farms are neither identical nor "homogeneous" when it comes to their design, manufacture, location, wind capacity factor, operation, maintenance routine or degradation.*"

67. The Commissioner's approach does not, in truth, involve comparison with other operators. Instead, it involves devising an imaginary and notional "*average*" operator that does not correspond to *any* actual operator. The price notionally achieved by that notional operator will be higher or lower than that of actual windfarm operators; *ditto* its notional average operational costs. But that says nothing as to the price that the hypothetical operator of any specific windfarm would achieve or the costs that such an operator would incur. If windfarms were indeed entirely homogenous, there might be some validity in the Commissioner's approach. But they are not. Outputs differ. Costs differ. Those differences do not necessarily indicate any deviation from normally efficient operation and simply averaging the prices and costs of different operators does not establish a benchmark for efficient operation. That is, in my view, a fundamental flaw in the Commissioner's position. In the circumstances, the application of a *Standard NAV/MW* is apt to result in the arbitrary over-valuation of some windfarms and the under-valuation of others.

68. In my view, such an approach is neither required nor permitted by section 19(5) of the 2001 Act or by the principles to which that sub-section now gives statutory expression. The Commissioner's approach disregards the fundamental principle that there must be individual assessment of the rateable property and it sacrifices correctness – and fairness – so as to achieve an artificial uniformity.
69. There is also a fundamental difficulty in the Commissioner's approach insofar as it relies on confidential financial and commercial information relating to other windfarms that Hibernian is not in a position to access or review. In my view, it is no answer to this point to say, as the Commissioner says, that the hypothetical tenant would have access to such information. The ratepayer has a right to investigate and, if appropriate, to challenge the basis of the Commissioner's valuation. That right is significantly impaired if such valuation depends on information to which the Commissioner, but not the ratepayer, has access.
70. The Commissioner's suggested approach is also fundamentally inconsistent with the R & E method which, after all, the Commissioner accepts is the appropriate valuation method to apply in the circumstances here.
71. Although the statutory rating construct is rooted in a *hypothetical* tenancy (a fact much emphasised by the Commissioner in his submissions), it is clear that, in applying the R & E method, one starts by looking at the accounts of the actual occupier. *Ryde* states that principle very clearly:

*“665.1 It must be remembered that the receipts and expenditure method involves using the actual occupier's profits as shown in the accounts as evidence of what*

*the hypothetical tenant would expect to earn in the year commencing on the valuation date, thus enabling a judgment to be made as to the proportion of those profits which the hypothetical landlord and tenant would agree upon as rent.”*

72. That the actual accounts of the occupier are the first port of call in a valuation based on the R & E method is also made clear in Bond & Brown *Rating Valuation Principles and Practice* (4<sup>th</sup> ed; 2018), chapter 9.5 and in the *Guidance Note*. All of these texts make it clear that, for valuation purposes, adjustments *may* need to be made to the financial information in the accounts. Where reliable accounts are not available – as for instance where the business is newly established - other sources of financial information, such as the accounts of comparable operators, will have to be identified. But the correct starting point is to look at the actual accounts of the occupier.
73. There were accounts available here and the reliability of those accounts, and the projections based on them, was not challenged by the Commissioner.
74. *Wishart v Hulse* [2018] UKUT 224 (LC) provides an illustration of when it may be appropriate to make an adjustment to the position disclosed by the accounts. There the Upper Tribunal was persuaded that the actual performance of the business carried on by the ratepayer – the operation of four self-catering holiday units – was significantly better than the performance likely to be achieved by a hypothetical tenant of a reasonably efficient standard and thus adjusted the actual turnover figures for the business downwards to reflect that “*over-trading*”. The Upper Tribunal also made

adjustments to the costs in the accounts *inter alia* to include a cost for tasks which the occupiers had undertaken without payment.

75. The Commissioner places reliance on the following passages from the Upper Tribunal’s judgment:

*“27. The basis of the valuation is the assumption of a letting to a reasonably competent or efficient operator who will expect to achieve a level of income, or turnover, and to incur a level of expenditure, which are broadly representative of an average level of performance. That is not to exclude the possibility that, on a letting in the open market, the successful tenant might be significantly better than average. Nevertheless, since the object of the valuation is to determine a letting value for the hereditament provided by the notional landlord, it is assumed that an above-average tenant would not be prepared to pay more in rent because of any particular attributes of his or her own (whether in terms of skill, experience or resources) which might result in a better level of performance than would be achieved by an average operator.....*

*29. As we have explained, the incoming tenant is assumed to be reasonably competent and of average ability, being neither especially skilled nor particularly inept. The parties are assumed to base their agreed rent on the performance which that tenant, or any other broadly average tenant, would be capable of achieving. It follows that the turnover to be considered is not that of the actual occupier but that of a reasonably efficient hypothetical tenant, i.e. the FMT [“fair maintainable trade]*

30. *The performance achieved by the actual occupier may be a useful starting point in the assessment of FMT, but it cannot be adopted uncritically, or as necessarily representing the trade which might be expected to be achieved by the notional tenant. If the actual occupier is not of average ability or reasonably competent, but instead is of outstanding ability, or, for that matter, is conspicuously incompetent, the income generated by the actual operator's business may require to be adjusted. Moreover, in any case where the assumed tenure (an annual letting) is different from the basis on which the business of the ratepayer has been operated (which in the case of self-catering holiday businesses is almost invariably by a freehold proprietor) it is necessary to bear in mind the possibility that the performance of the actual occupier may not reflect the performance of an annual tenant (albeit one with a reasonable expectation of continuing in occupation)."*

76. *Wishart v Hulse* does not involve any novelty. *Ryde* notes that the operation of the R & E method may well “*require adjustments to be made to the actual occupier's accounts to ensure that the estimated profits treated as the divisible balance are those that would be derived only from occupation of the tenement to be valued and that flow from occupation of those premises as distinct from the actual occupiers' special skills and attributes.*”

77. Nor, in my view, does the decision in *Wishart v Hulse* provide any support for the approach adopted by the Commissioner here. The Commissioner is not advocating for

any *adjustment* to Hibernian's accounts on the basis that it is operating its windfarm less efficiently than a hypothetical reasonably efficient tenant would do. The Commissioner does not make the case that the receipts shown in Hibernian's accounts are less than the receipts that would be earned by a hypothetical reasonably efficient tenant and should therefore be *adjusted* upwards. Equally, he does not say that the costs shown in the accounts exceed the costs that a hypothetical reasonably efficient tenant would incur if operating the windfarm and should therefore be *adjusted* downwards. The Commissioner rather advocates disregarding Hibernian's accounts entirely and substituting for them an entirely different valuation basis, namely the "*Standard NAV/MW*" derived in the manner already described, from confidential financial information to which Hibernian (or any other windfarm operator, in Limerick or elsewhere) has no right of access.

78. Before this Court, the Commissioner sought to recharacterise the accounts issue as one concerning the admissibility of evidence (written submissions, para 64 and following). Hibernian understandably challenges that characterisation. It makes the point that the Commissioner never sought to rely on the accounts of other windfarm operators to argue that the receipts and expenditure in Hibernian's accounts should be adjusted and that the Commissioner instead argued that Mr McMorrow's analysis should be substituted *in toto* for an analysis of Hibernian's accounts. I agree that the Commissioner's attempt to reframe the issue is unconvincing. But even if the Commissioner *had* sought to rely on Mr McMorrow's analysis to suggest that the receipts and expenditure in Hibernian's accounts should be adjusted, I agree with the

Judge that, for the reasons set out in paras 41-48 of his Judgment, it was not reliable or admissible for that purpose.

79. In my view, the Tribunal was entitled to take the approach it did. It was entitled to conclude that Hibernian's accounts were a "*more reliable*" and "*more appropriate*" basis for assessing the NAV than the basis advocated by the Commissioner. Any other conclusion would have been erroneous in law. It follows that the Tribunal was right to reject the Commissioner's scheme of valuation and the Judge was right to reject the Commissioner's appeal. It also follows that the Commissioner's appeal to this Court fails.

## CONCLUSIONS AND ORDERS

80. Neither party has succeeded in establishing any error on the part of the High Court Judge and accordingly I would dismiss the appeal and the cross-appeal and would affirm the judgment and order of the High Court as to how the questions raised in the Case Stated should be answered.
81. The Judge made no order for costs. That appears to have been the appropriate order, given that each party had partial success. It also appears to be the appropriate order here, where each party has again been partially successful. My provisional view, therefore, is that the costs order made by the Judge should be affirmed and that this Court should make no order for the costs of the appeal and cross-appeal. However, if either party wishes to argue for some different costs order, they should notify the Court of Appeal Office within 14 days. In that event, the Court will convene a short hearing at a date and time to be notified. It should be noted that the party seeking the hearing will be at risk of costs in the event that the order ultimately made is as per the provisional indication above.

*Whelan and Haughton JJ agree with this judgment and with the orders proposed.*