THE HIGH COURT

[2020 No. 968 SS]

BETWEEN

THOMAS MCNAMARA

APPLICANT

– AND –

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 12th July 2021.

SUMMARY

This is a successful application for an order pursuant to s.949AR(2) of the Taxes Consolidation Act 1997 (as amended) directing that the case stated in the within proceedings be sent to the Tax Appeal Commissioners for amendment. This summary forms part of the court's judgment.

I

The Case Stated

1. This case arises ultimately out of an amended notice of assessment to CGT for the year 2007, notice of which issued on 7th August 2014. The assessment relates to a chargeable gain realised by the appellant on the disposal of the 'Texas' department store and other associated

land and buildings in Tullamore, County Offaly. The Tax Appeals Commission (the 'TAC') issued a determination on 16th January 2020 in respect of an amended assessment raised by the respondent in August 2014.

2. Except where a provision of the Tax Acts provides that a determination of the Commissioners is to be final and conclusive, a party who is dissatisfied with a determination of the Commissioners as being erroneous on a point of law may by notice in writing require the Commissioners to state and sign a case stated for the opinion of the High Court. The notice must specify the particular respect in which the determination is alleged to be erroneous in law. The statutory right to request that the TAC sign and state a case for the opinion of the High Court and for the High Court to hear the said case stated on receipt of same, arises from s.949AP of the Taxes Consolidation Act 1997 (the 'TCA 1997'). By letter of 5th February 2020, on the instructions of Mr McNamara, his solicitors requested the TAC to state and sign a case for the opinion of the High Court. That letter comprises the s.949AP(2) notice for the purpose of these proceedings.

3. Following on the issuance of that s.949AP(2) notice, a Tax Appeals Commissioner has stated and signed a case for the opinion of the High Court in accordance with s.949AQ of the TCA 1997. The questions of law stated for the court in that case stated are the following:

> "*I.* *Whether, upon the facts provide* [*sic* – it is not clear whether 'proved' or 'provided' is intended, most likely 'proved'] *or admitted, I was correct in law in my determination that the sale of the property on 4 July 2007, constituted a sale of development land in accordance with section 648 TCA 1997.*
>
> *II.* *Whether, upon the facts provide* [*sic*] *or admitted, I was correct in law in determining that the statutory requirements of section 949I(6) of the Taxes Consolidation Act 1997 were not met and that the Appellant was thereby not entitled to rely on the additional ground of appeal.*
>
> *III.* *Whether, upon the facts provide* [sic] *or admitted, I was correct in law in my determination that the Appellant's return in respect of the tax year of assessment 2007*

contained a number of errors and therefore did not contain 'a full and true disclosure of the facts' in accordance with s.955(2)(b) TCA 1997, and that the amended assessment was not out of time."

4. By notice of motion of 4th August 2020, Mr McNamara comes seeking the following principal reliefs:

"*1.* *An order pursuant to section 949AR(2) of the Taxes Consolidation Act 1997 (as amended) directing that the case stated in the within proceedings be sent* [*i.e.* remitted] *to the Tax Appeal Commissioners for amendment, in the following manner:*

(a) *That the first question submitted in the case stated should be amended to state as follows:*

> *"Whether having regard to the evidence given and the issues raised thereupon as addressed in the notice seeking the case stated, I was correct in law in my determination that the sale of the property on 4th July 2007 constituted a sale of development land in accordance with section 648 TCA 1997."*

(b) *That the second question submitted in the case stated should be amended to state as follows:*

> *"Whether I was correct in determining that the statutory requirements of section 949I(6) of the Taxes Consolidation Act 1997 were not met and that that the Appellant was thereby not entitled to rely on the additional ground of appeal and whether I sufficiently addressed the legal issues*

raised and provided adequate reasons in determining the legal arguments made thereto (the issues thereupon as addressed in the Notice seeking the case stated).”

(c) *That the third question submitted in the case stated should be amended by its substitution by the following questions:*

“(iii) Whether I was correct in holding that the Appellant did not make a true and full disclosure in his tax return.

(iv) Whether I was correct in dismissing the Appellant’s submission that. where a taxpayer has brought all relevant matters to the attention of his professional tax advisor, he should be considered to have taken due care in the preparation of their return.

(v) Whether I was correct to dismiss the Appellant’s submission that although and error may have been made in the return, professional advice had been relied upon in filing the return and the error could not amount to a failure of the Appellant to make a full and true disclosure of all material facts.

(vi) Whether I was correct in finding that the amended assessment was not statute-barred.

(vii) *Whether I was correct in the sufficiency and adequacy of the reasons given in dismissing the Appellant's arguments on the applicability of the time bar and provide adequate reasons for the dismissal of these points.*"

(d) *That the case stated be amended by the inclusion of the transcripts of the proceedings before the Tax Appeals Commission as exhibits to the case stated and forming part of the case stated.*"

5. One difficulty that presents is that the court does not see that the questions set out in the case stated properly or fully reflect the points of law as set out in Mr McNamara's s.949AP(2) notice of 5th February 2020, *i.e.* the court does not see that the point/s of law contained in the case stated in these proceedings are the points of law "*as set out in the notice referred to in section 949AP(2)*". To show that this is so, the court, in the compares hereafter the points of law identified in Mr McNamara's s.949AP(2) notice and the points of law identified in the case stated.

6. The Appeal Commissioners appear in the case stated to distil the eight points listed hereafter (which feature in Mr McNamara's s.949AP(2) notice) into the single question listed as Question I in the case stated. The eight points in the s.949AP(2) notice are as follows:

"*(1)* *The Commissioner was incorrect in determining that the expert evidence and report of Savills on behalf of the Respondent was capable of being relied on, given the errors found in the methodology and substance of same, including that the expert witness* [a long list of various purported errors are then identified]....

(2) *The Commissioner was incorrect to determine that no expert evidence had been given by the Appellant and to determine the case on this basis.*

(3) *The Commissioner was incorrect in determining that the fact that the expert evidence given on behalf of the Appellant was not contained in a Report meant it was not expert evidence.*

(4) *The Commissioner was incorrect to find the methodology and substance of the Expert Report produced by the Respondent to be correct given the errors therein and outlined herein.*

(5) *On the basis of the evidence given, the Commissioner was incorrect in law in determining that the Appellant had not satisfied the onus or burden of proof placed on him of proving that the sum paid for the land was less than or equal to the current use value at the time of the sale.*

(6) *There was no reliable evidence before the Commissioner to justify the findings of fact made by the Commissioner as against the Appellant.*

(7) *On the basis of the primary facts as found, the findings were not capable of supporting the inferences drawn from them.*

(8) *The evidence given was inconsistent with and contradictory to the determination of the Commissioner.*"

7. Question I of the Case Stated is as follows:

"*I.* *Whether, upon the facts provide* [*sic*] *or admitted, I was correct in law in my determination that the sale of the property on 4 July 2007, constituted a sale of development land in accordance with section 648 TCA 1997.*"

8. Mr McNamara makes complaint that the present wording of this Question I has as its starting point "*the facts provide or admitted*", rather than the evidential basis for those findings which, it is clear from point (1) of the s.949AP(2) notice is the central thrust of the issues raised in this regard by the notice of appeal. That this is so, is clear from points (1)-(8) of the s.949AP(2) notice (as quoted above). The importance of properly formulating the questions for the case stated (in such a manner as complies with s.949AQ(1)(a)(v) of the TCA 1997) is, it

seems to the court, evident in respect of Question I of the case stated, given that the issues are in respect of the facts found and the inferences made by reference to same in the determination against which appeal is being brought. The court respectfully does not see that points (1)-(8), as set out in s.949AP(2) notice, are properly or fully reflected in Question I of the case stated, *i.e.* the court does not see that the point of law contained in Question I of the case stated in these proceedings reflects properly or fully the points of law "*as set out in the notice referred to in section 949AP(2)*" (as per s.949AQ(1)(v) of the TCA 1997). For the avoidance of doubt, neither does the court see that points (1)-(8) are otherwise caught by any or all of Questions I-III of the case stated.

9. The Appeal Commissioners appear in the case stated to distil the three points listed below (which feature in Mr McNamara's s.949AP(2) notice) into the single question listed as Question II in the case stated. The three points in the s.949AP(2) notice are as follows:

> "*(9)* *The Commissioner was incorrect to determine that the Appellant was unable to identify a basis upon which the additional ground of appeal could reasonably be stated in the notice of appeal when this was identified to the Tax Appeals Commission in the Appellant's submission on the issue on 6th March 2017* [some further details are then provided]….
>
> *(10)* *The Commissioner was incorrect to neither acknowledge nor address the reason advanced by the Appellant for the exercise of the statutory discretion of the Commissioner to allow the additional ground of appeal to be included.*
>
> *(11)* *The Commissioner did not sufficiently address the legal points made by the Appellant on the amendment of the notice of appeal nor provide adequate reasons for the dismissal of these points.*"

10. Question II of the Case Stated is as follows:

> "*II.* *Whether, upon the facts provide* [*sic*] *or admitted, I was correct in law in determining that the statutory*

requirements of section 949I(6) of the Taxes Consolidation Act 1997 were not met and that the Appellant was thereby not entitled to rely on the additional ground of appeal."

11. In respect of the three points raised at points (9)-(11) of the s.949AP(2) notice, these issues relate, *inter alia*, to the sufficiency of the reasons given in deciding the legal points made by the appellant and the provision of adequate reasons for the dismissal of these points. Yet Question II as drafted is referential to "*the facts provide* [*sic*] *or admitted*" and therefore does not encompass the issues of the reason advanced by the appellant for the exercise of the statutory discretion, nor provide adequate reasons for the dismissal of the submissions made in respect of same that were addressed at the hearing. The court respectfully does not see that points (9)-(11), as set out in s.949AP(2) notice, are properly or fully reflected in Question II of the case stated, *i.e.* the court does not see that the point of law contained in Question II of the case stated in these proceedings reflects properly or fully the points of law "*as set out in the notice referred to in section 949AP(2)*" (to borrow from s.949AQ(1)(v) of the TCA 1997). For the avoidance of doubt, neither does the court see that points (9)-(11) are otherwise caught by any or all of Questions I-III of the case stated.

12. The Appeal Commissioners appear in the case stated to distil the seven points listed below (which feature in Mr McNamara's s.949AP(2) notice) into the single question listed as Question III in the case stated. The seven points in the s.949AP(2) notice are as follows:

"*(12) The Commissioner was incorrect in holding that the determination made in the appeal, that the property in question was development land, could also act as the substantial reason for allowing the respondents to defeat the statutory limitation period on the basis that this determination meant that the return made by the appellant was not a full and true disclosure of the facts. The Commissioner was incorrect in finding that the determination of the characterization of the transaction in the appeal also determined if a full and true disclosure of the facts had been made by the appellant in his return.*

(13) *The Commissioner was incorrect in law to determine that the Appellant did not make a true and full disclosure in his tax return.*

(14) *The Commissioner was incorrect to determine that the Appellant did not make a true and full disclosure in his tax return when the Return was made by the Appellant's tax advisor, and any errors were of a technical nature and were extraneous to the issues in the case.*

(15) *The Commissioner was incorrect in dismissing the submission that, where a taxpayer has brought all relevant matters to the attention of his professional tax advisor, he should be considered to have taken due care in the preparation of the return.*

(16) *The Commissioner was incorrect in dismissing the submission that although an error may have been made in the return, professional advice had been relied upon in filing the return and the error could not amount to a failure of the Appellant to make a full and true disclosure of all material facts.*

(17) *The Commissioner was incorrect to find that the amended assessment was not statute-barred.*

(18) *The Commissioner did not sufficiently address the legal points made on the applicability of the time bar and provide adequate reasons for the dismissal of these points.*"

13. Question III of the case stated reads as follows:

"*III.* *Whether, upon the facts provide* [sic] *or admitted, I was correct in law in my determination that the Appellant's return in respect of the tax year of assessment 2007 contained a number of errors and therefore did not contain 'a full and true disclosure of the facts' in accordance with s.955(2)(b) TCA 1997, and that the amended assessment was not out of time.*"

14. In respect of the issues raised at points (12)-(18) of the s.949AP(2) notice and sought to be encompassed by Question III of the case stated, these issues relate, *inter alia*, to the sufficiency of the reasons given in deciding the legal points made by Mr McNamara and the provision of adequate reasons for dismissal of those points. Nor does Question III deal with the issues of reliance on professional advice. Question III as presently stated is too narrow to encompass the issues set out in Mr McNamara's.949AP(2) notice. The court respectfully does not see that points (12)-(18), as set out in the case stated, are properly or fully reflected in Question III of the case stated, *i.e.* the court does not see that the point of law contained in Question III of the case stated in these proceedings reflects properly or fully the points of law "*as set out in the notice referred to in section 949AP(2)*" (to borrow from s.949AQ(1)(v) of the TCA 1997). For the avoidance of doubt, neither does the court see that points (13)-(18) are otherwise caught by any or all of Questions I-III of the case stated.

15. A case stated is drafted solely by the TAC pursuant to s.949AQ(2) of the TCA 1997. However, this is subject to a right of representation concerning the draft notice which arises pursuant to s.949AQ(3) of the TCA 1997, which provides as follows: Unfortunately, a COVID-related glitch arose in the roll-out of this process in the within case. Perhaps the best way to describe what happened is by way of summary chronology:

24 March 2020.	TAC email draft case stated to Mr McNamara's solicitors. The email is sent to the solicitors' reception desk email address and not the email address of Mr Browne, the solicitor with whom the TAC had liaised prior to this date. Because of the first COVID lockdown, the firm's offices were closed and while Mr Browne apparently had access to his own work emails, he did not have access to the reception desk email address. Why the TAC suddenly liaised with the reception desk address and not Mr Browne is not at all clear.

2 April 2020.	Mr Browne is copied on correspondence from the Revenue Commissioners acknowledging receipt of the draft case stated on 24th March 2020 and seeking certain input.
3 April 2020.	Mr Browne writes to the TAC indicating that he has not received the draft case stated (as he is still unaware of the email to the reception desk address). No response was received to this correspondence, perhaps because of the now complete national lockdown.
9 April 2020.	Mr Browne indicates that in the absence of a response, counsel would have the representations in relation to the draft case stated ready on 24th April 2020 (thereby in effect seeking an extension of time for representations).
14 April 2020.	TAC emails Mr Browne confirming receipt of the email of 9th April and indicating that it awaited receipt of the representations on the draft case stated.
24 April 2020.	Mr Browne receives an email indicating that the case stated must be completed and signed in accordance with s.949AQ(6) TCA 1997.[1] This email also indicates that the cover letter of 24th March 2020 had indicated that the

[1] Section 949AQ(6) provides as follows: "*As soon as practicable, but not later than three months after receiving the notice referred to in section 949AP(3)(b), the Appeal Commissioners shall complete and sign a case stated and send it to the parties*." The notice referred to in s.949AP(3)(b) is a notice to the Appeal Commissioners (issued pursuant to s.949AP(2) whereby "[a] *party who is dissatisfied with a determination as being erroneous on a point of law may by notice in writing require the Appeal Commissioners to state and sign a case (…a '*case stated*') for the opinion of the High Court*"). The court understands that this notice was received on 5th February 2020, with the result that the Appeal Commissioners could lawfully complete and sign and send out the case stated "*not later than*" three months after that date. Though no unlawfulness presents in this regard, it is not clear to the court why the letter of 24th March fixed on a date on or before 24th April as the date by which the case stated would be signed; perhaps it was done simply as a matter of good administration so as better to ensure that the three-month timeframe for the various actions referenced in s.949AQ(6) would be complied with. It is also not clear to the court how, if the three-month period expired on 5th May 2020, it was not until 29th May 2020 that Mr Browne received the signed case stated. However, nothing in the within application turns on the want of clarity presenting in this regard.

	case stated would be signed on or before 24th April 2020. No mention is made of the representations. By email of the 24th, Mr Browne indicates that he would have the representations with the TAC on 27th April 2020.
27 April 2020.	Representations lodged with TAC.
5 May 2020.	Expiry of 3 month period referred to in s.949AP(3)(b) of Act of 1997.
29 May 2020.	Signed case stated received by Mr Browne. It is immediately apparent that no changes have been made to same following on the representations of 27th April.
2 June 2020.	Mr Browne emails TAC to query if there had been any regard to the representations of 27th April.
4 June 2020.	Initial email response received from TAC.
5 June 2020.	Mr Browne writes to TAC seeking further clarification.
23 June 2020.	TAC replies to indicate that while the Appeal Commissioner had read the representations, the TAC was of the view that as the representations for Mr McNamara had not been made in the 21-day period referred to in s.949AQ(3)(b) of the TCA 1997 the TAC did not have the jurisdiction to consider same. The TAC went on to note that s.949AR(2) of the TCA 1997 was an avenue open to Mr McNamara in this regard.
7 July 2020.	Perhaps unsurprisingly, the solicitors for Mr McNamara write to complain that they considered that the TAC was behaving unfairly but noting the reference to s.949AR(2).

16. The court has been referred to certain provisions of statute and also to a number of leading Irish cases and Northern Irish case-law. (The court has also been referred to certain English case-law; however, the court considers that there is enough in the Irish and Northern Irish case-law to decide the within application). Principal among the cases to which the court has been referred are the following: *Emerson v. Hearty and Morgan* [1946] N.I. 35 (which has long been applied by the Irish courts), *Mitchelstown Co-Operative Society Ltd v. Commissioner for Valuation* [1989] I.R. 210, *Ó'Cualacháin v. McMullan Brothers Ltd* [1995] 2 I.R. 217, *McGinley v. Criminal Assets Bureau* [2001] IESC 49, *National University of Ireland Cork v. Alan Ahern* [2005] 2 I.R. 577, *Dublin City Council v. Williams* [2010] IESC 7, *O'Brien v. Quigley* [2013] IEHC 398, *Byrne v. Revenue Commissioners* [2021] IEHC 262, *O'Sullivan v. Revenue Commissioners* [2021] IEHC 118, and *Express Motor Assessors Ltd v. Revenue Commissioners* [2021] IEHC 420. From that statute and case-law, the following points/principles emerge (the points/principles are stated in Bold text; the application of them to the case at hand is done by a 'Court Note' after each point/principle):

17. (1) Under s.949AP(2)-(3) and s.949AQ(1) the following process must unfold. First, a party who is dissatisfied with a determination as being erroneous on a point of law may by notice in writing require the Appeal Commissioners to state and sign a case (a 'case stated') for the opinion of the High Court. Second, a s.949AP(2) notice must state what is provided in s.949AP(3) and be sent as indicated in s.949AP(3). Third, under s.949AQ(1) the case stated must, *inter alia*, state the point/s of law as set out in the notice referred to in section 949(AP)(2).

18. Court Note: Noted.

19. (2) In the form in which the dissatisfaction/error referenced in s.949AP(3)(a)/s 949AP(3)(b) of the Act of 1997 is stated in a s.949AP(2) notice, the TAC should be placed in a position whereby it can 'package' a case stated in the form contemplated both by s.949AQ(1)(a) of the Act of 1997 and also in applicable case-law, most notably *Emerson/McGinley*.

20. Court Note: This case has moved beyond this point and the court is faced with an application that falls to be determined on the facts as now presenting.

21. (3) The point/s of law referred to in s.949AQ(1)(a)(v) in and of themselves (or coupled with the exhibits referred to in s.949AQ(7A)) must be complete. If a point of law is only comprehensible by reference to particular elements of transcript evidence the court (a) does not see how a party can be said completely (a) to "*state in what particular respect the party concerned is dissatisfied with the determination*" (as per s.949AP(3)(a)), and (b) to "*state in what particular respect the determination is alleged to be erroneous on a point of law*" (as per s.949AP(3)(b)) when the point of dissatisfaction/error raised does not point to where in the transcript evidence the particular difficulty is perceived to lie.

22. Court Note: This case has moved beyond this point and the court is faced with an application that falls to be determined on the facts as now presenting.

23. (4) It is clear from the judgment of Murphy L.J. in *Emerson*, that, in what is an appellant's appeal, it falls to him in the first instance to submit a s.949AP(2) notice that is capable of yielding a case stated that complies with s.949AQ(1)(a) of the Act of 1997 and applicable case-law, most notably *Emerson/McGinley*.

24. Court Note: This case has moved beyond this point and the court is faced with an application that falls to be determined on the facts as now presenting.

25. (5) Following on (1), there will, as a consequence of s.949AQ(1)(a)(v), likely, if not inevitably. in practice be some degree of distillation by the Appeal Commissioners of the information provided in a s.949AP(2) notice when formulating a case stated pursuant to s.949AQ(2) of the TCA 1997.

26. Court Note: This case has moved beyond this point and the court is faced with an application that falls to be determined on the facts as now presenting.

27. (6) Notwithstanding (5), to the extent that a point of law as stated in a s.949AP(2) notice is a point of law, s949AQ(1) is clear that "*(a) A case stated shall contain–(v) the point of law as set out in the notice referred to in section 949AP(2)*". Thus, while the Appeal Commissioners may lawfully engage in the type of distillation process mentioned above when formulating the case stated for the purposes of s.949AQ, they need to be careful that

any point of law contained in the case stated that goes to the court is, pursuant to s.949AQ(1)(v) "*as set out in the notice referred to in section 949AP(2)*".

28. Court Note: For the reasons stated above, the court respectfully does not see that the questions set out in the case stated properly or fully reflect the points of law as set out in Mr McNamara's s.949AP(2) notice of 5th February 2020, *i.e.* the court respectfully does not see that the point/s of law contained in the case stated in these proceedings are the points of law "*as set out in the notice referred to in section 949AP(2)*".

29. (7) Though it is possible to read s.949AQ(1)(a)(v) as requiring that a point of law in a case stated must mirror the phraseology of the s.949AP(2) notice, it seems to the court that what the Oireachtas in fact means in this regard is that a point of law as identified in the case stated should properly or fully reflect the relevant point of law as contained in the s.949AP(2) notice.

30. Court Note: For the reasons stated above, the court respectfully does not see that the questions set out in the case stated properly or fully reflect the points of law as set out in Mr McNamara's s.949AP(2) notice of 5th February 2020, *i.e.* the court respectfully does not see that the point/s of law contained in the case stated in these proceedings are the points of law "*as set out in the notice referred to in section 949AP(2)*".

31. (8) A case stated is drafted solely by the TAC pursuant to s.949AQ(2) of the TCA 1997, which provides as follows; however, this is subject to a right of representation concerning the draft notice which arises pursuant to s.949AQ(3) of the TCA 1997. Once a case stated is completed and signed, the TAC is *functus officio* in the matter, unless the matter is remitted to it upon the determination of the High Court pursuant to s.949AR(1)(b).

32. Court Note: Noted.

33. (9) Section 949AR(1) of the TCA 1997 provides that "*(1) The High Court shall hear and determine any question of law, arising in a case stated and – (a) shall reverse, affirm or amend the determination of the Appeal Commissioners, (b) shall remit the matter to the Appeal Commissioners with its opinion on the matter, or (c) may make such other order in*

***relation to the matter as it thinks just, and may make such order as to costs as it thinks fit.*"**
The most natural reading of s.949AR(1), given the use of this conjunctive "*and*" is that points (a)-(c) are matters that follow the hearing and determination of any question of law that arises in a case stated. Thus it does not seem to the court that s.949AR(1) applies to a pre-hearing interlocutory application such as the within.

34. Court Note: Noted.

35. (10) Section 949AR(2) of the TCA 1997 provides that "*(2) The High Court may send the case stated back to the Appeal Commissioners for amendment, in which case – (a) the Appeal Commissioners shall amend the case stated accordingly, and (b) the High Court shall, thereafter, proceed in one of the ways specified in subsection (1)*". The verb used is "*may*", not 'must' and thus the provision appears to acknowledge that an alternative line of amendment is possible. (The court does not accept that the maxim *expressio unius est exclusio alterius* essentially transforms the "*may*" into a 'must and require that if amendment is to be effected it can only be done via remittal).

36. Court Note: Noted.

37. (11) Section 949AQ(7) and (7A) provide, respectively as follows:

> "***(7)*** ***A party requesting the case stated shall send it to the High Court within 14 days after the date on which it was sent to the party by the Appeal Commissioners in accordance with subsection (6).***
>
> ***(7A)*** ***The party requesting the case stated shall— (a) compile a copy of the exhibits specified in the case stated, and (b)include the copy of the exhibits so compiled with the case stated when sending it to the High Court in accordance with subsection (7).*"**

It is clear from these provisions that the documents which are to support the case stated must be exhibited to the case stated and form part of the case stated, and that case stated in its totality, including those documents/exhibits is what goes before the court.

38. Court Note: Noted.

39. (12) A question as to conclusions or inferences arrived at from findings on primary fact is a valid question to raise in an appeal by case stated as such conclusions could present error on a point of law, if those conclusions are ones which no reasonable commissioner could draw (*Byrne*).

40. Court Note: These are the types of question that Mr McNamara seeks to raise here.

41. (13) Whether dealing with findings on primary fact or conclusions on mixed questions of fact and law, the role of the High Court is to consider the evidence before a commissioner. In this regard, an official transcript of the hearing is the most accurate summary of the evidence which was before a commissioner. So as a matter of general principle, the High Court must be entitled to have regard to the transcript, and thereby have access to what is, in effect, the evidence before a commissioner. (*Byrne*).

42. Court Note: Noted. However, *Byrne* was a case where the parties had proposed (and hence agreed) to the court having regard to such evidence on a *de bene esse* basis. There is nothing objectionable about parties agreeing to such extra-statutory arrangements in a case stated process so long as no contravention of statute/law presents. However, when one has regard to the facts of *Byrne* it is only (it can only be on is facts) authority for a case where such agreement presents. Such agreement just does not present here; in point of fact the parties here are in complete *dis*-agreement as to how to proceed.

43. (14) While it may on occasion be necessary to send a case stated back to the Commissioner, that also may not be necessary. Where the findings of fact are clearly set out, as are the reasons for the determination, the High Court is not constrained by s.949AR (2) to send the case stated back to the Commissioner for amendment if it is of the view that the questions of law for the opinion of the Court should be amended or expressed differently, and that any such amendment may be effected by this Court without the need to send the case stated back to the Commissioner, a course which would only complicate matters, increase costs and delay the resolution of the matter. (*O'Sullivan*). None of the cases to which the court has been referred appears expressly to indicate where this power

of court amendment derives from. It may be that it is but an aspect of the inherent jurisdiction of the court lawfully to order matters that come before it so that they are despatched in a manner that is as efficient as possible but also consistent with the requirements of fair procedures.

44. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment.

45. (15) For the High Court to exercise its discretion to amend a case stated the case stated must contain sufficient findings of fact for the point of law to be introduced by amendment to be determined (*Express Motors*).

46. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment.

47. (16) Following on (15), where a case stated does not contain sufficient findings of fact to allow the point of law in a case stated to be determined, it will be sent back to allow those findings of fact to be made (*Express Motors, Mitchelstown Co-Op, Emerson*). This is because the High Court has no jurisdiction to make such findings itself and can only determine matters of law. It is therefore a matter for the court or body stating the case to set out its findings of fact and its determination, and if this is not done, the case stated must be returned for those findings to be made and included in the case stated.

48. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment.

49. (17) A party dissatisfied with the contents of a case stated under s. 949AQ (2) of the TCA should proceed by way of motion in the High Court to have it sent back for

amendment and not by way of judicial review (*Express Motors, Napier),* save where there has been a refusal to state a case on any question.

50. Court Note: This is how Mr McNamara has proceeded.

51. (18) An application to amend may be made either by motion to the High Court or when the case comes on for hearing (*Unkles; Yorkshire Tyre*).

52. Court Note: Mr McNamara has proceeded by motion.

53. (19) It is undesirable that there would be any absolute rule that any application to amend could only be made at the hearing of the case stated. If the amendments to be made were relatively major and, in particular, if the matter had to be remitted to the Appeals Commissioner to make the necessary findings of fact, it would be more efficient to bring that application in advance of the hearing of the case stated itself (*Express Motors*).

54. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment. So the timing of the within application is apposite.

55. (20) Where the reasons for the application to amend are related to the omission of relevant evidence or the necessary findings of fact, it would be appropriate to canvass that issue by way of interlocutory motion. Otherwise, having set the matter down for hearing, it might be that the case stated could not proceed and this would result in greater delay in finalising the assessment of Revenue.

56. Court Note: Mr McNamara has proceeded appropriately.

57. (21) Such an approach would also be appropriate where the motion to amend comprises in effect an appeal from the refusal of the Appeals Commissioner to include an entirely new and separate question. Where there has been a refusal to state a case on a particular issue of law, that may be more appropriately canvassed by way of interlocutory motion (*Express Motors, Christie*).

58. Court Note: Mr McNamara has proceeded appropriately.

59. (22) If the amendment is not a very significant departure from the existing pleadings, and in particular if it would not require any additional evidence, then the amendment may be permitted at the beginning of or even (exceptionally) in the course of the trial. The question is one of degree. Minor amendments are readily consented to and dealt with even at a very late stage, whereas more substantial amendments are more likely to be opposed, and to require an interlocutory hearing (*Express Motors*).

60. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment. So the timing of the within application is apposite.

61. (23) Where entirely new questions, separate and distinct from those already in the case stated and requiring findings of fact not already in the case stated, are to be added, it would seem more desirable that any issues in relation to the proposed amendment would be teased out in advance of the hearing of the case stated. It would seem more desirable that, if such a course is necessary in the particular circumstances of the case, that the need for it would be identified by way of an interlocutory motion brought in advance of the hearing of the case stated (*Express Motors*).

62. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment. So the timing of the within application is apposite.

63. (24) By contrast to the position as identified in (21), where the issues of law which require determination are not set out in a satisfactory way, but all of the requisite findings of fact and other matters identified in *Emerson* are already contained in the case stated, then no such course will be required, and a court-devised amendment will be appropriate (*Express Motors*).

64. Court Note: Here there is such a complete mis-match between the questions that fall properly to be posed that the entirety of the case stated will fall to be re-formulated. Hence the court does not see that this is an appropriate case in which the court should exercise its power of amendment. So the timing of the within application is apposite.

65. (25) As to the form of a case stated (i) it should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter, (ii) after the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the decisionmaker, (iii) the case should set out clearly (a) the decisionmaker's findings of fact, and (b) any inferences or conclusions of fact which s/he drew from those findings. The task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the decisionmaker stating the case stated. Thus, it is not legitimate by setting out the evidence in the Case Stated and omitting any findings of fact to attempt to pass the task of finding the facts on to the court to which the case stated is stated. What is required in the Case Stated is a finding by the decisionmaker of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the case stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the decisionmaker which would justify him in deciding as he did (*Emerson*).

66. Court Note: Mr McNamara was at pains in this application to emphasise the line in *Emerson*, at p.36, where Murphy L.J. states:

> "*Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did*".

67. This, Mr McNamara claims is the line that enables him to have the entirety of the transcript evidence placed before the High Court in this case. The court respectfully disagrees. Murphy L.J. clearly contemplates that there will be instances in which evidence will be set out in the

case stated. He most certainly does not endorse as a matter of practice that the entirety of the transcript of the proceedings in the forum below will be placed before the court to which the case is stated. And it is striking that although Denham J. in *McGinley* adopts the observations of Murphy L.J. in *Emerson* as to how a case stated should be 'packaged', she sees no inconsistency in also stating that "*It is most unusual to append to a case stated the transcript of the evidence as was done in this case*". ("[M]*ost unusual*" but not altogether prohibited, *i.e.* facts may present in which such an approach may be merited.)

68. (26) When a court has before it a case stated seeking its opinion as to whether a particular decision was correct in law, the following principles apply:-(a) findings of primary fact by the decisionmaker should not be disturbed unless there is no evidence to support them; (b) inferences from primary facts are mixed questions of fact and law; (c) if the decisionmaker's conclusions show that he has adopted a wrong view of the law, they should be set aside; (d) if the decisionmaker's conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable decisionmaker could draw; (e) some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for it is not retrying matters) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law (*Ó'Cualachain*).

69. Court Note: Noted.

70. (27) It is most unusual to append to a case stated the transcript of the evidence (*McGinley; Williams*).

71. Court Note: "[M]*ost unusual*" but not altogether prohibited, *i.e.* facts may present in which such an approach may be merited.

72. (28) The question of whether certain matters ought or ought not to have been considered by a decisionmaker and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal (*Ahern*).

73. Court Note: Noted.

Conclusion

74. For the reasons stated, the court will send the case stated back to the Appeal Commissioners for amendment in the light of this judgment. It may assist the Commissioners for the court to note (a) that a case stated should comply with s.949AQ(1)(a)(v) (the case stated here does not so comply), (b) its sense that Mr McNamara's criticisms of the Appeal Commissioner's decision against which it is sought to bring an appeal by case stated are so comprehensive, detailed, and all-embracing that this is a case in which fairness (and efficiency) require that the transcript of the proceedings before the Appeal Commissioner be appended to the decision.

75. The court will hear the parties on the issue of costs.